



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.

1930

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1930

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: (1930) I.L.R., 53 Madras

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CITY MUNICIPAL (MADRAS) ACT (IV OF 1919), sec. 129—*Duty of Corporation under the section to refund a portion of timber-tax—By-law made by Corporation entitling it to refuse refund unless refund applied for in particular way or particular time—Validity of.* The Corporation of Madras, on whom under section 129 of the Madras City Municipal Act (IV of 1919), a duty is imposed to make a refund of nine-tenths of the tax collected on imported timber, if the timber is exported from the city, cannot make a by-law, entitling the Corporation to refuse the refund, unless the person demanding the refund applies for it in a particular way or at a particular time. *Per REILLY, J.*—The Corporation has no power in a case, where the Corporation have a duty to pay, and the exporter has a right to claim, a refund, to promulgate any by-law, enforceable by a penalty compelling an exporter to do any particular thing in order to get the refund.

Raghavulu Nayudu v. Corporation of Madras ... (1930) I.L.R., 53 Mad., 722

CIVIL PROCEDURE CODE (ACT V OF 1908), sec. 35—*Next friend or guardian of minor party to a proceeding—Jurisdiction of Court to direct next friend or guardian to pay costs—Scope of sec. 35—Next friend or guardian instituting suit in forma pauperis—Liability to pay Court-fee to Government.* A Court has jurisdiction to direct the next friend or guardian of a minor who is a party to a proceeding to pay the costs of such a proceeding. Section 35

of the Code of Civil Procedure (Act V of 1908) which refers to costs of and incident to all suits is wide enough to cover even Court-fees; and a person, who as next friend or guardian of a minor institutes a suit in *forma pauperis*, may, on the disposal of the suit, be directed to pay the court-fee to Government.

Elumalai Naicker v. Kuppammal ... (1930) I.L.R., 53 Mad., 716

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 73 (1), PROVISOS (A) AND (B), AND O. XXXIV, R. 14—Suit on a mortgage—Personal decree only passed, as mortgagor had no title to the property—Acquisition of title by mortgagor subsequent to the decree—Application by decree-holder to sell the property—Claim to a charge under sec. 43 of the Transfer of Property Act—Right of decree-holder to sell the property free of charge, claiming priority over other rateable decree-holders—Applicability of sec. 73 (1), proviso (b) where debt under the decree is same as under the charge.] In a suit for sale on a mortgage, the Court passed a money decree, as it held that the mortgagor had no title to the mortgage property. Subsequent to the decree, the mortgagor acquired title to the property. The decree-holder applied for execution of the decree, praying that that property might be sold in satisfaction of the charge claimed to have been obtained by him under section 43 of the Transfer of Property Act; and he further claimed on appeal, that the properties might be sold free of the charge under section 73 (1), proviso (b) of the Civil Procedure Code. *Held*, that, in execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached; that, assuming that the decree-holder executing his money decree obtained a charge for his debt under section 43 of the Transfer of Property Act, the proviso (b) to section 73 (1) of the Civil Procedure Code, did not apply to this case, as the money decree and the charge refer to the self-same debt of the decree-holder; that the decree-holder was entitled to attach and sell the property in execution of his money decree; and that Order XXXIV, rule 14 was no bar to such execution sale in this case.

Gowri Ambal v. Ramanathan Chettiar ... (1930) I.L.R., 53 Mad., 670

SEC. 84—Gadwal State, whether a foreign State within the meaning of—Promissory note executed in Gadwal without stamp—Enforceability of, in British Indian Court—Note in favour of Ruler of Gadwal, represented by his officer—Suit by Ruler, maintainability of.] On the finding that the Gadwal State, situate within the territories of, and subject to the suzerainty of, His Exalted Highness the Nizam of Hyderabad, was wanting in some of the characteristics of a sovereign State, i.e., that it had no independent powers of legislation, that its Judges were appointed by the Nizam, and that the decisions of its Courts were subject to the appellate jurisdiction of the Nizam's Courts, their Lordships held (a) that the Gadwal State was neither a sovereign State nor a foreign State within the meaning of section 84 of the Civil Procedure Code and (b) that a suit by its Ruler for moneys due to him on certain toddy contracts entered into by the defendant, a resident in British India, was maintainable in British India. A promissory note executed in the Gadwal State, but unstamped, which is according to the law of that State not void, but only inadmissible in evidence, can be sued upon in British Indian Courts. *Dhondiram Chatrabuj v. Sudasak Savatram*, (1918) I.L.R., 42 Bom., 522 followed. A promissory note executed in favour of the Ruler of Gadwal represented by his ex-officio officer for the time being, without describing the payee by name is valid and is enforceable by the Ruler. *Mahanth Damodar Das v. Venares Bank, Ltd.* (1920) 5 Pat., L.J., 536 followed.

Venkatarani Reddi v. Raja of Gadwal ... (1930) I.L.R., 53 Mad., 983

SEC. 92—Sanction for a "scheme suit" obtained by three—Suit filed by two only, including other reliefs—Maintainability of.] A suit under section 92, Civil Procedure Code, must be instituted by all those who obtained the sanction; if not, it is invalid and the defect cannot be cured by impleading such of those who have not joined

as plaintiffs, as defendants to the cause; *Maddala Biganannarayana v. Vadapalli Perumallacharyulu*, (1915) 29 M.L.J., 231 and *Venkatesh Malia v. Ramayya Hegade*, (1914) I.L.R., 38 Mad., 1192, followed. Considerations before granting sanction pointed out. Where a sanction was given under section 92, Civil Procedure Code, to file "a scheme suit in respect of the affairs," of a temple, no relief can be given in respect of any other matter, e.g., removal of the trustee or the appointment of new trustees or receivers. *Srinivasa v. Venkata*, (1987) I.L.R., 11 Mad., 143, followed.

Pitchayya v. Venkatakrishnamachariu ... (1930) I.L.R., 53 Mad., 223

CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 110—Right of appeal to Privy Council—Value of subject-matter of suit.] In section 110 of the Code of Civil Procedure, 1909, dealing with appeals to the King in Council from a decree or final order of a High Court, the words "the amount or value of the subject-matter of the suit in the Court of first instance" mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of first instance; and that meaning is not affected by the alternative condition which follows in the section. *Subramanya Ayyar v. Sellammal*, (1915) I.L.R., 39 Mad., 443, approved.

Manganna v. Mahalakshamma ... (1930) I.L.R., 53 Mad., 167

O. XLIII, R. 1 (c)—Preliminary decree in a partition suit—Default of plaintiff to appear on date of hearing after such decree—Jurisdiction of Court to dismiss suit for default—Application by plaintiff to set aside dismissal of suit, whether competent under O. IX, r. 9 or under sec. 151, Civil Procedure Code—Petition to set aside, purporting to be under O. IX, deemed to be under sec. 151—Order dismissing suit, and order dismissing petition, deemed to be under sec. 151—Latter order, if appealable under O. XLIII, r. 1 (c)—Revision, competency of.] After a preliminary decree was passed in a suit for partition, the Court has no jurisdiction to dismiss the suit for default of appearance of the plaintiff on a date fixed for the further hearing of the case. *Lachmi Narain Marwari v. Balmakund Marwari*, (1924) I.L.R., 4 Pat., 61 (P.C.), relied on. The order dismissing the suit in such circumstances cannot be treated as one passed under Order IX of the Code of Civil Procedure; and an application for restoration of the suit cannot be made under Order IX, rule 9 of the Code; but an application, purporting to be made under Order IX, rule 9, must be deemed to be made under section 151 of the Code for the exercise of the Court's inherent powers. The order dismissing the application for restoration of the suit, not being under Order IX, rule 9, is not appealable under Order XLIII, rule 1 (c); consequently, a civil revision petition against the order dismissing the suit is maintainable.

Yagammal v. Arulayee ... (1930) I.L.R., 53 Mad., 395

SEC. 144—Restitution—Security bond for return of principal amount on y—Stay of execution—Amount deposited in Court drawn by appellant—Liability to interest on principal amount on restitution, in the absence of provision therefor in the bond.] In an application under section 144, Civil Procedure Code, (1908), for restitution of an amount paid into Court by the respondents and taken out by the appellant on his giving a security bond for repayment of such amount which did not contain a provision for interest on such amount. *Held*, that the party who drew out the money was liable to pay interest in restitution on the principal amount under section 144 of the Code, even though the security bond did not contain a provision for payment of interest; *Indra Chind Bothra v. Mr. A. H. Forbes*, (1917) 2 Pat. L.J., 149 and *The Collector of Ahmedabad v. Lavji Mulji*, (1911) I.L.R., 35 Bom., 255, followed; *Alagappa Chettiar v. Muthukumara Chettiar*, (1918) I.L.R., 41 Mad. 316, referred to.

Asuram Sada Suk v. Sub-Collector, Rajahmundry ... (1930) I.L.R., 53 Mad., 70

CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 144 AND 146, O. XXI, R. 53 (3) AND O. XXII, R. 10—Restitution—Decree-holder of a money decree—Attachment of a money-decree of judgment-debtor—Money realized—Attached decree reversed on appeal—Right of judgment-debtor of attached decree to restitution from attaching decree-holder, under sec. 144.] Where the holder of a decree for money attaches a decree of his judgment-debtor and realizes a sum of money in execution of the latter decree, but on appeal the latter decree is reversed, the attaching decree holder is liable to make restitution of the amount realized by him to the judgment-debtor in the latter decree, under section 144 read with Order XXI, rule 53 (3), Order XXII, rule 10 and section 146 of the Civil Procedure Code.

Anganna Reddi v. Subbaraya Chettiar ... (1930) I.L.R., 53 Mad., 796

O. VI, R. 5—Defendant ordered to give further and better particulars of matter pleaded—Failure to comply—Jurisdiction of Court to strike out defence.] Where under Order VI, rule 5 of the Code of Civil Procedure a Court has ordered a defendant in a suit to give further and better particulars of a matter pleaded in his written statement, on failure by him to comply the Court has jurisdiction to direct that his defence be struck out.

Nedungadi Bank, Ltd. v. Official Assignee of Madras. (1930) I.L.R., 53 Mad., 645

O. XIII, R. 4—Admission of document by the trial Court, time for—Sec. 2 (21)—“Signed” not including stamping of initials of the judge.] If a trial judge had not considered the admissibility of a document proved before him, the mere endorsement thereon under Order XIII, rule 4, Civil Procedure Code, does not preclude him from considering its admissibility at a later stage of the case. *Semle*—Though “signed” includes, according to section 2 (20), Civil Procedure Code, “stamped,” “initials” of the judge cannot be “stamped.”

Venkanna v. Parasuram Byas ... (1930) I.L.R., 53 Mad., 137

O. XX, R. 16—Suit for accounts—Passing final decree, without preliminary decree, when allowable.] Though the general rule is that in suits for an account, a preliminary decree directing accounts to be taken should be passed before passing a final decree, yet in cases where the facts are so simple, either by admission or proof, as to afford a ready decision, so that the taking of accounts will be unnecessarily lengthening the proceedings, without any benefit to the parties, a final decree may be passed, without any preliminary decree. Order XX, rule 16, Civil Procedure Code, is consistent with this view. Dictum in *Hurriath Rai v. Krishna Kamar Bukshi*, (1886) I.L.R., 14 Cal., 147 at 158 (P.C.), followed.

Velliyappa Chetti v. Vellaiyappa Chetti ... (1930) I.L.R., 53 Mad., 475

O. XXI, RR. 71 AND 84—Resale under r. 84, after proclamation—“Forthwith” in r. 84, meaning of.] Where, on the failure of an auction purchaser to deposit the twenty-five per cent of the price, the Court is required under Order XXI, rule 84, Civil Procedure Code, to hold a resale “forthwith,” it means that the Court should hold the resale “as expeditiously as the circumstances permit.” Though it is not obligatory on the Court to issue a fresh proclamation in every case of such resale, yet it is competent to do so in the circumstances of a particular case in the interests of the defaulting purchaser; and when it does so, the resale held immediately after the fresh proclamation should be deemed to be one held “forthwith” within the terms of rule 84.

Hanumayamma v. Ankamma ... (1930) I.L.R., 53 Mad., 900

O. XXI, R. 89—Application under rule 89—Money specified in the rule, deposited in Court—Security bond taken by order of Court from the decree-holder for repayment of amount—Suit by applicant to establish his title to property sold, decreed in his favour—Suit by

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applicant to recover money on the security bond, if maintainable—Security bond, if valid—Competency of Court to take the security bond.] Where a person, other than the judgment-debtor, entitled to apply under Order XXI, rule 89, Civil Procedure Code, to set aside a sale in execution of a decree, applies and pays the amount specified in the rule, the Court has no jurisdiction to direct the decree-holder to execute a security bond for repayment of the amount to the applicant in the event of the latter succeeding in a suit instituted by him to establish his right to the property sold in execution; and the security bond is not legally enforceable in a suit by the applicant against the executant; *Narayan v. Amruda*, (1927) I.L.R., 45 Bom., 1904, followed. Where it appeared that the applicant was a purchaser of the property from the judgment-debtor, that he undertook to pay the debt of the decree-holder and had improperly obstructed and refused to pay the debt, there was no ground of equity to entitle him to enforce the security bond executed under the order of the Court.

Kummakutty v. Nelakandan Nambudri ... (1930) I.L.R., 53 Mad., 943

CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXII, RR. 3 AND 10—Appeal in a suit for redemption by one of several trustees of a devaswom implicating other trustees and mortgagees as respondents—Death of a trustee, who was respondent, before judgment—Judgment passed without bringing legal representative of deceased trustee—Abatement of appeal—Judgment, if valid.] Where, during the pendency of an appeal in a suit for redemption, by a trustee of a devaswom implicating the other trustees as well as the mortgagees as respondents, one of the trustees, who was a respondent, died and his legal representative, the succeeding trustee in his place, was not brought on the record, and judgment was passed in the appeal in favour of the devaswom, a member of the mortgagee's family, who was a respondent, applied to set aside the judgment as invalid, on the ground that the appeal had abated as the legal representative of one of the trustees of the devaswom was not on the record of the appeal; *Held*, that the appeal had not abated; that the devaswom was sufficiently represented in the appeal even after the death of the trustee; and that the judgment was binding on both the parties.

Sekhara Menon v. Narayanan ... (1930) I.L.R., 53 Mad., 790

O. XXXIII, R. 3—Suit relating to public trust—Compromise of suit—Duty of the Court—Power and duty of Court to see that interest of public trust should not be sacrificed by the compromise.] When a compromise in a suit relating to a public trust is submitted to a Court, it not only has the power, but is under a duty, to scrutinize its terms, with a view to make sure that the interests of the trust are properly safe-guarded; and if the Court finds that a compromise is not in the interest of the public trust, the Court should not accept the compromise; while, in the case of private individuals, the only question the Court has to consider is whether there has been in fact a compromise and, if so, whether the adjustment is a lawful one. Further, in the case of a public trust, no compromise can be said to be lawful which sacrifices the interests of the trust; consequently, a compromise entered into without regard to such interests is not a lawful agreement within Order XXXIII, rule 3 of the Civil Procedure Code and cannot be accepted by the Court. *Sundarambal Ammal v. Yogavana Gurukkal*, (1914) I.L.R., 38 Mad., 850; and *Sankiralinga Nadan v. Rajeswara Dorai*, (1908) I.L.R., 31 Mad., 256 (P.O.), referred to.

Narayanaswami Mudali v. President, H.R.E. Board. (1930) I.L.R., 53 Mad., 398

O. XXXIII, RR. 2 AND 8—Plaint with insufficient Court-fee—Conversion into a pauper suit—Jurisdiction of Court to convert.] Where a plaint had been admitted with a certain court-fee and a written statement had been put in and issues settled and the Court, at the trial of an issue as to the court-fee, required additional court-fee which in amount was so large that the plaintiff could

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- not pay it, an application for permission to continue the suit as a pauper should not be dismissed because it was not in accordance with rules 2 and 8 of Order XXXIII, Civil Procedure Code. In such a case, the Court can in its inherent power allow the application, if the plaint disclosed a subsisting cause of action and the plaintiff is after notice to the opposite side and the Government found to be a pauper. *Thompson v. The Calcutta Tramway Company*, (1893) I.L.R., 20 Cal., 319, followed.
- Subba Rao v. Venkataratnam* ... (1930) I.L.R., 53 Mad., 43
- CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, RR. 10 AND 11**—Suit in forma pauperis, partly successful. Extent of defendant's liability for court-fee. If a plaintiff who is allowed to sue in forma pauperis succeeds only in part, the court-fee recoverable under Order XXXIII, rules 10 and 11, Civil Procedure Code, from the unsuccessful defendant is only proportionate to that part and not more, the rest being payable by the plaintiff.
- Rami Reddi v. Polamma* ... (1930) I.L.R., 53 Mad., 780
- O. XXXVIII, R. 9**—Attachment before judgment—Dismissal of suit—No formal order withdrawing attachment, effect of. Upon the dismissal of a suit, an attachment before judgment necessarily ceases under Order XXXVIII, rule 9, Civil Procedure Code, even though the Court did not pass an order withdrawing it.
- Balaraju Chettiar v. Masilamony Pillai* ... (1930) I.L.R., 53 Mad. (F.B.), 834
- O. XLI, R. 33**—Discretionary power, under—Attaching decree holder's right to redeem mortgage—Sec. 91, Transfer of Property Act (IV of 1882)—Suit on mortgage. O. XXXIV, r. 1, Civil Procedure Code—Attaching decree-holder, whether a necessary party. Held by the Full Bench (BEASTLEY C.J., ANANTAKRISHNA AYYAR and CUNNINGHAM JJ.):—An attaching decree-holder has no interest in, or charge on, the immovable property attached and as such is not a necessary party within the meaning of Order XXXIV, rule 1, Civil Procedure Code, to a suit by a mortgagee. Hence, if under the decree in the mortgage suit to which he is not a party, the property is sold before he redeems it, he loses the right to redeem which was given to him by section 91 (j) of the Transfer of Property Act (since repealed). Held previously by the Full Bench (CUTTS TROTTER C.J., BEASTLEY and MADHAVAN NAIR JJ.) The powers given to an Appellate Court by Order XLI, rule 33, Civil Procedure Code, are very wide and can be exercised in a proper case even in favour of a respondent who has neither appealed nor filed a memorandum of cross-objections. But the exercise of such extraordinary power is a matter of discretion with the appellate Court depending on the circumstances of the case.
- Subramania Chettiar v. Sinammal* ... (1930) I.L.R., 53 Mad. (F.B.), 881
- O. XLIV, R. 1**—Leave to appeal in forma pauperis—Question to be considered by Court before granting leave to appeal—Prima facie good case, if exists—Court not to strive to arrive at a definite and final conclusion, if decree is erroneous or unjust. Order XLIV, rule 1 of the Civil Procedure Code, does not contemplate that, before granting leave to appeal in forma pauperis, the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust; it is enough if the applicant shows that he has prima facie a good case, and if he does so, leave to appeal should be granted.
- Chennamma, In re* ... (1930) I.L.R., 53 Mad., 245
- COMPANIES ACT (INDIAN) (VII OF 1913), ss. 3, 187, 198, 200 AND 201**—Order made by High Court on a contributory to pay a call—Application to a District Court to enforce the order—Jurisdiction of the District Court to enforce the order—Procedure. The District Court of a place where a contributory has property has no jurisdiction to entertain an application for enforcement of an order of the High Court directing him to pay a call, as such an order could be enforced under section 200 of the Companies Act, 1913, only by the Court which would have had jurisdiction over the company if its registered office was situate at such place; and that Court under section 3 (1) of the Act was the High Court. Section 3 (3) of the Act, cannot validate the proceedings of the District Court in such a case, if the objection to its jurisdiction was taken therein at the very commencement and at the proper time. *Kavastha Trading and Banking Corporation v. Jai Karan Lal*, (1928) I.L.R., 6 Pat., 132, followed.
- Natarajan v. Narasimha Ayyangar* ... (1930) I.L.R., 53 Mad., 147
- COMPANIES ACT (INDIAN) (VIII OF 1913), SEC. 166**—Petition for winding up—If can be presented by shareholders who have fully paid up their share capital—Sec. 162 (vi)—Nature of circumstances rendering winding up "just and equitable." A petition for the winding up of a company under section 166 of the Indian Companies Act (VII of 1913) presented by shareholders who have fully paid up their share capital is maintainable. *In re National Savings Bank Association*, [1966] 1 Ch.A., 547 and *In re Anglessea Colliery Company*, [1868] 1 Ch.A., 555, followed. Held, further, on the facts found, circumstances existed which would render it just and equitable for the Court to direct the winding up of the Company under section 162 (vi) of the Act. *Lech v. John Blackwood, Ltd.*, [1924] A.O., 783, referred to.
- Sabapathi Press Company, Ltd., v. Sabapathi Rao* ... (1930) I.L.R., 53 Mad., 38
- CONSENT DECREE**—Construction of:—See EXECUTING COURT ... 750
- CONSOLIDATION OF CIVIL REVISION PETITIONS BY ONE PERSON**—Single vakalat and one process fee—Sec. 20, Court-fees Act. The High Court has no power to consolidate two or more revision petitions filed by a single petitioner, though the cases in respect of which the petitions are filed may be related and disposed of by the lower Court in one judgment or order, so as to enable the petitioner to file one vakalatnama in all the petitions or to pay one process fee for such respondents as are common therein, as such a course would be contrary to rules 41 and 61 of the Appellate Side Rules of the High Court framed under section 29 of the Court-fees Act and rule 2 (1) of Order XLI-A of the Civil Procedure Code; *In the matter of the application of Studd*, (1898) I.L.R., 26 Cal., 124, followed.
- Pythilinga Pandara Sannadhi, In re* ... (1930) I.L.R., 53 Mad., 262
- CONSOLIDATION OF SECOND APPEALS**—Payment of one aggregate court-fee and filing one vakalatnama for all appeals by the appellant—Sec. 151, Civil Procedure Code—Sec. 4, Art. 10, Sch. II, Court-fees Act (VII of 1870). Where a landholder who filed several suits for rent against different sets of tenants failed in both the lower Courts and filed several second appeals in the High Court, held by the Full Bench that he could not be allowed under section 151, Civil Procedure Code to consolidate the second appeals, so as to enable him to pay one single court-fee on the aggregate value of all the second appeals, or to prosecute them all on a single vakalatnama, as such a course would contravene rules 1 and 3 of Order XLI, Civil Procedure Code, section 4 and article 10 of Schedule II of the Court-fees Act and rule 31 of the Appellate Side Rules of the High Court; *In re Perumal Nadar*, (1927) 14 M.L.J. 595, overruled.
- Maharaja of Venkatagiri, In re* ... (1930) I.L.R. 53 Mad. (F.B.), 248
- FRAC-T**—Third party's right to sue on. Where on a contract between A and B, B agrees to pay a sum of money to C and no more circumstances appear, C being a stranger to the contract, cannot sue B for the money, though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the following circumstances, e.g., (a) where B afterwards agrees with C to pay him direct or becomes estopped from denying his liability to pay him personally; (b) where the contract between A and B creates a trust in favour of C; (c) where the contract charges the money to be paid out of some

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immovable property, or (d) where it is due to C under a marriage settlement, partition or other family arrangement; <i>Jamna Das v. Ram Astor Pande</i> , (1911) I.L.R., 34 All., 63 (P.C.), followed.	
<i>Subba Chetti v. Arunachalam Chettiar</i> ... (1930) I.L.R., 53 Mad., 270	
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... SEC. 65:—See LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 28 ...	309
COURT-FEE—Appeal against order directing final decree should be passed—Court-fee payable whether as on miscellaneous appeal or as on appeal against final decree:—See SUIT FOR SALE ON A MORTGAGE ...	155
COURT-FEES (INDIAN) ACT (VII OF 1870), SS. 5, 7 (IV) (b) AND (v) AND SCH. II, ART. 17 (VI):—No decision by Taxing Officer under sec. 5, on sufficiency of Court-fee on appeal—Jurisdiction of Court to decide sufficiency on hearing appeal—Suit for possession alleging adverse possession by defendant—Court-fee on suit and appeal—Court-fee on undetermined mesne profits, if payable on appeal.] If there has been no decision of the Taxing Officer under section 5 of the Court-fees Act, it is open to the respondent to object at the hearing of the appeal as to the sufficiency of Court-fee paid on the appeal. <i>Kanturi Chetti v. Deputy Collector, Bellary</i>, (1898) I.L.R., 21 Mad., 289, followed. But if there is such a decision, the respondent cannot raise any such objection though he had no opportunity of urging his objection before the officer. <i>Ranga Pai v. Baba</i>, (1897) I.L.R., 20 Mad., 398, followed. Except in cases where a plaintiff alleges in the plaint that he is in actual or constructive possession of joint properties, as in suits for partition between members of a joint Hindu family or between tenants in common, in all other cases, where a plaintiff sues for possession either of whole or of part, alleging adverse possession by the defendant, he must pay Court-fee as for possession under section 7 (v) of the Court-fees Act. It is only if the amount of mesne profits had been ascertained and decreed, Court-fee on appeal is payable thereon: but where the decision was only that the defendant was liable to pay mesne profits, leaving the amount thereof to be determined in execution, no Court-fee is payable in appeal on the profits.	
<i>Kanduvani Nair v. Raman Nair</i> ... (1930) I.L.R., 53 Mad., 540	
SEC. 4, ART. 10, SCH. II:—See CONSOLIDATION OF SECOND APPEALS ...	248
SEC. 8—Court-fee payable on an appeal for additional compensation under Land Acquisition Act (I of 1894)] In an appeal to the High Court under the Land Acquisition Act claiming additional compensation, the court-fee payable under section 8 of the Court-fees Act on the appeal is not merely on the additional amount claimed in the appeal but also on the 15 per cent payable thereon in case of success.	
<i>Brahmanandam v. Secretary of State for India</i> ... (1930) I.L.R., 53 Mad., 48	
SEC. 20:—See CONSOLIDATION OF CIVIL REVISION PETITIONS BY ONE PERSON ...	262
COURT-FEES MADRAS, AMENDMENT ACT (V OF 1922), SCH. II, ART. 17 (1)—Application under sec. 84 (2) of the Madras Religious Endowments Act (II of 1927—Court-fee.] The Court-fee payable on an application under section 84 (2) of the Madras Religious Endowments Act (II of 1927) to modify or set aside a decision of the Endowments Board under section 84 (1) of the Act is Rs. 15 under article 17 (1) of Schedule II of the Madras Court-fees Amendment Act of 1922 and not the fee prescribed by articles 17-B or 17-C of the Act. <i>Sundara Aiyar v. Commissioners of Hindu Religious Endowments Board</i>, (1928) I.L.R., 52 Mad., 888, approved;	

<i>Godasankara Valia Rajah v. Board of Commissioners for Hindu Religious Endowments, Madras</i> , (1928) 58 M.L.J., 118, overruled.	
<i>Camodaran v. H.R.E. Board, Madras</i> ... (1930) I.L.R., 53 Mad., 266	
CRIMINAL PROCEDURE CODE (ACT V OF 1898), AS AMENDED BY ACT XVIII OF 1923—Orders under sec. 144—Jurisdiction of High Court to interfere in revision.] Under the Code of Criminal Procedure as amended by Act XVIII of 1923, the High Court has jurisdiction to interfere in revision with orders passed under section 144 of the Code. <i>Pedappan Servai v. Perianan Servai</i>, (1928) I.L.R., 52 Mad., 69, overruled.	
<i>Muthuswami v. Thangammal Aiyar</i> ... (1930) I.L.R., 53 Mad., 173	

ss. 110, 117, 118, 256 AND 257—Right of a person called to give security for good behaviour to avail sec. 256—Applicability to him of sec. 257.] Section 256 of the Criminal Procedure Code, which gives to an accused person an absolute right of recalling the prosecution witnesses for cross-examination, is not applicable to a person called upon to give security for good behaviour; but he has the qualified right given by section 257 of the Code. *Chintamma Singh v. Emperor*, (1907) I.L.R., 35 Calc., 243, followed the observation in *Venkatachinnayya v. King-Emperor*, (1920) I.L.R., 43 Mad., 511, held obiter and dissented from.

Karuthaswami Servai, In re ... (1930) I.L.R., 53 Mad., 320

SEC. 250—Appeal from an order under—Whether an appeal under secs. 250 and 407—Sec. 428—Jurisdiction of appellate Court to take additional evidence—Failure to record reasons—Invalidity of proceedings.] An appeal from an order under section 250 of the Code of Criminal Procedure is an appeal under and by virtue of sections 250 and 407 of the Code, and the Court hearing the appeal has jurisdiction under section 428 of the Code to take additional evidence if it thinks it to be necessary, and failure to record its reasons as required by section 428 will invalidate the proceedings, only if such omission has occasioned a failure of justice.

Seeniah Nayudu v. Abdul Wahab Sahib ... (1930) I.L.R., 53 Mad., 883

ss. 285 AND 537—Judgment to be signed by all members of Bench present—Failure to comply—Not an illegality and cured under sec. 537.] In a trial before a Bench of Magistrates, by whomsoever the judgment and record may have been written, they should, under section 285 of the Code of Criminal Procedure, be signed by all the members of the Bench present; but failure to comply with this provision is not necessarily an illegality, and may, where no failure of justice had been occasioned, be cured by section 537 of the Code. *Rama Kotiah v. Subbiah*, (1929) I.L.R., 52 Mad., 237, referred to.

Nathan, In re ... (1930) I.L.R., 53 Mad., 165

SEC. 421—Whether prohibits hearing and dismissal of criminal appeal at time of presentation of papers—Need for special posting of appeal for hearing after reasonable time—Disposal of appeal raising questions of fact without original records being sent for—Desirability of giving sufficient time when appellant or his pleader unable to argue appeal when it is presented.] Section 421 of the Code of Criminal Procedure does not prohibit a criminal appeal being heard and dismissed at the time of presenting the papers and there need not be a special posting of the appeal for hearing after a reasonable time. It is however desirable, when the appellant or his pleader is unable to argue in support of the appeal when it is presented, that a Court proceeding under section 421 should give sufficient time to the appellant or his pleader and inform him that he will be heard on a particular day in support of the appeal. An appeal though raising questions of fact may be disposed

of under section 421 without the original records being sent for. *Hussain Sahib, In re*, (1924) I.L.R., 48 Mal., 385, referred to.

Narasimhamurti, In re ... (1930) I.L.R., 53 Mad., 865

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 491—Minor wife illegally detained—Husband seeking to recover custody—If entitled to proceed under section—Plurality of remedies provided by law—If husband bound to resort to less expensive and less threatening remedy—Minor with her consent in custody of a person—Another better entitled in law desires custody—If minor "illegally detained" within meaning of section.] A husband seeking to recover custody of his minor wife illegally detained by others is entitled to proceed under section 491 of the Code of Criminal Procedure, and the opposite party cannot be heard to say that, where there are more than one remedy provided for under the law, the less expensive and less threatening remedy should be resorted to by the petitioner. *Bryant v. Bull* (1879) 10 Ch.D., 155, followed. If a minor, even though with her own consent, remains in the custody of a person, he must be held to have illegally detained her within the meaning of section 491, if another person, who is better entitled in law to have the custody of the minor, desires to have that custody. *Abraham v. Mahtabo*, (1885) I.L.R., 16 Cal., 487, referred to.

Subbuswami Goundan v. Kamakshi Ammal ... (1930) I.L.R., 53 Mad., 72

SEC. 537—Assumption of failure of justice if mandatory provision infringed.] Section 537 of the Code of Criminal Procedure affords no real ground for the assumption that, if a mandatory provision of the Code is infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. The impugned procedure must be one that is not only prohibited by the Code but also works an actual injustice to the accused. *Abdul Rahman v. King-Emperor*, (1926) 54 I.A., 96; I.L.R., 5 Rang., 53, followed; *N. A. Subramania Ayyar v. King-Emperor*, (1901) 28 I.A., 257; I.L.R., 25 Mad., 61, referred to.

Ramaraja Tevan, In re ... (1930) I.L.R., 53 Mad., 987

CRIMINAL TRIALS—Case and counter-case—Defence witnesses in a case already examined as prosecution witnesses in counter-case—Depositions—Whether may be filed as part of their evidence as defence witnesses in former case.] Where the defence witnesses in a case have already been examined as prosecution witnesses in a counter-case, their depositions in the latter case may be filed, to save time, as part of their evidence as defence witnesses in the former case, in favour of the prisoner, and with the consent of both sides. *Umar Hajee v. King-Emperor*, (1922) I.L.R., 46 Mad., 117, referred to.

Krishnayya, In re ... (1930) I.L.R., 53 Mad., 775

Practice of tendering for cross-examination important eye-witnesses cited by prosecution—Regularity of—Proper procedure.] The practice of tendering important eye-witnesses cited by the prosecution for cross-examination is highly irregular. In cases where any witness known to the prosecution is able to swear to facts material to the case, the proper procedure to follow is to ask him to give evidence on oath as to the facts known to him, and which are relevant to the case, though other witnesses might have spoken to the same facts. Merely "tendering for cross-examination" is not a practice which should be encouraged especially in murder cases, as it would be very unfair to the accused. *Queen-Empress v. Ram Sahai Lal*, (1884) I.L.R., 10 Cal., 1070, followed.

Veera Koravan, In re ... (1930) I.L.R., 53 Mad., 69

CRIMINAL TRIBES ACT (VI OF 1924), SEC. 23 (1) (b)—Long interval of time between accused coming out of prison after serving last sentence and commission of offence—If a "special reason to the contrary" within meaning of section.] Under the Criminal Tribes Act (VI of 1924), the fact that there has been a long interval of time, between the accused person coming out of

prison after serving his last sentence and the commission of the offence, would be a "special reason to the contrary" within the meaning of section 23 (1) (b) of the Act, so as to entitle a Court to impose on the accused a lesser sentence than transportation for life. *In re Mayandi Thevan*, (1927) I.L.R., 50 Mad., 474, referred to.

Karuppa Tevan, In re ... (1930) I.L.R., 53 Mad., 80

CROSS-EXAMINATION—Practice of tendering important eye-witnesses cited by prosecution in criminal trial for:—See CRIMINAL TRIALS ... 69

DEDICATION—Proof of:—See RELIGIOUS ENDOWMENT FOUNDED BY A WORSHIPPER ... 608

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DISTRICT COURT—Jurisdiction of to enforce order made by High Court directing contributory to pay call:—See INDIAN COMPANIES ACT (VII OF 1913), ss. 3, 187, ETC. ... 147

DISTRICT MUNICIPALITIES (MADRAS) ACT (V OF 1920)—Election Rules, r. 8—Revising Board—Nomination by Collector—Refusal of a member to act—Power of Collector to appoint another from outside the body of members-in-waiting—Personal interest of a member of the Revising Board—Nature of—Revising Board, whether properly constituted, if a member is personally interested—Objection, waiver of—Decision of the Board in the case of difference of opinion—Decision of majority, without discussion with the member in the minority, if valid.] Where, after the Collector of a district had, under rule 6 of the rules for the preparation of electoral rolls in a municipality, under the District Municipalities Act (19-0), nominated the members of a Revising Board as well as a body of members-in-waiting, one of the non-official members of the Revising Board declined to serve on it, the Collector was competent under the rules to nominate to the Board, in the place of the member who declined to serve, a person who was not one of the members-in-waiting. Where a member of the Revising Board was disqualified by personal interest in the adjudication of a claim before it, the Board was not legally constituted, and its decision was invalid on that ground; *Frome United Breweries Co. v. Bath Justices*, [1926] A.C., 586, referred to. Where, however, the claimant, knowing the facts and aware of the conduct of the member who had such personal interest, did not raise the objection of personal interest of such member as disqualifying him from sitting on the Board, during several previous hearings of the case before it, he must be deemed to have waived his objection on that ground, and would be debarred from raising the objection thereafter; *Frome United Breweries Co. v. Bath Justices*, [1926] A.C., 586, relied on. A final decision ought not to be pronounced, in a case in which the judges hearing the case differ, until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment; *Khelut hunder Ghose v. Tarachurn Kuondoo Chowdry*, (1866) 6 W.R., 269, and *Rohilkand Kumaon Bank v. Row*, (1884) I.L.R., 6 All., 468, relied on. Where, therefore, two of the members of the Revising Board delivered their judgment, without waiting to know what the third member's view was, and put it out of their power to reconsider or alter their decision or to be influenced by his view, and the latter delivered his judgment on a different date, after some further inquiry by himself, held that there was no valid decision of a properly constituted Board in the case.

Municipal Council, Srirangam v. Ananta Subramania Iyer ... (1930) I.L.R., 53 Mad., 653

s. 69 (1) AND (2)—Toll-gate contract not in writing—Suit by municipality for arrears, maintainability of—Decree on basis of quantum meruit.] A contract letting the collection of tolls within a municipality governed by the Madras

District Municipalities Act (V of 1920) is invalid and does not bind either party if it does not conform to section 69 of the Act, which requires it to be in writing signed by two councillors. *Raman Chetti v. The Municipal Council of Kumalakom*, (1907) I.L.R., 30 Mad., 290, followed. This rule applies not only to executory contracts but to executed contracts also. In spite of such invalidity of the contract, a decree for what will be due on the basis of quantum meruit can be given. *Mahomed Ebrahim Molla v. Commissioners for the Port of Chittagong*, (1926) I.L.R., 54 Cal., 189 followed.

Municipal Council, Tiruvarur v. Kannuswami Pillai ... (1930) I.L.R., 53 Mad., 352

DISTRICT MUNICIPALITIES (MADRAS) ACT (V OF 1920), SCH. IV, APP.

A—Signature—Meaning of—Warrant issued by Chairman—Not signed but bearing facsimile—Validity of.] A warrant purporting to have been issued by the Chairman of a Municipality, not signed by him but only bearing a facsimile stamp of his signature, is not a valid warrant. The word "Signature" in Appendix A of Schedule IV of the District Municipalities Act must be taken in its accepted sense of Sign Manual.

Madar Sahib, In re ... (1930) I.L.R., 53 Mad., 508

DWELLING HOUSE:—See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 11 (b) ... 487

EASEMENTS (INDIAN) ACT (V OF 1882), SS. 5 AND 13 (f)—Right of way

over a well-formed and metalled road, not a continuous easement—Contrary English rule not applicable where the Act is in force—Easement of necessity—meaning of.] The decisions in England prior to 1881 were not uniform on the question whether a right of way was a continuous easement or not; but the Indian Easements Act (V of 1882) adopted in section 5 the view that it was not. Hence on a partition of two tenements, a right of way even over a well-formed and metalled road does not pass to the grantee as a continuous easement under section 13 (f) of the Act. It is this view, as enacted in the Act, that must govern wherever the Act is in force, in preference to the now well-established view to the contrary in England. The way may, however, pass to the grantee if it is an easement of necessity; but an easement of way cannot be termed "necessary" though the way was used as a way before the partition or even though it may be the most convenient or reasonable means of access, if in fact there is another way; *Krishnamaraju v. Marraju*, (1905) I.L.R., 28 Mad., 495, and *Esa Abbas Sait v. Jacob Haroon Sait*, (1909) I.L.R., 33 Mad., 827, followed.

Narayana Gajapatiraju v. Ratnayammaji ... (1930) I.L.R., 53 Mad., 440

EASEMENTS OF NECESSITY—Meaning of:—See INDIAN EASEMENTS ACT (V OF 1882), SS. 5 AND 13 (f) ... 449

EAST INDIAN DEPENDENCIES OF FRANCE—Whether "Foreign States":—

See INDIAN EXTRADITION ACT (XV OF 1903) ... 102

EDUCATION-CESS—Right of landholder to recover from tenant:—See MADRAS

ELEMENTARY EDUCATION ACT (VIII OF 1920), SS. 34 AND 36 ... 151

ELEMENTARY EDUCATION (MADRAS) ACT (VIII OF 1920), SS. 34 AND

36 AND RULES UNDER S. 36—Education-cess, levied and collected from the landholder—Right of landholder to recover any portion of the cess from his tenants.] A landholder, from whom an education-cess under the Madras Elementary Education Act (VIII of 1920) was collected by the Government, is not entitled to recover from his tenants any portion of the cess so collected. Although the education-cess is recoverable as an addition to land-cess under the rules framed under section 36 of the Act, yet the former cess does not become land-cess for all purposes, and there is no statutory right given to the landholder to recover any portion of the education-cess from the tenant, as in the case of land-cess.

Nagabushanam v. Venkanna ... (1930) I.L.R., 53 Mad., 161

LIABILITY OF REDEMPTION—Clog:—See MORTGAGE ... 805

STATES LAND ACT, MADRAS (I OF 1908), SS. 3 (11) AND (15), 56, 151

AND 159—Sale by ryot of a portion of his holding—Agreement by purchaser with Zamindar to erect buildings thereon for working a rice mill, for a higher rent—Tender of patta to purchaser for higher rent—Refusal to accept such patta—Suit by Zamindar for specific performance of agreement in a Civil Court—Jurisdiction of Civil Court to entertain suit—Validity of agreement.] A purchaser from a ryot of a portion of the ryoti lands in his holding, agreed with the Zamindar that he should be allowed to erect buildings thereon for the purpose of working a rice mill, on payment of a higher rent than what was originally payable for such lands as agricultural lands. The Zamindar, having accepted the proposal, caused the subdivision of the lands from the main holding and registered the same separately in the purchaser's name. On the latter refusing to accept the patta tendered for the higher rent, the Zamindar sued the purchaser in a Civil Court for the specific performance of the agreement. On objection being taken to the jurisdiction of the Civil Court to entertain the suit, held, that the defendant was not a ryot within the definition in section 3 (15) of the Madras Estates Land Act, as he did not hold ryoti lands for the purpose of agriculture; that the amount agreed to be paid by him was not rent; nor was there any question of enhancement of rent; nor was the suit, one for enforcement of patta falling under section 56 of the Act, which did not apply to the case, and consequently the Civil Court had jurisdiction to entertain the suit. *ANANTAKRISHNA AYYAS J.*—There is nothing in the Madras Estates Land Act which prevents the landholder and a tenant from entering into a contract with each other that the land should in future be held or used, not for agricultural but building purposes. *Venugopala Rice-mill v. Rajah of Pittapuram* ... (1930) I.L.R., 53 Mad. 367

ss. 4, 12, 27, 73—Terms of patta—Custom—Relief from rent on land left fallow—Insufficiency of tank water—Dry crop on wet land—Experimental harvest by landholder—Tenant's right to trees—Temple service—Finding in first appeal—Code of Civil Procedure (V of 1908), ss. 100, 101.] In the case of a tenancy under the Madras Estates Land Act, 1908: Where there is a custom by which the tenant is relieved of rent in respect of land allowed to lie fallow, the custom is one of the conditions under which the tenant holds within the meaning of section 27 of the Act, and section 4, which entitles the landholder to collect rent in respect of all ryoti lands, is restricted in its operation by the custom. *Segu Rowthen v. Alagappa Chetty*, (1914) 26 M.L.J., 289 and *Arunachalam Chettiar v. Muthayanai Thevar*, (1913) 26 M.L.J., 289, approved on that point. If owing to insufficiency of water in the tank the tenant raises a dry crop on wet lands he is not liable to pay thereon rent at the *sarasari* wet rate (*Quere*, as to the rate he is liable to pay.) Having regard to section 73, the landholder cannot insert in the patta a provision enabling him to harvest part of the land himself in order to determine his due proportion of the produce of the whole. A finding upon first appeal that no rent or tax has been paid in respect of palmyra trees, except as to a specified number, is conclusive that the tenant is entitled under section 12 to use, enjoy and cut down the trees other than those so excepted. So too, a finding in first appeal that although temple service had been rendered by the tenants, it was not proved to have been rendered as a condition of the tenure, the evidence being consistent with it having been rendered voluntarily, is conclusive against an obligation to render the service being included in the patta. Appeal by landholder from decree of the High Court, (1917) I.L.R., 40 Mad., 640 dismissed.

Raja of Ramnad v. Mangalam ... (1930) I.L.R., 53 Mad. (P.C.), 597

SEC. 112—Agreement to sell by landholder—Proceedings under sec. 112 started by landholder after the agreement but before execution of sale-deed by him—Notices issued to Collector but

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not served on ryots prior to sale—Competency of landholder to sustain proceedings under the section.] Where a landholder, after he had agreed to sell his interest in the property to another but before a sale-deed therefor was executed, started proceedings, under section 112 of the Madras Estates Land Act, for the recovery of arrears of rent and sent notices to the Collector as contemplated by the section, held, that the proceedings were properly initiated under the section, even though the ryots were not actually served with notices prior to the execution of the sale-deed, and that the landholder was entitled to attach and sell the holding for arrears of rent. <i>Forbes v. Maharaj Bahadur Singh</i> , (1914) I.L.R., 41 Cal., 928 (P.C.), explained and applied.	
<i>Meenakshi Ammal v. Ranganwami Ayyar</i> ... (1930) I.L.R., 53 Mad., 802	
ESTOPPEL BY RECORD —See INCOME-TAX ACT (XI OF 1922), ss. 22, 24 AND 87 ... 420	
EVIDENCE (INDIAN) ACT (I OF 1872) , SEC. 68 AS AMENDED BY ACT XXXI OF 1926—Retrospective effect of:—See LIMITATION ACT (IX OF 1908), ss. 20 AND 21 ... 119	
SEC. 92, CL. (4)—Mortgage-bond—Discharge on payment of a portion of amount due, whether provable—Indian Contract Act (IX of 1872), sec. 83—Registration Act (XVI of 1908), sec. 17.] Where a mortgagee agreed to take a payment by the debtor as a complete discharge, that is, not only promised previous to the payment to take it in complete discharge, but at the time of payment gave a discharge, such a discharge is not an agreement within section 92, clause (4) of the Evidence Act; consequently the discharge can be proved by oral evidence. <i>Mohin Chandra Dey v. Ram Dayu Dutta</i> , (1925) 30 C.W.N., 371; and <i>Srimati Bhaba Sundari v. Ram Kamal Dutta</i> , (1926) 44 Cal. L.J., 269, followed; <i>Jagannath v. Shankar</i> , (1919) I.L.R., 44 Bom., 55, dissented from. Section 68 of the Indian Contract Act provides that no consideration is necessary, not for an agreement to remit, but for an actual remission.	
<i>Balasundara Nair v. Ranganatha Aiyar</i> ... (1930) I.L.R., 53 Mad., 127	
EXECUTING COURT —Duty of, to construe decree—Consent decree against Hindu widow—Charge created on husband's immovable property—Necessity binding on husband's estate not established in suit—Whether charge to subsist till debt satisfied or for life-time of widow—Determination of by executing Court.] An executing Court, though it cannot question the validity of a decree, is bound to construe it, if necessary. Where by a consent decree against a Hindu widow a charge is created on her husband's immovable property and, though necessity binding the husband's estate was not established in the suit, an application is made for execution after the widow's death, the executing Court must determine whether the charge is to subsist until the debt is satisfied or only for the life-time of the widow.	
<i>Meenambal Ammal v. Aburubammal</i> ... (1930) I.L.R., 53 Mad., 750	
EXTRADITION (INDIAN) ACT (XV OF 1903) —East Indian Dependencies of France—Whether "Foreign States" within meaning of the Act—Article IX of Treaty of 7th March 1815—Right of British Indian Government to deliver up a British Indian subject to Pondicherry Government on statement by latter of commission of theft by such subject, and on its demand, without satisfying itself of existence of prima facie case—Unilateral act of one of the parties—Whether can impose procedure more elaborate than that contemplated in treaty.] The East Indian Dependencies of France, having been expressly excluded from the Extradition Treaty of 1876, and not being States or parts of a State to which the Extradition Acts of 1870 and 1873 apply, are not "Foreign States" within the meaning of the Indian Extradition Act of 1903. Extradition in the East Indian Possessions of Great Britain and France are governed by Article IX of the Treaty of	

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the 7th March 1815; and that article contemplating summary delivery at the request of any authority of the either High Contracting Party and not providing any special procedure for the purpose of extradition, the British Indian Government may, on the statement of the Government of Pondicherry that a British Indian subject has committed the offence of theft within its territory and on its demand, deliver him up to the Government of Pondicherry, without holding an enquiry to satisfy itself that there is a prima facie case against the person whose extradition is sought. Where the treaty practically provides for surrender on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the parties. <i>Rahamat Ali v. Emperor</i> , (1919) I.L.R., 47 Cal. 37, and <i>In re Cullington</i> , (1920) I.L.R., 48 Cal., 328, referred to.	
<i>Muthu Reddi, In re</i> ... (1930) I.L.R., 53 Mad., 1028	
FIRST INFORMATION REPORT —Statements in—Purposes for which can be used—Variation between statement of witness in first information report and statement in Sessions Court—Effect of.] Statements in the first information report can only be used for the purpose of contradicting or corroborating a witness and for no other purpose. If a witness in the Sessions trial makes a statement different to that attributed to the witness in the first information report, that discredits the evidence of the witness to that extent in the Sessions Court, but does not make the statement in the first information report the evidence upon that matter in the case.	
<i>Sankaralinga Thevan, In re</i> ... (1930) I.L.R., 53 Mad., 590	
FOREIGN STATE —See CIVIL PROCEDURE CODE (V OF 1908), SEC. 84 ... 988	
Extradition:—See EXTRADITION (INDIAN) ACT ... 1023	
FORMA PAUPERIS —Suit in—Partly Successful—Court-fee:—See CIVIL PROCEDURE CODE (V OF 1908), O. XXIII, RR. 10 AND 11 ... 780	
Liability of next friend to pay Court-fee to Government:—See CODE OF CIVIL PROCEDURE (ACT V OF 1908), SEC. 35 ... 716	
GENERAL CLAUSES ACT (X OF 1897) AS AMENDED BY ACT XXXI OF 1920, SEC. 31—Applicability to Act of Parliament:—See WRIT OF CERTIORARI ... 979	
GOTRAJA SAPINDAS —Preferential heir amongst—Determination of—If seven and not merely three degrees in each branch to be reckoned.] For the purpose of determining which of two gotraja sapindas is the preferential heir, only three and not seven degrees in each branch have to be reckoned, and after the third degree in one branch, the three degrees in the next collateral branch must be considered and so on. Hence, the great-grandson of the great-grandfather of the propositus is a preferential heir to the son of the great-grandson of the grandfather of the propositus. <i>Budha Singh v. Lalit Singh</i> , (1916) I.L.R., 37 All., 604 (P.C.), referred to.	
<i>Soobramiah Chetty v. Nataraja Pillai</i> ... (1930) I.L.R., 53 Mad., 61	
GOVERNMENT OF INDIA ACT , ss. 106 (1) AND 110:—See WRIT OF CERTIORARI ... 979	
HEIR —Determination of:—See GOTRAJA SAPINDAS ... 61	
HINDU LAW —Suit for partition by a son against his father and step-brother—Provision for marriage expenses of daughters—Marriage done and expenses incurred by father after suit and before decree—Liability of plaintiff for his share of marriage expenses incurred by father—Charge on plaintiff's share for future marriage expenses of unmarried daughters—Right of daughter in the joint-family property—Obligation for marriage expenses, nature of—Partition in father's lifetime—Liability of son's share in a suit for partition for marriage expenses of his sisters—Right of son for marriage expenses of his daughter, if any, living at partition.] In a suit for partition, instituted by a Hindu governed by the Mitakshara Law, against his father and his step-brother, the father claimed a provision for the marriage expenses of his daughters, one of whom was married subsequent to the suit and before	

decree and two others were unmarried, and the plaintiff contended that he or his share in the family property was not liable therefor, after the disruption of the coparcenary. *Held* (by RAMESAM and REILLY JJ., JACKSON J. dissenting), that the right of the daughter to her marriage expenses and maintenance is based on her right to or interest in the joint-family property, and not based on the natural obligation of a father to maintain his children; that this obligation of the family property is not affected by a partition between the father and his sons; but the son's share, on partition, is liable for the marriage expenses of the daughter of the father in proportion to the son's share in the property divided; that, on the other hand, for the marriage expenses of the daughter of the son, if any, the share of the father or of a collateral after partition is not liable; and that, consequently, the plaintiff should pay his father his one-third share of the sister's marriage expenses incurred after suit and his one-third share in the property should be charged with a third of the expenses of marriages of his unmarried sisters, to be paid as and when they were incurred; *Ramalinga Annai v. Narayana Annai*, (1922) I.L.R., 45 Mad., 489 (P.C.), distinguished.

Subbaya v. Ananta Ramayya ... (1930) I.L.R., 53 Mad., 84

HINDU LAW—Widow—Relinquishment of estate—Intervening reversionary interest of daughters—Structures erected on another's land—Belief in validity of title—Transfer of Property Act (IV of 1882), sec. 51.] A transfer by a Hindu widow of her husband's estate to two sons of daughters cannot be justified as a valid surrender or relinquishment of the estate, if at the time of the transfer, the daughters are alive and have reversionary interests, and are not proved to have consented to the transfer. *Rangasami Goundan v. Nachippa Goundan*, (1918) I.L.R., 42 Mad., 523; L.R., 45 I.A., 72, referred to. [It was not necessary to consider whether consent by them would validate the transfer.] Decree affirmed giving a transferee, who had effected improvements believing in good faith that he was owner, the alternative rights mentioned in section 51 of the Transfer of Property Act, 1882, and in respect of improvements effected at a later date, when he had not proved that he so believed, liberty to remove the materials subject to conditions.

Narayanaswami Ayyar v. Rama Ayyar ... (1930) I.L.R., 53 Mad. (P.C.), 602

IMPROVEMENTS—Compensation:—See USUFRUCTUARY MORTGAGE OF WARG LANDS TO WHICH KUMKI LANDS ARE ATTACHED ... 767

INCOME-TAX (INDIAN) ACT (XI OF 1922)—Money-lending business—Theft of money kept in the business premises—Loss, whether can be deducted in computing income-tax.] *Held* by BEASLEY C.J. and CURGENVEN J. (ANANTAKRISHNA AYYAR J. dissenting)—that the loss incurred by theft of money used in a money-lending business, and in the business premises, should not be allowed for in computing the income-tax, where the theft was committed by persons who were not at the time of the offence employed as clerks or servants on the business of the assessee.

Ramaswami Chettiar v. Commissioner of Income-tax, Madras ... (1930) I.L.R., 53 Mad. (S.B.), 904

SEC. 10 (2) (vi) AND PROVISIO
(b)—Allowance for depreciation of buildings, machinery, etc., in one of several businesses carried on by assessee—Right of assessee to deduct such allowance from profits or gains of other businesses—Effect of the proviso on the main section—"Business" in sec. 10 (1), construction of.] Where an assessee owns a number of businesses, and the profits and gains of one of them are insufficient to cover the full allowance for depreciation of the machinery, plant, etc., used for the purpose of that business, admissible under section 10 (2) (vi) of the Income-tax Act, the excess of the allowance for depreciation can be set off against the profits and gains of the other businesses. "Depreciation" under section 10 (2) (vi) stands on the same footing as the other charges mentioned in section 10, and, under

the well-known principle of construction of provisos the proviso (b) to section 10 (2) (vi) should not be so construed as to withdraw by mere implication any part of what the main provision in the section has given. *West Derby Union v. Metropolitan Life Assurance Society*, [1937] A.C., 647, relied on. Further, the words "any business" occurring in section 10 (1), having been construed to include all businesses put together in *Commissioner of Income-tax v. Arunachalam Chettiar*, (1923) I.L.R., 47 Mad., 860, the words "profits or gains" in proviso (b) to section 10 (2) (vi) should be held to mean the aggregate profits or gains of all the businesses together.

Commissioner of Income-tax, Madras v. Suppan Chettiar ... (1930) I.L.R., 53 Mad. (S.B.), 702

INCOME-TAX (INDIAN) ACT (XI OF 1922), ss. 22, 24 AND 37—Income-tax Officer, making an enquiry for assessment, if a Court—Decision of, if res judicata or an estoppel by record—Decision, when can be re-opened—Accounts for more than three years from year of account, right to call for, in what cases—Effect of non-production—Presumption under sec. 114, Indian Evidence Act (I of 1872).] An Income-tax Officer, making an enquiry as contemplated by the Income-tax Act, 1922, for the purpose of assessing a person, is not a Court, and the rule of *res judicata*, applicable to the decisions of Civil Courts, does not apply to the decisions of the Income-tax officers; nor do the decisions of such officers in assessing the income constitute an estoppel by record against the income-tax officials. Though an Income-tax officer is not bound by the rule of *res judicata* or estoppel by record, yet he can re-open the matter of assessment only if fresh facts come to light, which, on investigation, would entitle the officer to come to a conclusion different from that of his predecessor. The power of an Income-tax officer to call for accounts is limited under the proviso to section 22 (4) to a period of three years, only when he acts under section 22, and, in default, proceeds to assess to the best of his judgment under section 23 (4). But he can call for accounts for more than three years when he is enquiring under section 23 (2) into the truth of the allegations in the return of income made by an assessee, and on non-production of such accounts, may draw the presumption laid down in section 114 of the Evidence Act.

Sankaralinga Nadar v. Commissioner of Income-tax, Madras ... (1930) I.L.R., 53 Mad. (S.B.), 420

ss. 66 (1) AND (2) AND SEC. 4 (2)—
Application by assessee for reference to the High Court—Point of law, not included in the application, whether can be ordered by the High Court to be referred—Application under sec. 66 (1) by assessee, if competent—Remittances from foreign places to British India to the assessee, whether out of profits or capital—Presumption, whether conclusive or rebuttable by assessee—Entries in assessee's account, whether relevant evidence.] Where an assessee had not made an application to the Income-tax Commissioner, under section 66 (2) of the Income-tax Act, 1922, to refer a point of law to the High Court within one month of the passing of an order under section 31 or 32 of the Act, he cannot ask the High Court to direct the Commissioner to refer such a question to the High Court. Neither section 66 (1) of the Indian Income-tax Act, nor section 45 of the Specific Relief Act, empowers the High Court to direct the Commissioner to refer such a question under such circumstances. *Commissioner of Income-tax, Madras v. Thiruvengada Mudaliar*, (1927) 55 M.L.J., 19 (F.B.), approved. The ordinary presumption that money remitted from a foreign business and received in British India by an assessee is out of profits and not out of capital, is one which can be rebutted by the assessee; *Scottish Provident Institution v. Allan*, [1908] A.C., 129, explained and applied.

Subbiah Ayyar v. Commissioner of Income-tax, Madras ... (1930) I.L.R., 53 Mad. (S.B.), 510

INSOLVENT—Discharge of—Annulment—See ss. 5, 27 (2), 43 (1) OF THE PROVINCIAL INSOLVENCY ACT (V OF 1920) ... 268

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INTEREST—Liability for on restitution of principal:—See CIVIL PROCEDURE CODE (V OF 1908), SEC. 144	708
INTEREST ACT, THE (XXXII OF 1839)—Lease-deed—Provision for bringing waste lands under cultivation—Agreement to pay rent at a certain rate on area of lands brought under cultivation—Rent payable from the year in which Government levied revenue on such lands brought under cultivation—No agreement in lease to pay interest on arrears of rent—Suit for arrears of rent with interest thereon—Interest, whether payable under Interest Act, or on general equitable grounds, or as damages—Cases when interest was payable prior to the Indian Act—English Law under 3 and 4 William 4, c. 42—Effect of proviso in the Interest Act (XXXII of 1839)—Interest, whether payable as damages, section 73, II, (n) of the Indian Contract Act.] In a lease-deed, under which waste lands were to be gradually brought under cultivation, the lessee agreed to pay rent at a certain rate on the extent of the land reclaimed, from the year in which the Government revenue was assessed on such lands; there was no provision in the deed for payment of interest on the arrears of rent. On a suit being instituted by the lessor to recover arrears of rent, together with interest thereon, <i>Held</i>, (1) that interest was not payable on the rent under the Interest Act (XXXII of 1839), as the rent payable under the lease-deed was not "a sum certain," and the time for its payment was not "a certain time," within the terms of the Act; <i>Maine and New Brunswick Electric Power Co. v. Hart</i>, [1929] A.C., 631 (J.C.), relied on; (2) that interest could not be awarded by the Court on general equitable grounds, as the proviso to section 1 of the Interest Act only enables the Court to award interest in all cases where it was payable in law before the Act, and the Courts in India, following the practice of the English Courts, did not, prior to the Indian Act, award interest in the case of ordinary debts but did so only in certain special cases; <i>Maine and New Brunswick Electric Power Co. v. Hart</i>, (1929) 30 L.W., 154 (P.C.), and <i>London, Chatham and Dover Railway Co. v. South Eastern Railway Co.</i>, [1893] A.C., 429, applied; and (3) that interest could not be granted by way of damages by virtue of section 73 of the Indian Contract Act, read with Illustration (n) to that section; <i>Kamalammal v. Peeru Meera Levvai Raothen</i>, (1917) I.L.R., 20 Mad., 481, followed; but (4) where the rent was made a charge on land, interest was awardable on the arrears thereof, though there was no provision for interest in the deed creating the charge; <i>Draz, In re Saville v. Draz</i>, [1903] 1 Ch., 781, referred to.	
<i>Nanchappa Goundan v. Ittichathara Mannadiar</i> ... (1930) I.L.R., 53 Mad., 549	
JOINT HINDU FAMILY—Partition—Separation of one or more members, others remaining united—Subsequent partition—Shares in—How determined.] Where there has been a partition of one or more members in a joint Hindu family, the other members remaining united, the shares due, at a subsequent partition, to the various branches should be determined, not <i>rebus sic stantibus</i>, but only after taking into account the earlier partition, and deducting from the share of the branch, a member or members of which separated at the earlier partition, the share or shares already taken by such member or members. <i>Manjanatha v. Narayana</i>, (1880) I.L.R., 5 Mad., 382, followed. Principle of <i>stare decisis</i> considered.	
<i>Narayana Sah v. Sankar Sah</i> ... (1930) I.L.R., 53 Mad. (F.B.), 1	
JUDGMENT IN PREVIOUS SUIT—Evidence Act (I of 1872).—ss. 21, 63, 65 AND 145:—See TRESPASSER PAYING DEBTS DUE BY DECEASED OWNER OF AN ESTATE	952
JURISDICTION—British Indian Court—Promissory note executed in Gadwal without stamp in favour of Ruler:—See CIVIL PROCEDURE CODE (ACT V OF 1908), SEC. 84	988
Decision on sufficiency of Court-fee on hearing of appeal:—See ss. 5, 7 (iv) (b) AND (v) AND SCH. II, ART. 17 (vi), COURT-FEES ACT (VII OF 1870)	540

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JURISDICTION—Irregular exercise:—See SUIT FOR LAND AND PAST MESNE PROFITS	838
Plaint with insufficient Court-fee—Conversion into pauper suit:—See CIVIL PROCEDURE CODE, (V OF 1908), O. XXXIII, RR. 2 AND 8.	43
LAND ACQUISITION—Court-fee on appeal for additional compensation:—See INDIAN COURT-FEES ACT (VII OF 1870), SEC. 8	48
LAND ACQUISITION ACT (I OF 1894), SEC. 9 (2) AND (3)—Necessity to give fifteen days' notice under—Absence of such interval—Effect of, on sec. 25—Waiver, requisites of.] A public notice under section 9 (2) of the Land Acquisition Act (I of 1894) requires at least fifteen days' interval between its publication and the time at which claimants to the land are required to state their objections and make their claims. Section 9 (3) which enacts "that the Collector shall also serve notice to the same effect" on the occupier and others interested in the land, means that there must be in the case of such personal notices also a similar interval of at least fifteen days between the date of the service of such notices and the date when they are required to state their objections and claims. It is only when such interval has been given by the notices under sec. 9 (2) and (3) that the stringent provisions of section 25 (2) can be applied. Where in answer to a notice issued under section 9 (3) which gave only nine days' interval, a claimant appeared before the Land Acquisition Officer and replied to a question of his that he did not know the value of his land, and the Government did not show that the claimant knew that he was entitled to at least fifteen days' notice, when giving the reply, <i>Held</i>, that though by the above reply the claimant failed to make a claim to compensation there was no waiver of the requisite notice.	
<i>Venkatarama Ayyar v. Collector of Tanjore</i> ... (1930) I.L.R., 53 Mad., 921	
ss. 9 (2) AND 25 (1)—Making of a claim for a specific amount necessary for claiming more compensation than that allowed by Land Acquisition Officer.] According to sections 9 (2) and 25 (1) of the Land Acquisition Act (I of 1894) a claim for compensation for land taken under the Act can be considered to have been made only if the person whose property is acquired under the Act makes a claim either orally or in writing for a specific amount as compensation for his land. The mere filing by him of certain sale-deeds of neighbouring lands without making a claim for a specific amount will not amount to the making of such a claim, though the Land Acquisition Officer may consider the prices given in the sale-deeds, to help him in the course of his duty to determine the value of the land acquired.	
<i>Subbanna v. District Labour Officer, East Godavari</i> ... (1930) I.L.R., 53 Mad., 533	
LANDHOLDER—Agreement to sell by—Recovery of rent:—See MADRAS ESTATES LAND ACT (I OF 1908), SEC. 112	802
LAND-REVENUE ASSESSMENT (MADRAS) ACT (I OF 1876)—Land forming portion of an estate—Ownership acquired by adverse possession by another against the holder of the estate—Landholder, whether entitled to have separate registration of such portion—"Alienation by sale or otherwise", construction of—Alienation, if wider than transfer.] The Madras Land-revenue Assessment Act (I of 1876) applies not only to cases of transfers of portions of a permanently settled estate by acts <i>inter vivos</i>, but also to cases where a person has become owner of a portion of such an estate by virtue of adverse possession for the statutory period. <i>Pusarla Peda Brahmaji v. Krishnamachariar</i>, (1919) 11 L.W., 389, and <i>Subba Rao v. Raja of Pithapur</i>, (1926) 53 M.L.J., 400, followed; <i>Krishna Pramada Dasi v. Dharendra Nath Ghosh</i>, (1928) I.L.R., 58 Calc., 813 (P.O.), referred to.	
<i>Venkatarama Rao v. Maharaja of Pittapuram</i> ... (1930) I.L.R., 53 Mad., 784	
LEAVE TO APPEAL—Test:—See LETTERS PATENT, CL. 15	405

LEGAL PRACTITIONERS ACT (XVIII OF 1879), sec. 28—*Oral agreement between pleader and client—Validity of—Suit by pleader on the agreement or in the alternative, for quantum meruit—Right of pleader to get reasonable remuneration for work and labour done—Indian Contract Act (IX of 1872), sec. 65—Contract discovered to be void—Applicability of sec. 65—Compensation for benefit received under void contract, liability for—Stare decisis, as to construction of sec. 28 of Legal Practitioners Act.* Where a pleader sued to recover from his client a sum of money as remuneration for his services as a pleader, on the basis of a verbal agreement entered into with his client, or, if the agreement was held to be invalid, on the basis of quantum meruit, *Held*, that though the agreement was void under section 28 of the Legal Practitioners Act, the pleader was entitled to reasonable compensation for work and labour done by him on behalf of the client. It is too late to go behind the uniform course of decisions in Madras on this question, and reconsider the correctness of the reasoning as to the construction of section 28 of the Act. *Held*, further, that the provisions of section 65 of the Indian Contract Act, requiring compensation to be paid or restoration of advantage received, by a party under a contract discovered to be void, apply to this case; *Harnath Kunwar v. Indar Bahadur Singh*, (1922) I.L.R., 45 All., 179 (P.C.) and *Ananda Mohan Roy v. Gour Mohan Mullick*, (1923) I.L.R., 50 Cal., 929 (P.C.), relied on.

Thangammal Aiyar v. Krishnan ... (1930) I.L.R., 53 Mad., 309

LESSOR AND LESSEE—Deposit of an amount made by lessee with lessor—Interest on the amount to be adjusted towards half the rent—Principal amount to be adjusted towards rent of last year of the lease period—Default in payment of rent—Subsequent suit by lessee for return of deposit from lessor—No forfeiture clause in lease—Amount of deposit, whether forfeited—Deposit, essentials of.] A lease provided that the lessee should deposit a certain amount with the lessor, that the interest on the amount deposited was to be taken in part-payment of the rent and, that the principal amount was to be taken in discharge of the last year's rent. Upon default in payment of the first year's rent, and re-entry upon the land by the lessor, the lessee sued to recover the full amount deposited by him with the lessor. *Held*, that the amount left by the lessee with the lessor was not a deposit in the strict legal sense of the term, liable to be forfeited on default of payment of rent; and that the lessee was entitled to recover the return of his deposit, less the rent that became payable in the first year. What is strictly known as a deposit in the legal sense must possess a two-fold character; it must first be a part-payment and next it must be of the nature of money "staked"; *Howe v. Smith*, (1834) 27 Ch.D., 89, referred to.

Varadaraja Perumal Koil v. Muniappa Pillai ... (1930) I.L.R., 53 Mad., 141

LETTERS OF ADMINISTRATION TO ESTATE OF DECEASED PERSON—

Petition for—Acknowledgment of liability in petition by heir—Saving of limitation—Validity of acknowledgment by heir against persons whose position as heirs was disputed at the time of presentation of petition.] An acknowledgment, by an heir, of liability for a debt owing by the deceased and payable out of the estate of such deceased person, in a petition for letters of administration to the estate saves limitation, but only as against him who made the acknowledgment and the other heirs who authorised such acknowledgment, and not as against those persons whose position as heirs was disputed at the time of the presentation of the petition and was not determined till some time subsequently.

Raja Ram v. Fakiruddin Sahib ... (1930) I.L.R., 53 Mad., 480

LETTERS PATENT OF THE HIGH COURT, CL. 15—Amendment of—

Application in the High Court in a second appeal for stay of execution of decree—Dismissal by a single Judge of the High Court—Appeal against order under Letters Patent, cl. 15, after amendment—Leave to appeal, not applied for—Maintainability of Letters Patent appeal, without leave—Jurisdiction in dismissing petition, whether appellants.] Where, in a second appeal pending

in the High Court, an application for the stay of execution of the decree of the lower Court was dismissed by a single Judge of the High Court, and an appeal was preferred against the order under the Letters Patent, but no leave to appeal against the order had been applied for under the amended Letters Patent, *Held*, that the order refusing stay of execution was passed in the exercise of the appellate jurisdiction of the High Court, and an appeal against the order, without obtaining leave to appeal, would not lie. *Sadaka Muhammad v. Hayath Batcha Sahib*, (1926) 54 M.L.J., 323; and S.R. 12731 of 1928, followed.

Kondalu Aiyar, In re ... (1930) I.L.R., 53 Mad., 158

LETTERS PATENT OF THE HIGH COURT, CL. 15—Decision of a single

Judge of High Court—Leave to appeal—Test to be applied in granting leave.] Under clause 15 of the amended Letters Patent, the Judge of the High Court, who decides a second appeal, has a discretion in granting leave to appeal from his judgment, and must be satisfied that the case is a fit one for further appeal. Considerations in granting leave discussed.

Bulliraju v. Satyanarayanamurti ... (1930) I.L.R., 53 Mad., 405

LIMITATION ACT (IX OF 1908), SS. 20 AND 21—Payment of interest by one

of several mortgagors, effect of, on others—"Chargeable" meaning of—Evidence Act, sec. 68, as amended by Act XXXI of 1926—Retrospective effect of.] According to section 21 of the Indian Limitation Act, payment, of interest as such by one of several mortgagors, who is not the agent of the others, does not by itself serve to keep alive the debt as against the others, who have not authorized the payment. The word "chargeable" in section 21 is not confined to personal liability. It includes also liability to pay out of property. Act XXXI of 1926, which amends section 68 of the Indian Evidence Act, relates only to processual law and not to substantive law. Hence it is retrospective in its operation. If the execution of a deed required to be attested by law is not denied by the executant, it need not be proved by any attesting witness, though it might have been executed before the Act.

Thayammal v. Muttukumaraswami Chettiar ... (1930) I.L.R., 53 Mad., 119

s. 23, ARTS. 29, 36 AND 40—Wrongful attachment before judgment of movables of defendant, whether a continuing wrong—Applicability of article 20—Starting point of limitation—Time taken in appeal to get attachment set aside, whether can be excluded.] Article 29 of the Limitation Act (IX of 1908) applies to all cases of attachment before judgment where specific movable property is actually seized and the seizure is wrongful either because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds; the article applies whether the property attached belongs to a defendant in the suit or to a third party. The starting point of limitation is the date of actual seizure and the time taken in getting the seizure declared illegal either on appeal or by other means cannot be deducted. Such wrongful seizure is not a continuing wrong within the meaning of section 28 of the Limitation Act.

Pannaji Devichand v. Senaji Kapurchand ... (1930) I.L.R., 53 Mad., 621

ART. 181—Suit for dissolution of a partnership and for accounts, etc.—Preliminary decree—Application by party for passing a final decree, more than three years after preliminary decree, whether barred—Suit, whether pending between preliminary and final decrees.] A suit for the dissolution of a partnership and for accounts, in which a preliminary decree has been passed, must be considered to be pending until final decree; hence an application to pass a final decree in such a suit is not subject to any limitation. *Srinivasa Mudali v. Ramaswami Mudali*, (1915) M.W.N., 725 followed.

Ramanathan Chetty v. Alagappa Chetty ... (1930) I.L.R., 53 Mad., 378

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LIMITATION ACT, INDIAN (IX OF 1908), ART. 182, CL. (5) — <i>Application by decreeholder for leave to bid and to set off price against decree amount—Step in aid of execution of a decree.</i> An application for leave to bid and to set off the price against the decree amount, filed by a decree-holder, is a step in aid of execution, falling within Article 182 (5) of the Limitation Act, 1908. <i>Nabadip Chandra Maiti v. Bepin Chandra Pal</i> , (1908) 12 C.W.N., 621, followed.	
<i>Vapu Howther v. Sivakatakham Pillai</i> ... (1930) I.L.R., 53 Mad., 390	
LINGAYATS —Custom of adoption of a married man— <i>Lingayats of North Kanara, not governed by Mayukha law of adoption.</i> Under the Hindu law obtaining in the Madras Presidency, the adoption of a married man is invalid; this rule applies also to Lingayats, who are only a sect of Hindus, in the absence of a custom to the contrary. As the district of North Kanara formed part of the Madras Presidency till 1861 and was then transferred to the Bombay Presidency only for administrative purposes, the Lingayats of that district are governed by the above rule and not by the law of Mayukha, prevailing in the Bombay Presidency, which expressly allows such adoption.	
<i>Somasekhara v. Mahadeva</i> ... (1930) I.L.R., 53 Mad., 297	
LOCAL BOARDS (MADRAS) ACT (XIV OF 1920), ss. 164 (1) AND 221 — <i>Penalty under sec. 164 (1) for alleged encroachment—Proceedings under section 221 for recovery—Whether Magistrate competent to enquire if alleged encroachment true and justified imposition of penalty.</i> A Magistrate acting under section 221 of the Madras Local Boards Act (XIV of 1920) in proceedings for the recovery of a penalty imposed by a local board under section 164 (1) of the Act in respect of an alleged encroachment is competent to enquire whether the alleged encroachment was true and justified imposition of the penalty. <i>In re Raheem Sahib</i> , (1929) I.L.R., 52 Mad., 714, approved. <i>Ramachandran Servai v. President, Union Board, Karai-kudi</i> , (1925) I.L.R., 49 Mad., 888, dissented from.	
<i>Ramaswami v. President, Taluk Board, Tadepalligudem</i> ... (1930) I.L.R., 53 Mad. (F.B.) 878	
... , SEC. 166— <i>Bus picks up passengers within one Municipality—Carries them at separate fares to another Municipality—In course of journey travels over District Board road—Liability to take out licence under second part of sec. 166 (1).</i> Where a bus picked up passengers within the limits of a Municipality, and carried them at "separate fares" to another place in another Municipality, but travelled in the course of the journey over a road belonging to a District Board, <i>Held</i> , that a licence from the President of the District Board, under the second part of section 166 (1) of the Madras Local Boards Act (XIV of 1920), was necessary for the bus being so run, although a licence may not be necessary under the first part of the section. <i>Local Fund Overseer, Mayavaram v. Pakkirisami Thevan</i> , (1927) I.L.R., 51 Mad., 527, distinguished.	
<i>Veerappa, In re</i> ... (1930) I.L.R., 53 Mad., 439	
MAGISTRATE — <i>Competency of to enquire into alleged encroachment:—See MADRAS LOCAL BOARDS ACT (XIV OF 1920), ss. 164 (1) AND 221</i> ...	878
MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACT (I OF 1900) — <i>Lease by President of District Board of roadside poramboke lands—Lease providing that lessee should vacate land, when required, without claiming any compensation for any improvements—Notice to quit—Construction of substantial building on land by lessee—Claim by lessee for compensation for building, whether can be made under the Act—Roadside poramboke lands, whether included under the Act for purposes of compensation.</i> Where the District Board of Malabar leased certain lands forming roadside poramboke to a lessee under an express condition that he should quit the lands, when required, without claiming any compensation for improvements of any sort made by him thereon, and the lessee, on being required to quit, claimed	

compensation for a substantial building erected thereon by him, under the Malabar Compensation for Tenants' Improvements Act; *Held*, that the Act applied only to leases of agricultural holdings or building sites, and not to leases of roadside poramboke lands; and that, consequently, the lessee could not claim any compensation under the Act. *Chathukutty v. Kunhappu*, (1927) I.L.R., 50 Mad., 813, followed; and Second Appeal No. 1445 of 1889 (unreported), referred to.

Sabju Sahib v. Malabar District Board ... (1930) I.L.R., 53 Mad., 54

MAYUKHA—*Law of adoption:—See LINGAYATS* ... 297

MONEY IN BUSINESS—*Loss by theft—Deduction:—See INDIAN INCOME-TAX ACT (XI OF 1922)* ... 904

MORTGAGE, PRIORITY OF—*Purchaser undertaking to pay two mortgages—Failure of purchaser to pay—Purchaser from purchaser paying only one—Effect of—A selling his share of joint family properties to his brother for discharging his debts—Effect of sale on their joint status—Third party's right to sue on contract.* If in consideration of a sale of certain lands the purchaser agrees to pay certain specific mortgages thereon, he cannot by paying only one of them claim priority in respect of that mortgage over others later in date; for the expressed intention was to pay and extinguish all of them; *Govindasami Tevin v. Dorasami Pillai*, (1910) I.L.R., 34 Mad., 119, followed. The same will be the result if, instead of the purchaser paying, an alienee from him paid. If of A and B, members of a joint Hindu family, A sells his share in some of the family properties, not to a stranger, but to B, A thereafter becomes divided from B in respect of the said properties, without any right of survivorship thereto. *Bala-krishna Trimbak Gendalkar v. Savitri Bai*, (1878) I.L.R., 8 Bom., 54, followed. If by a sale by A of certain properties to B, B undertakes to pay A's debts thereon, not only out of those properties, but also personally, A's creditors not being parties to this contract, cannot compel B to pay A's debts personally.

Lakshmi Achi v. Narayanasami Naiker ... (1930) I.L.R., 53 Mad., 188

MORTGAGE—*Transfer of Property Act (IV of 1882), sec. 60—Usufructuary mortgage suing for possession or for mortgage money—Compromise decree perpetuating mortgage relationship and also giving right to redeem in execution—Dismissal of execution application as barred by time—Right of redemption by suit—Civil Procedure Code (V of 1908), sec. 47—Res judicata—Clog on equity of redemption.* In a suit by a usufructuary mortgagee for possession and in the alternative for the mortgage money, a compromise decree was passed to the following effect:—(a) that the mortgagor was to pay the mortgage amount in three years and redeem, (b) that, on default, the mortgagee was to take possession in execution, (c) that the mortgagor could, thereafter, pay on the first day in any year the mortgage amount and get possession, if necessary, by taking out execution, (d) that till payment within the three years the mortgagor was to be in possession on payment of an annual rent to the mortgagee, (e) that on default of payment of rent the mortgagee was to take possession in execution, and (f) that the mortgagor was to be entitled to redeem on payment of the mortgage amount thereafter, on the first day in any year and get possession, if necessary, by taking out execution. Default in payment of rent having occurred, the mortgagee took possession; and thereafter, viz., more than three years after the decree, the mortgagor filed an application in execution for redemption on payment. On the mortgagee's objection, the execution application was dismissed as barred by limitation. Then the mortgagor brought this suit for redemption. *Held*, upholding the right to redeem, that the compromise decree did not put an end to the relationship of mortgagor and mortgagee, but on the contrary, perpetuated it, which carried with it the right of redemption, that though it was a decree, it was no better than a contract and did not operate as *res judicata*; and, on the footing that it was a contract, clause (a) above cannot be construed to restrict the mortgagor's right to one of

redemption in execution only; for if so construed, it would be void and unenforceable, as a clog on the equity of redemption in that it reduced the time for redemption from 60 years to 8 years, that the right to redeem in execution being only a privilege in addition to the right of suit, the dismissal of the execution application was no bar to the suit, and that section 47, Civil Procedure Code, was therefore no bar to the suit; *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*, (1898) I.L.R., 19 Mad., 249 (P.C.), followed; *Hari Ravji Chiplunkar v. Shapurji Hormuji Shet*, (1886) I.L.R., 10 Bom., 481 (P.C.), explained.

Ambu Nair v. Kelu Nair ... (1930) I.L.R., 53 Mad., 805

MURDER—Conviction for—Sentence lesser than death—Circumstance in which High Court will enhance sentence—Notice to show cause against enhancement—Practice relating to.] Where on a conviction for murder the Sessions Court awarded a sentence lesser than death, the High Court will not enhance the sentence, unless it is satisfied that, on the evidence in the case, the sentence of death is the only possible sentence which could have been passed by the Sessions Court. The practice of issuing notice to show cause against enhancement of sentence at the time of the admission of a criminal appeal is not illegal, and is one which has been very frequently adopted in the Madras High Court. It would, however, be desirable that, when an appeal comes up for admission by an Appellate Court, the records should be sent for before causing a notice to show cause against enhancement of sentence to issue.

Gunduthalayan, In re ... (1930) I.L.R., 53 Mad., 585

Deliberately planned, and cold-blooded—Appropriate sentence irrespective of age—Exception under sec. 22, Madras Children Act (IV of 1920)—Circumstances in which capital sentence inappropriate.] In cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature, whatever the age of the accused might be, provided his case does not come under section 22 of the Madras Children Act (IV of 1920), the capital sentence would usually be the appropriate one. But where the murder cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, the capital sentence might not be the appropriate one.

Kolanda Nayakkan, In re ... (1930) I.L.R., 53 Mad., 861

NEXT FRIEND OR GUARDIAN—Liability of, for costs:—See CODE OF CIVIL PROCEDURE (ACT V OF 1908), SEC. 35 ... 718

ORIGINAL SIDE FEE RULES, O. VI, R. 1 (b) AND (c)—Suit on Original Side—Posted for final disposal—Some defendants admit claim, others ex parte—Plaintiff calls one defendant to prove claim against ex parte defendants—Whether suit “disposed of”—Applicability of clause (b) in r. 1.] Where a suit on the Original Side of the High Court came on for final disposal, and the first and the second defendants admitted the plaintiff's claim, and the third and the fourth defendants were ex parte, and the plaintiff had to call the first defendant to prove his claim against the third and the fourth defendants, and the suit was decreed, held, that the suit was not “disposed of” within the meaning of Order VI, rule 1 (c) of the Original Side Fee Rules, but that the suit was decided “ex parte” with reference to some of the defendants, and “on confession of judgment” with reference to the other defendants, and that therefore the plaintiff would be entitled to tax his costs only under clause (b) of the above rule.

Subrahmanian v. Appadurai Mudali ... (1913) I.L.R., 53 Mad., 714

PARTICULARS:—See CODE OF CIVIL PROCEDURE (V OF 1908), O. VI, R. 5 ... 645

PARTITION ACT (IV OF 1893), SEC. 4—Hindu family, divided in status but occupying family property in common—Suit by a purchaser of a share of dwelling house from one of the members of the family—Right of another

member for benefit of sec. 4 of the Act—“Undivided family” in sec. 4, meaning of.] Where a purchaser of a share in a dwelling house from a member of a Hindu family, whose members although divided in status occupy the house in common, sues for partition of the house against the members of the family, a member of the family, who is a defendant in the suit, is competent to apply for the benefit of section 4 of the Partition Act. *Sultan Begam v. Debi Prasad*, (1908) I.L.R., 30 All., 324, followed.

Sivaramayya v. Kapa Venkata Subbamma ... (1930) I.L.R., 53 Mad., 417

PARTITION—Suit for—Provision for marriage expenses of daughters:—See HINDU LAW ... 84

Shares in:—See JOINT HINDU FAMILY ... 1

PENAL CODE (INDIAN), SEC. 171-D—Personation—Ingredients—Proof of corrupt motive.] To constitute the offence of personation under section 171-D of the Indian Penal Code it is necessary to prove that the accused in doing the act with which he is charged was actuated by a corrupt motive.

Venkayya, In re ... (1930) I.L.R., 53 Mad., 444

PLEADER AND CLIENT:—See LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 28 ... 930

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SECOND SCHEDULE, ART. 18—Validity of sales—Power of Court to consider.] The power of the Court to inquire under article 18 of the second schedule to the Presidency Towns Insolvency Act involves also the power to consider the validity of sales, and, if a proper case is made out, not to confirm sales. If there is no reason to set aside, the Court merely confirms the sale.

Sankara Raju v. Kuppammal ... (1930) I.L.R., 53 Mad., 233

SEC. 11 (b)—Having a dwelling house—Circumstances which would not constitute.] Where a debtor was employed as an engine-driver at D outside the limits of the Ordinary Original Civil Jurisdiction of the High Court, and during the period of such employment he ordinarily resided with his wife at D, and there was a house within the limits of the Ordinary Original Civil Jurisdiction of the High Court in which his mother, his sisters and their children were living, and the debtor paid the rent for the house but not directly to the landlord, and he was providing money to enable his mother and sisters to live in that house, and the debtor presented a petition in the High Court on the Insolvency Side to be adjudicated an insolvent, held, that the debtor had no “dwelling house” within the meaning of section 11 (b) of the Presidency Towns Insolvency Act, and that therefore he was not entitled to present the petition for adjudication in the High Court.

Dost Mahomed v. Browne ... (1930) I.L.R., 53 Mad., 487

PRIVY COUNCIL—Right of appeal to—Value of subject-matter:—See CODE OF CIVIL PROCEDURE (ACT V OF 1908), SEC. 110 (P.C.) ... 167

PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 5, 27 (2), 43 (1)—Sec. 148, Civil Procedure Code (V of 1908)—No application in time for discharge of insolvent—Annulment of adjudication, when mandatory—Power of Court to extend time for application.] Under section 27 (2) of the Provincial Insolvency Act, the Court can extend the time for an application for discharging an adjudicated insolvent. Hence the words “the period specified” in section 43 (1) of the Act, mean the period either originally fixed or subsequently extended from time to time. Though if a debtor does not apply for discharge within “the period specified,” the Court is bound not to annul the adjudication and section 43 (1) is in this sense mandatory, yet if no express order of annulment is passed, as it should be passed, an annulment does not ipso facto take place. Until such an express order is made, anyone can apply for extension of time for discharge and the Court can, by virtue of sections 5 and 27 (2) of the Act and section 148, Civil

Procedure Code, extend the period, whether the application for it is made before or after "the period specified"; *Chinnappa Reddy v. Thomas Reddy*, (1927) I.L.R., 53 Mad., 839, overruled; *Gopal Ram v. Magni Ram*, (1927) I.L.R., 7 Pat., 875, followed; *Bhadri Narain v. Shea Koer*, (1889) I.L.R., 17 Cal., 512 (P.C.) applied.

Palani Goundan v. Official Receiver, Coimbatore ... (1930) I.L.R., 53 Mad., 288

PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 78, PROVISOR—Construction of—Proof of debt—Decree passed against insolvent and Official Receiver as parties—Subsequent annulment of adjudication—Application for execution of decree—Deduction of time—Formal proof of decree before Receiver, if necessary. Where a person obtained a decree against an insolvent subsequent to his adjudication, and the Official Receiver was a party to the decree, the debt must be held to have been proved within the terms of section 78 of the Provincial Insolvency Act, 1920, and the proviso to the section did not apply; consequently the decree-holder is entitled to the deduction of the time mentioned in the section in regard to an application for the execution of his decree, filed by him after the annulment of the adjudication.

Ramalinga Ayyar v. Rayalu Ayyar ... (1930) I.L.R., 53 Mad., 248

PUBLIC POLICY—Agreement to remunerate offering of prayers:—See AGREEMENT ... 29

PUBLIC TRUST—Suit relating to—Compromise of:—See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3 ... 398

QUANTUM MERUIT—See LEGAL PRACTITIONERS ACT (XVIII OF 1879), SEC. 28 ... 809

REGISTRATION (INDIAN) ACT (XVI OF 1908), SEC. 17:—See INDIAN EVIDENCE ACT (I OF 1872), SEC. 92, CL. (4) ... 127

... ss. 78 AND 77—Presentation of document before a Sub-Registrar—Non-appearance of executant—Order refusing registration—Making of order, meaning of—Application to Registrar, more than thirty days after order passed by Sub-Registrar but within thirty days of communication of order, if barred—Dismissal as barred by limitation, if an order of refusal—Suit under section 77 more than thirty days after Registrar's order but within thirty days of communication of such order to party, if barred.] An order was passed by a Sub-Registrar refusing registration of a document on the ground that the executant did not appear and admit its execution; a party affected by the order applied to the Registrar under section 73 (1) of the Registration Act to establish his right to have the document registered more than thirty days after the Sub-Registrar passed the order but within thirty days after the communication of the order reached the applicant; the Registrar dismissed the application as barred by limitation under the section; the party then instituted a suit in a Civil Court under section 77 (1) of the Act to enforce registration, more than thirty days after the date of the Registrar's order but within thirty days after the communication of the order reached the plaintiff: Held, that an order under section 73 (1) or section 77 (1) of the Registration Act, 1908, cannot be deemed to have been made unless passed in the presence of the parties, or after notice to them; or until it has been communicated to them; that, in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed, the expression "within thirty days after the making of the order," used in section 73 (1) and section 77 of the Act, means within thirty days after the date on which the communication of the order reached the parties affected by it; and that, consequently, in this case, both the application before the Registrar and the suit in the Civil Court were within time under section 73 (1) and section 77, respectively, of the Act: Held, also the order of the Registrar dismissing the application as being barred by limitation is "an order of refusal" within the meaning of section 77 (1) of the Act.

Swaminathan v. Latchmanan ... (1930) I.L.R., 53 Mad., 491

RELIGIOUS AND CHARITABLE SOCIETY INCORPORATED UNDER ACT XXI OF 1860—Resolution of majority opposed to fundamental articles of Association—Ultra vires.]

An association of Madhwa Brahmins who were disciples of several Madhwa Mutts, was formed in 1878 on a footing of equality of all the members, for the purpose of promoting the study of Sanskrit literature, especially of the Dwaita system of religious philosophy, by means of meetings, lectures, discourses, etc., and was registered under Act XXI of 1860, the articles of association giving it power to pass resolutions, by-laws and rules consistent with the above object. After working for 30 years on the above lines, some of the members of the association who were disciples of one particular mutt managed by their numerical strength to get a resolution passed which accorded to their spiritual head the honour of first thirtham (holy water) before meals, on occasions of meetings in preference to the spiritual heads of other mutts, which resolution had a tendency to wound the feelings of other members and to disrupt the association. In a suit by some of the members of the association to have the resolution cancelled, held (1) that the resolution did not relate merely to the internal management of the association and (2) that as it was fundamentally opposed to the basic principle of equality of all the members, it was invalid though passed by a majority and did not bind the minority. *Mulligan v. Mitchell*, (1837) 3 My. and Cr. 72; 40 E.R. 852, 853 and *Free Church of Scotland (General Assembly of) v. Overtoun (Lord)*, *Macalister v. Young* [1904] A.C., 515, followed.

Venkatesa Rao v. Srinivasa Rao ... (1930) I.L.R., 53 Mad., 737

RELIGIOUS ENDOWMENT FOUNDED BY A WORSHIPPER—Dedication of lands to—Proof of, by later usage, whether admissible—Trust, dedicating surplus income for private use of worshipper, whether valid.]

A pujari, who founded a public temple about a hundred years ago, bought lands, a few in the name of the deity, and all the rest in his own name, with the offerings made by various devotees and used part of the income for the purpose of the temple utilizing the rest for his own benefit. This mode of expenditure continued during the life-time of his son and grandson who also acted as pujaris. In a suit brought by certain worshippers in 1916 for framing a scheme under section 92, Civil Procedure Code, in respect of the offerings and for a declaration that all the lands belonged to the temple, Held, that in cases where there is no deed of endowment of lands, as in this case, or where it is ambiguous, usage is relevant evidence to determine whether the lands and the offerings were after their acquisition endowed entirely for the temple or were only burdened with the actual expenses thereof, the surplus being held by the Pujari for his own benefit. Held, further, that a trust, whether express or implied, by which a portion of the income from the trust property is directed for the purposes of a public temple and the surplus for the beneficial use of its pujari is not illegal.

Kumaraswami Asari v. Lakshmana Goundan ... (1930) I.L.R., 53 Mad., 608

RELIGIOUS ENDOWMENTS (MADRAS) ACT (II OF 1927), SEC. 84—Application under:—See MADRAS COURT-FEES AMENDMENT ACT (V OF 1922), SCH. II, ART. 17 (1) ... 266

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RETRACTED CONFESSION—If can be acted upon without material corroboration—Reasons given by accused for making confession, subsequently retracted, on the face of them, false—If corroboration necessary.] There is no absolute rule that a retracted confession cannot be acted upon, unless there is material corroboration. If the reasons given by an accused person for having made a confession which he subsequently withdraws are, on the face of them, false, that confession may be acted upon as it stands and without any further corroboration.

Kesava Pillai, In re ... (1930) I.L.R., 53 Mad., 160

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Subordinate Criminal Courts—Whether competent to revise their own orders—Procedure where mistake has been committed.] In this Presidency it is a clear rule of processual law that no subordinate Criminal Court can sit in revision upon its own record, and decide whether upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed, the matter must be referred to the High Court. (1875) High Court Proceedings, 17th Aug. 1875, No. 1793, II Weir 307, and <i>Achambit Mandal v. Mahatab Singh</i>, (1914) I.L.R., 42 Calo., 365, referred to.	
<i>Ekambara Mudali, In re</i> ... (1930) I.L.R., 53 Mad., 870	
RIGHT TO WORSHIP—Suit by Muhammadans against Hindus of a village for declaration and injunction—Mosque adjoining a Hindu Temple—Mosque built subsequent to temple—Right to worship in the Mosque undisturbed by playing of music by Hindus in their temple and in their religious processions in public street.] Where certain representative Muhammadans of a village sued certain representative Hindus of the same village for a declaration that they were entitled to carry on their worship, in a mosque which was closely adjoining a Hindu temple, undisturbed by the playing of music in the temple and in the religious processions of the latter in the public streets, and also prayed for an injunction, and it appeared that the Muhammadans chose to erect their mosque close to the temple which was built and was in existence long before the mosque and that service with music formed part of the usual religious worship in the temple and in the processions in the public streets, Held, that, where a new sect or body of worshippers invade a locality already occupied by another religious body, it is not a reasonable exercise of their right to undisturbed worship, that the former should claim to curtail the service or worship of the latter which had been customary long before the former had invaded the locality, and that, consequently, the plaintiffs were not entitled to prevent the defendants from playing music in the temple or in the procession in carrying on their customary worship. <i>Sundaram v. The Queen</i>, (1883) I.L.R., 8 Mad., 203, and <i>Manzur Hasan v. Muhammad Zaman</i>, (1924) I.L.R., 47 All., 151 (P.C.), referred to.	
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SUCCESSION ACT (INDIAN) (XXXIX OF 1925) AS AMENDED BY ACT XVIII OF 1929—Grant of succession certificate—Jurisdiction of High Court, Original Side.] Under the Indian Succession Act (XXXIX of 1925) as amended by Act XVIII of 1929, the High Court has on the Original Side Jurisdiction to grant a succession certificate under Part X of the Act.	
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a suit for the recovery of possession of immovable property and for past mesne profits, instituted after the Civil Procedure Code of 1908, the court passed a decree, as regards mesne profits, in the following terms: The mesne profits will be determined by a separate inquiry in execution proceedings." On the decree-holder filing a petition for execution for the certainment of past and future mesne profits, the judgment-debtor objected, *inter alia*, that the decree did not award mesne profits, that, even if it did, the direction for ascertainment in execution proceedings was passed without jurisdiction and void as being in contravention of Order XX, rule 12, of the Code of 1908, and that, in any event, the decree did not award future mesne profits; Held, (1) that the decree awarded mesne profits by necessary implication; (2) that, though the decree of the court, directing the ascertainment of mesne profits in execution proceedings, and not in the course of the suit, was in contravention of the provisions of Order XX, rule 12, of the Code of 1908, it was not passed without jurisdiction and was, therefore, not void, but was passed in regular exercise of jurisdiction and could be given effect to; *Lakshmi Bai v. Anji*, (1928) 31 Bom. L.R., 400 followed; (3) that the decree must be deemed to have awarded future as well as past mesne profits, even though there was no prayer in the plaint for future mesne profits; the alteration in the language of Order XX, rule 12, of the Code of 1908, from the corresponding provision of the Code of 1882, did not affect the power of the Court in awarding future mesne profits; *Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal*, (1881) I.L.R., 8 Calo., 178 (P.C.), referred to; and (4) that the petition for execution must be treated as an application in the suit under Order XX, rule 12, of the Code; *Ramachandra Raju v. Sri Raja Bhujanga Rao*, (1923) 46 M.L.J., 46 followed.

Kemgam Swamy v. Subbamma ... (1930) I.L.R., 53 Mad., 888

FOR SALE ON A MORTGAGE—Preliminary decree—Application for passing final decree—Notice—Contest—Order directing that a final decree should be passed—Appeal against the order—Court-fee, payable—Whether as in a miscellaneous appeal or on an appeal against the final decree.] An appeal against an order directing, after contest, that a final decree shall be passed in a mortgage suit should be treated as a miscellaneous appeal and is liable to be stamped with a court-fee accordingly; it is not an appeal against the final decree, liable as such to be stamped with an *ad valorem* court-fee.

Ranga Raju v. Ethirajammal ... (1930) I.L.R., 53 Mad., 155

ON A MORTGAGE PRAYING FOR SALE—Person not party to suit—Right to intervene in execution of decree passed in suit.] It is an established principle of law that no person, who is not a party to a suit on a mortgage praying for a sale, whatever the nature of the right such a person might claim, can intervene in the execution of the decree passed in that suit.

Ismail Hassam v. Haji Moosa & Co. ... (1930) I.L.R., 53 Mad., 581

LIABILITY IN RESPECT OF A BANKING ACCOUNT—Information as to extent of customer's past indebtedness to bank—Duty of bank to disclose, if any.] If A agree with a bank to stand surety for B for advances to B, the bank is under no legal obligation to volunteer to A any information as to the extent of B's past indebtedness, which is a matter on which the surety has to inform himself. But if in response to A's request, the bank gives false or wrong information, it might vitiate the contract of suretyship. The general presumption is that a promissory note or bill given for reducing a liability only operates as a conditional discharge until it is honoured. If

no intimation was given by the creditor to the debtor that he had appropriated any particular amount sent towards a particular debt, then the creditor is entitled to change and reappropriate it to another debt.

Imperial Bank of India v. Avanas Chettiar ... (1930) I.L.R., 53 Mad., 826

TARIFF (INDIAN) ACT (VIII OF 1894), SEC. 10 (b)—Construction of—Sale of salt—Payment of price including excise duty by purchaser to seller—Reduction of duty subsequent to transaction—Refund of excess duty to seller—Right of purchaser to sue the seller for the refund of duty received by the latter in the absence of contract to pay amount refunded—Right of purchaser under sec. 10 (b).] Where a contract for the purchase of salt contained no provision regarding subsequent reduction of the excise duty, and the purchaser paid the seller the price including the duty payable on the salt at the time of sale, and the Government, subsequent to the transaction, reduced the duty and gave to the seller a refund of the amount of such reduction, the purchaser is entitled to sue to recover such amount from the seller under section 10 (b) of the Indian Tariff Act (VIII of 1894), even though there is no express provision in section 10 (b) for the institution of a suit by the purchaser.

Narayana Chettiar v. Kadir Sahib ... (1930) I.L.R., 53 Mad., 680

TEMPLE SERVICE—Condition of tenure:—See ESTATES LAND ACT (MADRAS) (I OF 1908), ss. 4, 12, 27 AND 78 ... (P.O.) 597

THIRD PARTY—Right to sue on contract:—See CONTRACT ... 270

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TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 51:—See HINDU LAW. (P.O.) 692

TRESPASSER PAYING DEBTS DUE BY DECEASED OWNER OF AN ESTATE—Right to reimbursement—Necessity to prove bona fides when paying—Judgment in a previous suit—Admissibility of, to prove deposition or admission contained therein—Evidence Act (I of 1872), ss. 21, 63, 65 and 145.] Where A's title to the estate of B (deceased) based upon an alleged will in his favour by B, is found to be false owing to A's inability to prove the will, and A is not able to prove that he held the estate believing in good faith in his title, A cannot recover from B's heirs payments made by him, while he was in possession, to discharge debts due by B, whether secured or unsecured, unless such payments were made to avert an imminent loss to the estate. The judgment in the suit, which declared that the will was not proved, but which contained an abstract of the oral evidence given by A to the effect that the will was genuine, is not admissible even as secondary evidence within the meaning of sections 63 and 65 of the Evidence Act to prove the deposition which can be proved only by the production of the original or of a certified copy thereof. The deposition itself can be used only either to contradict the witness under section 145 or as an admission under section 21 of the Act; and if for the latter purpose, it can be used only to confirm what the deponent stated, viz., that the will was genuine and not to prove that it was a forgery.

Saradamba v. Pattabhiramayya ... (1930) I.L.R., 53 Mad., 952

TRUST—Suit by one trustee of a public trust against another merely for accounts, whether maintainable.] A suit by a trustee against his co-trustee demanding merely an account of the defendant's management, without an allegation of any specific breach of trust or threatened breach of trust by the defendant, is not maintainable. This rule applies not only to private trusts but to public trusts also; *Jannadas Gordhana Das v. Damodaradas Chinnilal*, (1926) 103 I.C. 225, followed.

Narayanan v. Mootha Poduval ... (1930) I.L.R., 53 Mad., 214

ULTRA VIRES—Resolution opposed to fundamental articles:—See RELIGIOUS AND CHARITABLE SOCIETY INCORPORATED UNDER ACT XXI OF 1860 ... 734

USUFRUCTUARY MORTGAGE OF WARG LANDS TO WHICH KUMKI LANDS ARE ATTACHED—Mortgages put in possession of warg and kumki lands—Improvements made by mortgagee on both lands—Right to compensation for value of improvements made on kumki lands as well as on warg lands—Suit for redemption.] When a usufructuary mortgagee of certain warg lands in South Kanara, to which the right of holding kumki lands was attached, was put in possession of both warg and kumki lands and he effected improvements on both, he could, on redemption, claim the value of improvements on both the lands. Although the mortgage deed did not contain a description of the kumki lands, yet as possession of such lands was given to the mortgagee, the kumki lands should be regarded as part of the security under the mortgage for the purposes of redemption and for claiming the value of improvements made on such lands.

Vasteya Holla v. Mahabala Rao ... (1930) I.L.R., 53 Mad., 787

WAIVER OF NOTICE:—See LAND ACQUISITION ACT (I OF 1894), SEC. 9 (2) AND (3) ... 921

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WRIT OF CERTIORARI—Jurisdiction of High Court to issue—Application for the writ against the Minister, Public Health, Government of Madras—Proper form of application—Exemption of Governor acting with Ministers in a transferred subject—Government of India Act (5 and 6 Geo. V c. 61), ss. 106 (1) and 110—Construction of Original Jurisdiction in sec. 110, if includes jurisdiction in certiorari—"Governor and Council," in Act of Parliament, if includes "Governor acting with Ministers"—General Clauses Act (X of 1897), as amended by Act (XXXI of 1920), sec. 31, if applicable to Act of Parliament.] Subject to a statutory exception in respect of the acts or orders of the Governor-General and Council and of the Governor and Council, done or made by them in their public capacity, the High Courts in India possess the same jurisdiction to issue writs of certiorari as the Court of King's Bench in England. Under the Indian High Courts Act, 1861 (24 and 25 Vict. c. 104), section 9, the High Court of Madras derived all the jurisdictions and the powers of the Supreme Court of Madras, which was abolished on the establishment of the High Court. But the Supreme Court of Madras, which had been established under the Government of India Act, 1800 (39 and 40 Geo. III c. 79) and the Charter of 1800 issued in pursuance of that Act, had no jurisdiction or authority over the Governor of Madras and his Council in respect of orders or acts made or done by them in their public capacity only, just as the Supreme Court of Fort William in Bengal had no jurisdiction or authority over the Governor-General and his Council in respect of similar acts or orders done or made by them in their public capacity, under the exemption enacted in 1780 by a statute, viz., 21 Geo. III c. 70. Consequently, the High Court of Madras derived no jurisdiction or power in certiorari over the Governor of Madras and Council from the Supreme Court of Madras. Under section 103 (1) of the Government of India Act, 1915 (5 and 6 Geo. V c. 61), the High Court of Madras has only such powers and authority as were vested in it at the commencement of that Act. As the High Court of Madras has no jurisdiction to issue the writ of certiorari against the Governor of Madras under section 106 (1) of the Government of India Act, 1915, it has equally no jurisdiction to issue the writ against "the Governor acting with the ministers," as the issue of a writ in the latter case would involve the exercise of such a jurisdiction against the Governor himself. Under section 110 of the same Act, the Governor-General and each member of his Executive Council or the Governor and each member of his Executive Council (and a minister appointed under this Act) shall not be subject to the "Original Jurisdiction" of the High Court in respect of anything counselled or ordered

or done by any of them in their public capacity; a writ of *certiorari* is issued in the exercise of the *Original Jurisdiction* of the High Court within the meaning of that expression in section 110; consequently a writ of *certiorari* cannot be issued by the High Court against "the Governor acting with ministers", by reason of the exemption contained in that section. *Per VENKATASUBBA RAO J.* (*MADHAVAN NAIR J. dissenting*):—Section 31 of the General Clauses Act (X of 1897, as amended by Act XXXI of 1920) may be relied on, for construing the expression "The Governor and Council" as including "the Governor acting with ministers", even though the former expression occurs in an Act of Parliament, because the Parliament is "an authority in British India" within the meaning of the section. *Per MADHAVAN NAIR J.*—An application for a writ of *certiorari* in respect of proceedings in a transferred subject relating to public health, can, as a matter of form, be properly directed only against the Government of Madras, Ministry of Public Health, and not against the Honourable the Minister of Public Health, Government of Madras.

Venkataraman v. Secretary of State for India ... (1930) I.L.R., 53 Mad., 979

THE INDIAN LAW REPORTS

(MADRAS SERIES)

APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Wallace, and Mr. Justice
Anantakrishna Ayyar.

A. M. NARAYANA SAH (PLAINTIFF), APPELLANT,

1929,
April 9.

v.

A. SANKAR SAH AND NINETEEN OTHERS (DEFENDANTS),
RESPONDENTS.*

*Joint Hindu family—Partition—Separation of one or more
members, others remaining united—Subsequent partition—
Shares in—How determined.*

Where there has been a partition of one or more members in a joint Hindu family, the other members remaining united, the shares due, at a subsequent partition, to the various branches should be determined, not *rebus sic stantibus*, but only after taking into account the earlier partition, and deducting from the share of the branch, a member or members of which separated at the earlier partition, the share or shares already taken by such member or members.

Manjanatha v. Narayana, (1882) I.L.R., 5 Mad., 362, followed.

Principle of *stare decisis* considered.

* Original Side Appeal No. 38 of 1926.

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ON APPEAL from the preliminary decree and judgment of Mr. Justice KUMARASWAMI SASTRI, dated the 12th day of January 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 170 of 1923.

The appeal came on for hearing before COURTS TROTTER, C.J., and PAKENHAM WALSH, J., who referred the following question to the Full Bench :—

“When there has been a partition of one or more members in a joint Hindu family, the other members remaining united, is this partition to be taken into account in determining the shares due to the various branches in a subsequent partition, as laid down in *Manjanatha v. Narayana*(1), or should the subsequent partition be made *rebus sic stantibus* as at the time of such subsequent partition?”

ON THIS REFERENCE—

K. S. Krishnaswami Ayyangar (*N. Rajagopalan* with him) for appellant (After stating the facts).—The decision in *Manjanatha v. Narayana*(1) is wrong. The basis of that judgment is two-fold—(1) equality at partition, and (2) capacity to confer spiritual benefit. Its correctness has been questioned in *Pranjivandas Shivalal v. Icharam*(2).

In the first place it is incorrect to say that any member or branch of an undivided Hindu family has a definite share in the joint family property. A Hindu joint family is a corporation in which the share of a member or a branch cannot be predicated until partition, *Appovier v. Rama Subba Aiyar*(3). Until partition there is merely a right to common enjoyment of joint family property, with a right to restrict alienations by a direct ancestor, *Mayne's Hindu Law* (Ninth Edition), 346. This is supported by the rule, as laid down in the cases, that a coparcener cannot make a gift, or a devise of his undivided share.

(1) (1882) I.L.R., 5 Mad., 382. (2) (1915) I.L.R., 39 Bom., 734.
(3) (1866) 11 M.I.A., 75.

A partial partition is not contemplated by the Hindu Law texts, and a separation of the kind we have to deal with in this case cannot be brought within the definition of partition in the *Mitakshara*, C. 1, s. 1, pl. 4. The text only says that “the sons of the same father shall take equally and according to their father.” But nowhere does it appear as to how this principle is to be worked out, or what is to be the share of the father at a subsequent partition.

One basis for the decision in *Manjanatha's* case is the doctrine of spiritual benefit. But this has been repeatedly held by the Judicial Committee to be inapplicable in the determination of succession under the *Mitakshara* Law. The passage in the *Smriti Chandrika* relied on in *Manjanatha's* case is inapplicable to the present case. Even in *Manjanatha's* case it is used only by way of analogy. *Debi Parshad v. Thakar Dial*(1), has definitely pronounced itself against founding legal arguments on such analogies. Besides, the authority of the *Smriti Chandrika* in this Presidency has been repudiated in recent cases.

As regards the principle of equality, the taking of a share once notionally fixed, as fixed for all time, will work great hardship in a number of cases. As pointed out in *Pranjivandas' case* it may deprive the branch in which partition had taken place of the benefit of any increase of property between the earlier and the later partitions. It cannot therefore be said that the application of the rule in *Manjanatha's* case always works in favour of an equitable partition.

V. V. Srinivasa Ayyangar, for T. L. Venkatrama Ayyar, for respondents Nos. 1 to 9, 12, 13, 15, 16, 18 and 19.—Lord WESTBURY's statement of the law in *Appovier's case* is not sufficiently comprehensive. Modern Hindu Law has largely deviated from the texts and commentaries. A right to partition is now undoubtedly a proprietary right. A member of a coparcenary can alienate his share, the alienee being entitled to whatever the alienor himself was entitled to, at the time of the alienation, *Chinnu Pillai v. Kalimuthu Chetti*(2). That rule has come into existence in spite of the texts. The alienee is not affected by any fluctuations in the value of the share subsequent to the alienation. The share of an undivided coparcener may be subjected to an attachment for a decree debt due by

(1) (1875) I.L.R., 1 All., 105. (2) (1910) I.L.R., 35 Mad., 47 (F.B.).

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him. The only restriction put on him is that the alienation must be for consideration and it should not be by will. These deviations from the strict Hindu Law have been recognized in some of the earliest cases, *Deendyal Lal v. Jugdeep Narain Singh*(1), *Suraj Bunsu Koer v. Sheo Persad Singh*(2), *Lakshman Dada Naik v. Ramchundra Naik*(3), and *Hardi Narain Sahu v. Ruder Perakash Misser*(4). Our High Court has accepted these principles in *Ayyagari Venkatramayya v. Ayyagari Ramayya*(5), *Manjayya v. Shunmuga*(6), and *Maharajah of Bobbili v. Venkatramanjulu Naidu*(7). A recent decision of the Judicial Committee in *Sat Narain v. Behari Lal*(8) has held that on the bankruptcy of a coparcener his share is vested in the Official Assignee. It is thus clear that it is now possible to predicate of any undivided member of a Hindu family that he has a vested interest in a fractional share which would go to him on an actual partition.

The rule in Manjanatha's case supports the principle of equality. The fact that in some stray instances it might work a hardship is no sufficient reason for not accepting it as correct. Next to the Mitakshara, the Smriti Chandrika is of paramount authority in Southern India. Assuming that the view of MUTTUSWAMI AYYAR, J., that his conclusion is supported by a passage in the Smriti Chandrika, is wrong, it does not follow that the rule itself as enunciated in that case is wrong.

The last point is that the decision in Manjanatha's case has been considered good law for more than four decades, and the result of overruling that judgment would be disastrous. There are no reported decisions of our High Court on the question subsequent to Manjanatha's case. There is, however, an unreported decision of WALLIS, C.J., and SPENCER, J., in A.S. No. 223 of 1917, decided after Pranjivandas' case, in which both the learned judges say that the authority of *Manjanatha v. Narayana*(9), so far as Madras was concerned, remained undisturbed.

K. S. Krishnaswami Ayyangar replied.

V. Ramaswami Ayyar, for K. Rajah Ayyar for respondent Nos. 10, 11, 17, 20 and 21.

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| (1) (1877) I.L.R., 3 Calc. 198. | (2) (1879) I.L.R., 5 Calc., 148. |
| (3) (1880) I.L.R., 5 Bom., 48. | (4) (1883) I.L.R., 10 Calc., 628. |
| (5) (1902) I.L.R., 25 Mad., 680. | (6) (1913) I.L.R., 38 Mad., 684. |
| (7) (1914) I.L.R., 39 Mad., 285. | (8) (1924) I.L.R., 6 Lah., 1. |
| (9) (1882) I.L.R., 5 Mad., 382. | |

OPINION.

COUTTS TROTTER, C.J.—The facts which give rise to the question we have to decide are set out at the beginning of the judgment of my brother ANANTAKRISHNA AYYAR. The point is a very short one, and, were the whole matter to be regarded as being at large, I should attach very great weight to the arguments addressed to us with much learning by Mr. K. S. Krishnaswami Ayyangar. There can be no doubt of the logic of the statement that, until an actual partition arises, no member of a coparcenary can be said to have a share, nor can any branch of the whole family; but in my opinion, it is far too late to apply all those logical rules in their strictness to Hindu Law as we find it to-day. Modifications have been found necessary as, for instance, in the case of the alienee from a member of the coparcenary, who is allowed to stand in his shoes and enforce a partition. See *Suraj Bunsu Koer v. Sheo Persad Singh*(1), where their Lordships frankly concede that the sanctioning of such transactions can be justified not by strict Hindu Law but by necessary implications of equity. Similarly, with regard to a partial partition as in the present case, I think it may be taken as settled law now, that the separation of one branch of the family does not involve a notional partition of the whole property including all the members, with the corresponding legal fiction that the remaining branches or members are to be deemed to have reunited. The appellant most strongly relied on the pronouncement of Lord Westbury in *Appovier v. Rama Subba Aiyan*(2), in which he says:

“No individual member (of an undivided family), while it remains undivided, can predicate of the joint and undivided

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| (1) (1879) I.L.R., 5 Calc., 148. | (2) (1866) 11 M.I.A., 75 at 89. |
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property that he, that particular member, has a certain definite share."

That is indisputable. But it is quite possible to predicate what would be the share of the branch to which the dividing brothers under the partial partition belong or of the individuals who pass out of the family, on a partition on that date. It was held by this Court in *Manjanatha v. Narayana*(1) that, when the eventual complete partition took place, the branch to which those members belonged who had under the partial partition taken their shares and passed out of the family, was to be debited in the ultimate reckoning and that the remaining members of the branch were not to be allowed to claim what would stand to be their share at that ultimate reckoning on the footing that the family property is to be regarded as divisible on the final partition among the co-sharers then existing without any reference to the partial partition, which denuded the family property *pro tanto* to the extent taken away by the seceding members on the partial partition, the decision being based, not on strict principles of Hindu Law, but on necessary considerations of equity. With that view I am inclined myself to agree, having regard to the fact that the rules laid down under the old authorities were laid down at a time when partial partitions such as the present were not recognized in Hindu Law at all. They are now not only constantly carried out unchallenged by anybody but recognized by Courts. But I would rely rather on the principle of *stare decisis*. The decision reported in 5 Mad., is nearly 50 years old. It has certainly never been questioned, although, oddly enough, until the present case, it has not, so far as I can ascertain, been explicitly referred to with approval or said to be followed. The inference, I think, must be

(1) (1882) I.L.R., 5

that in this Presidency this principle has been followed, and innumerable transactions must have taken place over that long period, and I think, to unsettle it now would be to cast a cloud over many titles which have stood unchallenged for long periods. It is quite true that a Division Bench in Bombay came to a different conclusion in *Pranjivandas Shivlal v. Icharam*(1), and declined to follow 5 Mad. They put it on the ground that the decision of the Madras High Court was warranted by the authority of the *Smriti Chandrika* which is not followed in Western India. I do not myself wish to rest this case on the authority of the *Smriti Chandrika*, but, so far as it goes, it does support the respondent's position. I think it is rightly put by the learned Judges in 5 Mad. on the wider principle of equity which must compel the branch concerned to bring into account that portion of the family property which on the partial partition had gone to their share. That equity, thus affirmed, I refuse to disturb on abstract considerations based on the old Hindu Law. I think this is a case to which the maxim "*Stare decisis*" obviously applies, and, however undesirable it is that there should be different rulings in two Presidencies on the same subject, it is after all to be remembered that the various Courts and Presidencies of this country do stand in water-tight compartments in many matters of Hindu Law and have worked out their own rules independently. The inhabitants of each Presidency in the absence of an authoritative ruling to the contrary from the Judicial Committee only act on the faith of undisturbed decisions of long-standing in their own Court. The matter is considered in detail in the judgment of ANANTAKRISHNA AYYAR, J. I only add these few words because, as the editor of the current edition

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of Mayne, I am in part responsible for the propositions laid down in paragraph 270 of that work, on which the appellant so strongly relies. I will take it that that paragraph lays down the strict rule of Hindu Law. As I have already pointed out, I think that there are countervailing and overriding equities which tell the other way. I agree that the answer to the question propounded should be in the affirmative.

WALLACE, J. WALLACE, J.—The question referred to the Full Bench is,

“ When there has been a partition of one or more members in a joint Hindu family, the other members remaining united, is this partition to be taken into account in determining the shares due to the various branches in a subsequent partition, as laid down in *Manjanatha v. Narayana*(1), or should the subsequent partition be made *rebus sic stantibus* as at the time of such subsequent partition.”

This involves at the outset a consideration of what was laid down in *Manjanatha v. Narayana*(1), and the reasons for the decision. The genealogy of the family in that case is given in the leading judgment of MURTHUSWAMI AYYAR, J. At a partition of 1867, of Venkatesa's branch, Ramakrishna and his three sons were alive, and of Narayana's branch, only his four grandsons were alive. Three of these and two of Ramakrishna's sons then separated, the former taking 4/12 share and the latter 3/12, leaving five shares to the joint family consisting of Ramakrishna, his third son and the remaining grandson of Narayana. In 1872, Ramakrishna died. In 1879, his third son sued the remaining coparcener and claimed three-fifths share. The Subordinate Judge held that he

and his coparcener shared alike and awarded him $2\frac{1}{2}$ out of 5 shares. The High Court held that he was entitled to the three shares claimed by him on the footing that Narayana's branch had already had 4 out of the 6 shares originally due to that branch, while Venkatesa's branch had only had 3 of the 6 shares due to that branch. Thus there were only 2 shares left for the defendant in that suit, the grandson of Narayana, and 3 shares left for the plaintiff, the grandson of Venkatesa.

The question to be decided by the High Court in that case reduced to the simplest terms was this: when there are two branches of a joint family and one member of one branch separates leaving the rest still joint, is the share already taken by him to be deducted from the share due to his branch at a subsequent partition, or is it to be entirely ignored and the subsequent partition effected as if it was in itself an entirely new and complete partition? The learned Judges proceeded on the footing that the root principle of Hindu Law to be applied to the case was the desire to “ensure equality of partition in cases of vested interests held in coparcenary”—thus premising that each branch, *quæ* branch, has before partition a vested interest in its theoretical fractional share, the share which would be due to it on a mental computation of the share which would come to it at an actual partition if then made; that is, that each branch theoretically has a fixed fractional share which is the whole share available to its members—a share which would fluctuate only by increase or decrease in the branches and not by increase or decrease among the members of the branches. The right of survivorship would thus operate in water-tight compartments within each branch so long as that branch is not extinct. Except when the share of a branch has been increased or

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diminished by the extinction or addition of other branches, the fractional share allotable to the branch is fixed and is not enlarged by virtue of the separation of any members of it. Sons come in through their father and represent him, and, so long as there are coparceners in each branch, the operation of the right of survivorship is precluded by the right of representation.

The Bench in 5 Mad. came to its decision on a consideration of three points:—

(1) The equality of sharing under the Hindu Law is an equality of the vested interest of each branch as representing each son of the same father who had each a capacity to confer an equal amount of spiritual benefit on him.

(2) Any other principle would, when there has been a partial severance of the joint family by one or more members taking his or their shares and going off, result in an inequitable division unfair to branches which had remained whole in the joint family.

(3) The assistance of the Smrithi Chandrika was called in in order to draw an analogy between this principle of partition and what the Smrithi Chandrika lays down as the principle of second partition among re-united coparceners, namely that the shares will be proportionate to what each brought into the common stock at reunion, a theory evidently based on the idea that the separation by partition by one member involves notionally a complete partition of the whole family and a reunion of the rest.

All these propositions are attacked by the appellant as being opposed to the Hindu Law. The first, in so far as the equality of sharing is based on the capacity of the sharers to confer spiritual benefit on the common ancestor, has admittedly now fallen out of favour so far

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as this Presidency is concerned as being not in accordance with Mitakshara Law. The third proposition must, in view of the later development of the interpretation of Hindu Law, be regarded as no longer sound. It appears to be now well established that a reunion after partition restores the joint family status, so that that status does not in any essential differ from the status of the family before partition. See *Narasimha Charlu v. Venkata Singaramma*(1), *Kristaya v. Venkatramaya*(2), *Kristnayya v. Guravayya*(3) and *Babu alias Govinddoss Krishnadoss v. Gokuldas Govardhandoss*(4). So that, the question before us resolves itself into a consideration of the legality of predicating "vested interest" of a branch in its notional fractional share and of the alleged inequity to the joint family, which is the point noted above as point No. 2. The appellant here maintains that such considerations of equity are irrelevant and that we must be guided entirely by the basic principle of Hindu Law, and quotes the well-known proposition of Lord WESTBURY in *Appovier v. Rama Subba Aiyar*(5), which is too familiar to require quotation. He contends that the predication by the 5 Mad. decision of vested interests in branches is contrary to this principle, and that no member, and therefore no set of members and no branch, can, while the family remains joint, predicate that it has a definite share. On the other side, it is argued that, while this may be a correct statement of the original theory of the joint family status as applicable to a case of complete partition, Hindu Law does not specifically deal with partial partition and therefore does not provide for any method of accounting and debiting which may be equitable when a partial

(1) (1909) I.L.B., 33 Mad., 165.

(2) (1903) 19 M.L.J., 723.

(3) (1921) 41 M.L.J., 503.

(4) (1928) 55 M.L.J., 132.

(5) (1866) 11 M.I.A., 75, p. 89.

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partition has already occurred, and that the law itself as now laid down is continually predicating that at any given moment a coparcener can claim that he has a definite share and has it in his own possession, so much so that he can alienate it to others for value, or a Court of law will hold it under attachment for a decree debt due by him, see *Lakshman Dada Naik v. Ramachandra Dada Naik*(1), *Deendyal Lal v. Jugdeep Narain Singh*(2), and *Hardi Narain Sahu v. Ruder Perakash Misser*(3), so that the above theory of the joint family status has been considerably modified in practice and is no longer good law; or perhaps to put it in another way, the rules of strict Hindu Law apply, and were only intended to apply, to cases where there had been no previous partial partition and where no question arises of the rights of third parties. To this it is rejoined that such modifications as the law has allowed are founded entirely on considerations of equity towards strangers and do not affect the law on the status of the members of a joint family *inter se*, and that the statement of the Hindu Law enunciated by Lord WESTBURY still remains good law, unaffected by the inroads of theoretical postulates carried out in the sacred name of equity, with which inroads the Court has nothing to do when the question for decision is entirely one between members of the joint family and in no way affects or involves the interests of outsiders.

Now, I do not think it is possible to accept this last proposition in its entirety and hold that Hindu law is still such a water-tight compartment unaffected by what goes on outside. To take the law as to the rights of an alienee to whom a coparcener has transferred his share

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for valuable consideration, it has no doubt been repeatedly laid down from the earliest times that what the alienee obtains is no more than the right to claim partition as against the other coparceners, which was the right possessed by his alienor. See *Deendyal Lal v. Jugdeep Narain Singh*(1), *Suraj Bansi Koer v. Sheo Persad Singh*(2) and *Hardi Narain Sahu v. Ruder Perakash Misser*(3), and in this Court *Manjayya v. Shanmuga*(4), *Maharajah of Bobbili v. Venkataramanjulu Naidu*(5) and *Kota Balabadra Patro v. Khetra Doss*(6). But if this is so, then in strict reasoning the alienee's right when he brings his suit would be no more than a right to stand in the shoes of his alienor, if his alienor were then suing for partition instead of the alienee; that is, the alienee would be entitled to a decree for his alienor's share as at the time of *partition*, however long that may be postponed after the date of the alienation. But the well-established law is that the alienee's right is to the fractional share to which his alienor was entitled on the date of the *alienation*, if he had then claimed and carried through a partition. Clearly then, the alienee is held entitled not merely to claim partition but to claim to be given his alienor's interest in the property not at the time of partition but at the time of alienation. It follows that his alienor had at that time something to sell which was not merely a right to claim partition but some real and definite interest in the property which could be the subject of a legal transfer of property. This view is strengthened when it is remembered that it is also established law (see *Ayyagari Venkataramayya v. Ayyagari Ramayya*(7), that the death

(1) (1877) I.L.R., 3 Calc., 198 (P.C.). (2) (1879) I.L.R., 5 Calc., 148.
(3) (1883) I.L.R., 10 Calc., 626. (4) (1913) I.L.R., 38 Mad., 684.
(5) (1914) I.L.R., 3 Mad., 265. (6) (1916) 31 M.L.J., 275.
(7) (1902) I.L.R., 25 Mad., 690.

(1) (1880) I.L.R., 5 Bom., 48 (P.C.).

(2) (1877) I.L.R., 3 Calc., 198 (P.C.). (3) (1883) I.L.R., 10 Calc., 626 (P.C.).

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of the alienor between the date of alienation and the date of the alienee's suit makes no difference to the right of the alienee to enforce partition and to obtain a decree for the share which was alienated to him. If the alienee can claim nothing but the right to claim partition, a mere right *in personam*, then as that right could not survive beyond the death of the alienor, he would take nothing, but on the contrary, the law says that he takes the interest of the alienor at the time of the alienation. Now all this clearly reacts on the joint family itself and its interests. Strict Hindu Law says that, on the death of a coparcener, his coparceners take his share by survivorship. It also says that a coparcener "cannot alienate property at all because he is not individually possessed of any and that such an alienation is void against the joint family. Therefore, as the law now stands, the equity done to the alienee is not only at the expense of his alienor but at the expense of the whole joint family.

This breach in the water-tight compartment is widened still further when we regard the present state of the law in a case of insolvency, that by the insolvency of a coparcener, of course for personal debts, *his* share vests in the Official Assignee and is thus lost to the joint family, a proposition evidently implied by the Privy Council in its judgment in *Sat Narain v. Bihari Lal*(1). That share can vest in the Official Assignee only if it first vested in the insolvent coparcener; and the vesting of a share is a very different thing from a mere claim to partition. Here again the death of the coparcener before partition would not restore to the joint family the share which had vested in the Official Assignee.

(1) (1924) I.L.R., 6 Lah., 1.

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A still further breach is made when we consider the law, in this Presidency at least, that the share of a coparcener can be attached for a personal decree debt, and when once attached will be held by the Court to satisfy the debt, even if the coparcener dies before the Court sale. It is difficult to realize how a mere claim to partition is attachable. Clearly, here also the theory is that some tangible interest vests in the coparcener, which can be the subject of attachment and Court sale. The Privy Council has even gone so far as to speak of an attaching decree-holder having a *charge* on that interest, *Suraj Bansi Koer v. Sheo Persad Singh*(1), or a *lien* on the share, *Deendyal Lal v. Jugdeep Narain Singh*(2), though attachment *per se* cannot create a charge on any property, much less on what is not property at all but a mere claim to partition. I have indicated in *Sankaralinga Mudaliyar v. Official Receiver of Tinnevely*(3) my view that the meaning of the use of the word "charge" or "lien" is that the Court employs its hold over the attached property for the benefit of the attaching decree-holder. However that may be, the attaching decree-holder benefits at the expense not only of his judgment-debtor coparcener but of the joint family as well.

I do not think the conclusion can be resisted that, as the law stands, it involves the proposition that a coparcener possesses and can transfer something much nearer to real property than a mere claim to partition. It is an interest in property, indefinite from the point of view that it may fluctuate in extent from time to time, but definite and ascertainable at any particular point of time, and actually made definite and ascertained by the act of the coparcener seizing and using it for his benefit, and holding it as against the possession and use of it to

(1) (1879) I.L.R., 5 Cal., 148. (2) (1877) I.L.R., 3 Cal., 198.
(3) (1925) 49 M.L.J., 616.

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which the joint family as a whole is entitled. The act of alienation makes definite the indefinite interest which the coparcener has and fixes it so that it is unaffected by any internal change within the joint family or by any of the rules of Hindu Law about devolution on death. So far, the Courts have not gone so far as to hold that an alienation *per se* is such an expression by the alienor of his unequivocal intention to separate as is sufficient to effect a severance of the alienor from the joint family, and at present the law is that the alienor, in spite of the alienation, remains a member of the joint family, *Ayyagari Venkatramayya v. Ayyagari Ramayya*(1), although the suit by the alienee for partition would presumably sever an alienor entirely from the joint family, and the alienee must always sue for partition of the alienor's whole share, *Manjayya v. Shanmuga*(2).

As to the method of computation of the shares which the alienor can dispose of, it is now well settled, in this Presidency at least, by the Full Bench decision in *Chinnu Pillai v. Kalimutlu Chetti*(3), relying on the Privy Council cases in *Suraj Bansi Koer v. Sheo Persad Singh*(4) and *Hardi Narain Sahu Ruler Perkuash Misse*(5), that what passes is the fractional share at the time of the alienation, and neither the definite share to be determined at the time of partition nor the money value of the share. The constant factor, if that phrase may be used, is the fractional share and not the value.

The net result of the law as it stands seems to be this, that each member of the joint family has at any definite period of time a present vested interest in the fractional share which would be his, if a partition was then and there made, and which would, by a partition at his will and pleasure, be converted into a separate

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interest. It seems to follow that each branch has a similar vested interest in the share which would come to it, and could, I take it, equally well dispose of its share as the individual coparcener can dispose of his. The extent of the theoretical share, of course, will, as pointed out already, fluctuate with births and deaths in the joint family, but it is predicable with sufficient definiteness at any moment of time to be transferable. This sort of interest is just the sort of holding by a branch of an undivided fractional share at any moment of time *as if divided*, which is the essence of the principle in 5 Mad. That case is, therefore, not wrong in predicating such a vested interest in the branch.

The question then is, whether we can go further with it and say that the fractional share which represents that vested interest remains a constant factor so long as there is no increase or decrease in the branches. Undoubtedly, when a coparcener disposes of his share or part of it, he will, on a partition, be debited with what he has taken. See the judgment of BHASHYAM AYYANGAR, J., in *Ayyagari Venkatramayya v. Ayyagari Ramayya*(1). I can see nothing illegal or inequitable in the same principle being applied to a branch. We have seen that equity towards the alienee demands the sacrifice of the joint family as well as of the alienor. Equity equally demands that the alienor shall make good to the joint family, so far as he can, the sacrifice he has made it suffer. Hence the system of accounting and debiting against the coparcener has a sound foundation in equity, and the principle is not different for a branch, especially when, as the 5 Mad. case points out, division under Hindu Law involves first the reckoning of the number of branches and a division equally among them.

(1) (1902) I.L.R., 25 Mad., 690 at page 717.
(2) (1913) I.L.R., 38 Mad., 684. (3) (1910) I.L.R., 35 Mad., 47.
(4) (1879) I.L.R., 5 Cal., 148. (5) (1893) I.L.R., 10 Cal., 620.

(1) (1902) I.L.R., 25 Mad., 690 at page 717.

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The branch has had for itself whatever any member of it has taken from the joint family. I can see no difference in principle between predicating for the sake of equity this sort of definite interest in his share by a coparcener and debiting against him whatever he has allocated to himself and uses for himself, and predicating also for the sake of equity the same sort of interest by a branch in the share due to the branch and debiting it with whatever has been taken away from the other branches by any member of it, the share in each case being reckoned as the fractional share to which the coparcener or branch is entitled.

It is clearly not the case that this modification of the strict Hindu Law is entirely evoked in order to do equity to the outsider. It is as necessary for the purpose of doing equity to the joint family as a whole, and it is here I think that the 5 Mad. case rests upon firm foundation. When once equity has been allowed to invade the realm of strict Hindu Law, it is merely a question of how far it is to be allowed to go. The 5 Mad. case has laid down that it shall be allowed to interfere so far as to distribute the proportion of shares in the manner there laid down, and it is not difficult to see that that method is based on considerations of equity towards the joint family itself. In such cases, a mental, although not a real, ledger is maintained against the appropriating coparcener or branch even while the joint family remains joint. If some principle of this kind is not adopted, clearly there would be a wild rush amongst coparceners to alienate their shares, and those who are hindmost, particularly minors, would suffer grievous loss.

It is not difficult, of course, to conceive of cases in which any kind of distribution would be inequitable towards some members. From one point of view, it

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might be considered inequitable that a separated member should lose his share in any increase in the general joint family property. In some cases the value of the fractional share alienated by the alienating coparcener may by no means be the same as the value of the share which the Court actually decrees to the alienee at the time of his suit. But the manifest inequity of rejecting the principle laid down in the 5 Mad. case was put before us in a hypothetical case by the learned Counsel for the respondents, and I do not think that the learned Counsel on the other side gave an adequate answer to that by saying that the joint family can always avoid such results by a suit for complete partition. The interests of minors in particular would be grossly prejudiced thereby, while compulsory separation amongst members who do not wish to divide is not necessarily an advantage to them, and the law, as it at present stands, does not allow several coparceners of a joint family to sue jointly in order to expel one delinquent member. It may be that, under considerations of equity, in future, the law may decide that it should go further towards modifying the strict principles of Hindu Law than it has so far done, but at present it is not necessary for us to decide more than the question referred to us, namely, whether the 5 Mad. ruling is still good law. Equality amongst the sons of fathers is of the essential spirit of Hindu Law, and the 5 Mad. case endeavours to secure that result by preventing any branch from eating part of its cake and keeping the whole. The 39 Bom. case, which is relied upon strongly by the other side, endeavours to secure that equality by ignoring the fact that any of the cake has already been eaten and by dividing the remainder equally. The 5 Mad. case decides that equity demands that at a second partition regard must be had to the state of the family before the first partition; the 39

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Bom. case decides that equity does not demand such an inroad on Hindu Law. Of the two principles, I prefer that laid down in 5 Mad., especially as the secondary principle of *stare decisis* is also in its favour. The judgment in 5 Mad. has stood for over forty years as the law in this Presidency, and we cannot doubt that numbers of partitions have been effected, or deliberately abstained from, on the faith of the decision there given. I cannot therefore see any justification for upsetting what has been the recognized law in this Presidency for so long a period. I would, therefore, answer the reference by saying that the law laid down in *Manjanatha v. Narayana*(1) is still good law.

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ANANTAKRISHNA AYYAR, J.—A Hindu Mitakshara undivided family consisted of four brothers and their sons. One of the sons of one of the four brothers filed a suit for partition and delivery to him of his share in the joint family properties; the Court granted him a decree in respect of his share, and all the other members of the family remained joint. Some years afterwards, and after the death of the four brothers, a suit for partition was brought by the remaining members of that branch, i.e., by the brothers of the person who was plaintiff in the previous suit, against the sons of the other three brothers; and the question raised is whether in this second partition the share that was decreed to the plaintiff in the prior suit should be taken into account.

The Hindu Law texts do not contemplate cases of partial partition —, partial, either as regards the property to be divided, or partial, as regards the coparceners who seek to become divided. But such partial partitions have been taking place for a long time and the law relating to the same is practically Judge-made law.

(1) (1882) I.L.R., 5 Mad., 362.

In the Presidencies of Madras and Bombay, alienations by Hindu coparceners of their shares in the joint family property for consideration have been recognized by Courts and held valid; also creditors of such coparceners have been permitted by Courts to bring to sale the shares of their debtors who happen to be coparceners in joint Hindu families. Creditors have been allowed to attach the shares of such coparceners, and in spite of the subsequent deaths of such judgment-debtors, Courts have allowed such decree-holders to realize the decree amounts by the sale of the shares of the deceased coparceners. It has been held by a Full Bench of this High Court that an alienee of the share of a Hindu coparcener gets the quantum of share which the coparcener was entitled to, if partition had been effected at the date of the alienation. It has also been held that a purchaser of a specific item of joint family property from a coparcener may be allotted the whole of the specific item, if the Court should think that the same could be done without working any injustice to the other coparceners.

As remarked by the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh*(1),

“there can be little doubt that all such alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and an undivided Hindu family, and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes and to work out his rights by means of a partition.”

The doctrine is thus founded upon principles of equity which the Courts have thought fit to apply to such cases.

Now, it is unquestioned Hindu Law, that when a joint Hindu family is comprised of coparceners belonging to

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(1) (1879) I.L.R., 5 Calc., 148 at page 166.

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different branches, the share of each of the branches is first taken into account whenever partition is sought for; and the shares of the members included in a particular branch are then calculated, having regard to the share of the branch itself. This doctrine is based on well-known principles of Hindu Law. It does not follow, when one branch of a joint Hindu family separates, that the other branches also become separated *inter se*. Just as it is open to the other branches of a joint Hindu family to remain joint even after one of the branches has separated from the rest, it is open to all the branches to remain joint even after one coparcener belonging to one of the branches became separated. When such a coparcener is partitioned off, notionally the share fraction due to the branch to which he belongs will have to be considered with a view to ascertain the exact share fraction to which such coparcener is entitled on the partition sought for by him. The share allotted to him is really a share of the share fraction to which his branch would be entitled, if that branch sought partition and separation at that time from the other branches of the joint family.

The question, then, is, when that branch (whether composed of the other members who existed at the time of the first partition or others who came to represent that branch) subsequently claims partition from the other branches of the joint family, whether the share fraction which was already allotted and given to the coparcener of that branch during the first partition should be taken into account in ascertaining the share fraction in working out the partition sought by that branch.

This question has been answered in the affirmative by INNES, O.C.J. and MUTHUSWAMI AYYAR, J., in *Manjanatha*

v. *Narayana*(1). A contrary view, however, has been taken by the Bombay High Court in *Pranjivandas Shivlal v. Icharam*(2).

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It was argued that the decision in 5 Mad. is opposed to the fundamental conception of an undivided Hindu family and that the share due to each branch should be ascertained according to the well recognized principles, and without regard being had to any shares that might have been previously allotted to particular coparceners of particular branches. The dictum of Lord WESTBURY in *Appovier v. Rama Subba Aiyar*(3) was strongly relied on. At page 89, Lord WESTBURY stated as follows:—

“According to the true notion of an undivided family in Hindu Law, no individual member of that family while it remains undivided can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of the rent, and claim to take from the collector or receiver of the rents, a certain definite share.”

Seeing that partial partition was not recognized by the old Hindu Law givers and none of the Hindu Law texts refer to the same, it is clear that the rules relating to such partial partitions should be sought for in places other than original Hindu Law texts. The law relating to partial partition is essentially Judge-made law. Such law was moulded out of considerations of principles of equity. Therefore, one has to look to principles of equity in adjudicating on questions relating to partial partitions. A share fraction of a branch of joint Hindu family having been allotted and given to some coparceners of that branch, it is against principles of equity that that branch should again claim as against the other branches of the family the full share fraction due to it,

(1) (1882) I.L.R., 5 Mad., 362. (2) (1915) I.L.R., 39 Bom., 734.
(3) (1866) 11 M.I.A., 75.

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without in any way being affected by the share fraction already given to some coparceners of that branch. If, for example, branch A was entitled to one-third share fraction of the properties of a joint Hindu family and each of the branches B and C to a similar one-third fraction, and a coparcener of branch A entitled to a moiety of that one-third share belonging to branch A demanded partition and was allotted a moiety of one-third share of branch A, then in the subsequent partition which the remaining coparcener of branch A should demand as against branches B and C, it is just that he should be awarded only a moiety of one-third share, whereas each of the branches B and C should be allotted a one-third share. The increase or decrease in value of the property that remained after the previous partition should not be taken into account, and that which remains should be taken to represent the value of the share fraction to which the branches that remained joint were entitled. The principle of survivorship, result of new births and deaths, would all apply to the joint property that remained after the previous partition and allotment of share to the coparcener of a branch; instead of the ordinary share fraction to which branch A would ordinarily, and in the absence of special circumstances, be entitled at the time of the subsequent partition, it would be entitled only to that portion of that share fraction which remained to it after the partition was effected at the instance of the coparcener belonging to that branch. Equity and justice speak in favour of such a rule, and I do not think that we are precluded by any rules of Hindu Law from giving effect to the same.

There are observations in Mayne's Hindu Law that at the time of actual partition, a coparcener may be debited with amounts of separate expenditure incurred, not for the purpose of the family in the sense in which

that expression is understood, but for exclusive private and personal purposes of the coparcener. In paragraph 293 of Mayne's Hindu Law, the following judgment from the Supreme Court of Bengal is quoted.

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"We apprehend that at the present day when personal luxury has increased and the change of manners has somewhat modified the relations of the members of the joint Hindu family, it is by no means unusual that in the common khatta book, accounts of the separate expenditure of each member are opened and kept against him; and that on a partition, even in the absence of fraud or exclusion, those accounts enter into the general account on which the final partition and allotment are made."

In the Full Bench case, *Ayyagari Venkatramayya v. Ayyagari Ramayya* (1), Justice BHASHYAM AYYANGAR observes as follows:—

"An undivided member of a family, though he may alienate either the whole or a part of his undivided share, will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of the family property other than what he has transferred. No doubt, such a member acts unfairly towards the rest of the family, and if they are not satisfied with his so doing, their only remedy is to become divided from him. When a partition is effected subsequent to such alienation either amicably or by suit, the property alienated will be included in such partition and debited to the share of the alienor. . . . In all these cases, the sale operates upon the interest and the share of the transferor as the same existed at the date of the transfer, and the transferee must work out the transfer by bringing a suit for ascertaining what the share and interest of the transferor was at the date of the transfer."

So, the principle of debiting to the share of a coparcener at the date of the partition something with which he was specially concerned is not a new one.

The question is not so much whether an admitted principle of Hindu Law shall be carried out to its

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apparently logical consequences as what are the limits of an equitable doctrine established by judicial decisions. Hindu Law text writers knew nothing of partial partition. Therefore the theory and incidents of joint family and joint family property according to the genius of the Mitakshara are not the sole questions that should govern us, but it is the nature and extent of the equitable principles relating to partial partition established by modern decisions that have to be really considered and applied to such cases.

I need not consider the arguments adduced in the judgment in the 5 Mad. case, derived from the doctrine of reunion or from the Smrithi Chandrika; I think that the principle laid down in that case is supportable from considerations other than those derived from the doctrine relating to reunion or from the provisions of the Smrithi Chandrika. The principle of that decision has been accepted in this Presidency without any question from 1882. People have, obviously, on the faith of that decision regulated their conduct. Ordinarily, it is open to the other coparceners of a Hindu family to claim separation of their shares whenever any coparcener demands severance. It is clear that but for the enforcement of the principle laid down in the 5 Mad. case, the members who elected to remain joint would be seriously prejudiced, if the view put forward by the plaintiff in the present suit and the view that recommended itself to the learned Judges of the Bombay High Court be accepted (see the details worked out in the Appendix at the end). The learned Judge who tried the suit (KUMARASWAMI SASTRI, J.) has mentioned in his judgment that the decision in the 5 Mad. case has never been questioned in this Presidency, but that it has been acted on for several years, and that the principle of *stare decisis* requires that the said decision should not be questioned at this

stage after it was taken to lay down the law in the Presidency for the last 47 years. It goes without saying that, owing to various circumstances that exist at present, partial partition has become more common now-a-days. We should be unsettling rights of various persons and title to property in this Presidency, should we, at present, overrule such a decision passed in 1882, as we were invited to do, on considerations of abstract theories regarding joint family properties and the rights of coparceners, and inferences that should logically follow from the same. It may be mentioned that even in Appoo Ayyar's case the Privy Council were anxious to emphasize the doctrine of *stare decisis*, for, at page 90, it is stated—

“Undoubtedly their Lordships would be unwilling to reverse any rule regarding property which had been long and constantly acted upon in the Courts of the Presidency.”

We find in the present case that the decision in 5 Mad. has never been questioned but has been accepted as correct and acted upon in this Presidency. It will work great prejudice and injustice if such a rule should be reversed on grounds such as those suggested before us.

As regards *Pranjivandas Shirlal v. Icharam*(1), evidently there was no decision of the Bombay High Court prior to 39 Bom., such as we have got in Madras. Further, the Mayukha is a special authority in Bombay.

The question is a difficult one. Injustice could not be totally avoided in whatever way it is answered.

The decision in 5 Mad. has not been discussed in detail either by Mayne, Trevelyan or Ghose. Sir E. J. Trevelyan merely submits that the Bombay view is the better of the two views, whereas Dr. Ghose simply says in Volume 1, page 577 of his book (3rd edition), that the Madras view seems to be more equitable.

(1) (1916) I.L.R., 39 Bom., 734.

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In the circumstances, I think we should follow the decision in 5 Mad.

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I must however take care to point out that it is not the actual number of shares that is to be taken into account in such cases, but only the share-fraction. Otherwise anomalies are likely to occur.

What the fractional share to which any branch would be entitled would depend on the circumstances that exist at the time of partition. A fractional share of such share having been allotted to a member of that branch, it would be entitled only to the remaining fractional share of the fractional share to which it would in the circumstances be entitled in the partition.

As representing one of the four branches, the branch of which the plaintiff, the 10th defendant, and Sudarsana Sah were members, would be entitled to one-fourth of the family properties. A third of the one-fourth was allotted to and taken away by Sudarsana Sah by the partition proceedings of 1910. The Plaintiff and the 10th Defendant who now represent that branch of the family would be entitled to two-thirds of that one-fourth—that is—two-twelfths of the family properties. The Plaintiff is entitled to one-twelfth, his brother the 10th Defendant to the other one-twelfth.

My answer to the question referred to the Full Bench is in the affirmative.

APPENDIX TO THE JUDGMENT IN O.S.A. No. 38 OF 1926.

A (dead).						B (dead)					
AAAAAA						BBBBBB					
1	2	3	4	5	6	1	2	3	4	5	6

Joint family property Rs. 1,200.

			RS.	A.	P.	RS.	A.	P.	NARAYANA SAH v. SANKAR SAH. ANANTA- KRISHNA AYYAR, J.
A-1	sues for his share of the joint family property and gets 1/6 of 600	...	100	0	0	1,100	0	0	
A-2	do.	1/5 of 550	110	0	0	990	0	0	
A-3	do.	1/4 of 495	123	12	0	866	4	0	
A-4	do.	1/3 of 433-2-0	144	6	0	721	14	0	
A-5	do.	1/2 of 360-15-0	180	7	6	541	6	6	
A-6	do.	1/2 of 541-6-6	270	11	3	270	11	3	
B's branch as a whole	gets the balance of	...	...	...	...	270	11	3	
Each of the sons of B	gets	...	...	...	...	45	1	10½	

P. V. Sudarsana Raju.—Attorney for appellant.

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APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and
Mr. Justice Anantakrishna Ayyar.

E. V. BALASUNDARA MUDALIAR (PLAINTIFF),
APPELLANT,

1929,
March 15.

K. MAHAMED OOSMAN SAHER (DEFENDANT),
RESPONDENT.*

Agreement—One party consents to remunerate another for latter offering prayers for success in former's litigation—If contrary to public policy—New heads of public policy—If Courts competent to devise.

An agreement, whereby one party consents to remunerate another for the latter to offer prayers to God for the success of the litigation in which the former is engaged, is not contrary to public policy.

Bhagwan Dat Shastri v. Raja Ram, (1927) I.L.R., 49 All. 705, distinguished.

* Original Side Appeal No. 24 of 1928.

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It is not open to the Courts to devise new heads of public policy. *Janson v. Driefontein Consolidated Mines*, [1902] A.C., 484, followed.

ON APPEAL from the judgment of WALLER, J., dated 16th January 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 705 of 1926.

The facts necessary for this report are set out in the judgment.

R. Swaminathan for appellant.—The agreement is a perfectly valid one. The consensus of opinion amongst civilized mankind is that prayer is efficacious. The prayer is not for the purpose of diverting the true course of justice but to make certain that justice will be done. It is inconceivable how such an agreement can be said to be opposed to public policy.

K. Narasimha Ayyar for respondent.—The object of the agreement is to bring some extraneous influence to bear on the mind of the Judge who is to decide the case. The Courts cannot countenance such agreements. See *Bhagwan Dat Shastri v. Raja Ram*(1).

[CHIEF JUSTICE—"You pray. I pay." That is valid.]

The object of the prayer must be examined to see whether it does or does not offend against public policy.

JUDGMENT.

COUTTS
TROTTER, C.J.

COUTTS TROTTER, C.J.—As we have come to the conclusion that this case must be remanded and disposed of afresh, I desire to say as little about it as possible, beyond what is necessary to indicate the grounds on which I dissent from the finding of the learned Judge, which was that the agreement relied upon by the plaintiff is contrary to public policy. It is a curious story, and it shortly amounts to this; that the defendant who was a Muhammadan was engaged in litigation which, he hoped, would yield a large sum of money. He requested the plaintiff, who was a Bhakta of the God Sri Subrahmanya, to do *pūja* to the God and to pray for his success in the

litigation and promised to remunerate him amply for so doing; and "amply" was afterwards crystallized into a sum of no less than Rs. 5,000. The defendant in fact effected a compromise of the suit in which he was engaged, for which he received no less a sum from the defendants in that suit than Rs. 32,500. The plaintiff thereupon brings this suit for payment of the agreed amount, Rs. 5,000, for his services and *pūja*.

Such an agreement presents many strange features to a sceptical mind, but I am unable to bring myself to hold that it is on the face of it illegal, as pleaded. To my mind, a man engaged in litigation, believing himself to have a just cause, may, without blame, pray himself to his God for success of the suit and, if he can pray without blame himself, I do not see anything wrong in his employing a priest or a Bhakta to pray on his behalf for reward. On the other hand, it is easy to see many ways in which such an agreement might be vitiated. I do not wish to indicate more precisely how it could be vitiated, because I do not wish to suggest defences which have not been raised or tried. It is enough to say that I do not think that this case is really covered by the authority of *Bhagwan Dat Shastri v. Raja Ram*(1), assuming that case to have been rightly decided, of which I am by no means confident. The defendant, I think, on our view of the case, ought to have an opportunity to apply to the lower Court to amend his pleading, and we so direct.

Costs of the appeal to abide the final result. Court fee paid on appeal to be refunded.

ANANTAKRISHNA AYYAR, J.—The plaintiff (Balasundara Mudaliar) claimed a sum of Rs. 5,550 being the principal and interest due under an agreement

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(Exhibit A) executed by the defendant (Muhammad Oosman Sahib) in favour of the plaintiff on 2nd January 1925. The suit was dismissed by the learned Judge on the ground that the agreement sued on was unenforceable as being opposed to public policy (issue 1). The suit was not tried on the merits, so it has to be taken that everything that has been alleged in the plaint is true for the purposes of this appeal.

The plaintiff is a Hindu, whereas the defendant is a Mussalman. The defendant claimed to be a partner in a Muhammadan firm and was about to file a suit to recover his share of the profits. Before doing so, in the month of August 1924, he requested the plaintiff who is described as a Bhakthan or devotee of God Sri Subrahmanya, to do *pūja* to Subrahmanya Swami for his success. The plaintiff did *pūja* for nine days and informed the defendant of the said Lord's command that the defendant would be successful in his proposed suit. The contemplated suit was filed on or about the 26th of September 1924. The defendant, about the beginning of October 1924, again approached the plaintiff and asked him to offer further prayers and perform *pūjas* in his name to God Subrahmanya daily, so that the God might be pleased, and the defendant might be sure of his success in that suit. The plaintiff, thereupon, informed the defendant that it would be sufficient if prayers were offered and *pūjas* performed to God Subrahmanya daily, both in the morning and evening, for a period of two *mandalams* or 80 days, in his name, and that the plaintiff should be amply remunerated. The defendant agreed that he would amply remunerate the plaintiff for such services. In pursuance thereof, the plaintiff performed *pūjas* and offered prayers in the defendant's name daily, both in the morning and evening, to God Subrahmanya, for a period of 80 days beginning from the

10th of October 1924, till the end of December 1924, "praying for his Divine Blessings to the defendant and for the success of the defendant in his said suit, C.S. No. 612 of 1924." The plaint further stated that, on the 2nd of January 1925, the defendant, in consideration of the services rendered to him by the plaintiff as aforesaid, agreed to pay him a sum of Rs. 5,000 and executed and gave to the plaintiff a letter Exhibit A, by which the defendant agreed to pay to the plaintiff the said sum of Rs. 5,000, if the Court should give a decree to the defendant herein in the said suit for Rs. 50,000 or more. The defendant further undertook that, if he should settle his claim for any amount less than Rs. 50,000, then and in such event also, the defendant was liable to pay the plaintiff the said sum of Rs. 5,000, which sum should be a first charge on the amounts to be realized in the said suit, C.S. No. 612 of 1924. Suit No. 612 of 1924 was settled between the parties, the plaintiff therein (the defendant in the present suit) was to get Rs. 32,500, and he seems to have received the whole of the said amount in two instalments, and Suit No. 612 of 1924 was withdrawn on 21st July 1925. The present suit was instituted on 29th November 1926.

In paragraph 12 of the written statement, the defendant stated that the consideration mentioned in the agreement is not lawful and cannot support the promise to pay any amount to the plaintiff; and in paragraph 14 he urged that the alleged consideration, "being an invocation to a Hindu God Subrahmanya to unduly interfere with and prevent the course of justice, as to bring success to one of the parties to a litigation, is irreligious, illegal, immoral and opposed to public policy, and cannot support the promise to pay." The learned trial Judge dismissed the suit, holding that the agreement alleged by the plaintiff is opposed to public policy.

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This is what he said :—" For the purpose of my decision, I will assume that everything that has been alleged in the plaint is true. What, to my mind, it all amounts to is this ; that the plaintiff extracted from the defendant a promise to pay him a certain sum of money, by guaranteeing that his intercession with Subrahmanya Swami would secure a successful issue to his litigation. In other words, the consideration for the promise was an undertaking to ensure success by bringing some extraneous influence to bear on the mind of the Court ; it seems to me clear that an agreement of this nature is opposed to public policy. The policy of the law, no doubt, is to enforce agreements as far as possible ; but an agreement of this kind tends to affect the due administration of justice by bringing some extraneous influence to bear on the Court or on the opposite party. Apart from that, the consideration for it is a promise to do something which most sensible persons would regard as being outside the range of possibility. It is easy to see what undesirable consequences might ensue if promises of this nature were enforced. The plaintiff professed to have secured by his direct personal intervention a promise of success from the Deity and assured the defendant that 80 days' *puja* would make that promise secure. That is, I think, something totally different from undertaking merely a prayer for success. What the parties intended was that the plaintiff should bring some extraneous influence to bear on the mind of the Court. I find the preliminary issue against the plaintiff and dismiss the suit." The learned Judge relied on the decision of the Allahabad High Court, *Bhagwan Dat Shastri v. Raja Ram*(1).

On looking into the plaint, I find therein a recital of the plaintiff having performed *puja* for 9 days in the

(1) (1927) I.L.R., 49 All., 705.

month of August, and of the plaintiff having informed the defendant " of the said Lord's command that the defendant would be successful in his intended suit." The present suit, however, is based on the allegations that the defendant after filing his suit, No. 612 of 1924 on the 26th of September 1924, requested the plaintiff in October 1924, to offer further prayers and perform *puja* to God Subrahmanya daily, so that the God might be pleased and the defendant might be sure of his success in the said suit ; that the plaintiff informed the defendant that it would be sufficient if prayers were offered and *pujas* performed to God Subrahmanya daily both in the morning and evening for a period of 80 days in the defendant's name, and that the plaintiff was prepared to do the same if the defendant would amply remunerate him for such services ; that the defendant promised to amply remunerate the plaintiff for such services : that in pursuance thereof, the plaintiff performed *pujas* and offered prayers in the defendant's name for a period of 80 days from 10th October 1924 till the end of December 1924, praying for His Divine Blessings to the defendant and for the success of the defendant in his said suit, No. 612 of 1924, and that finally the defendant, in consideration of the services rendered to him by the plaintiff as aforesaid, agreed on 2nd January 1925 to pay him a sum of Rs.5,000, and gave the plaintiff Exhibit A. I am not able to see how this agreement is opposed to public policy. There is absolutely nothing wrong in a party to a suit asking somebody else to offer prayers to God in his name for the success of his suit. I fail to see how such an agreement " tends to affect the due administration of justice by bringing some extraneous influence to bear on the Court or on the opposite party." A litigant might believe in the justice of his case, and there is nothing wrong in offering prayers to God for the success of his case. The

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litigant may offer such prayers himself; or, if he thinks it worth while to do so, he may ask another to offer prayers in his name to God for the success of his case. I am not able to see anything wrong in this, either morally or legally. It is not open to the Courts to devise new heads of public policy, as stated by Lord HALSBURY in *Janson v. Driefontein Consolidated Mines* (1) "I deny that any Court can invent a new head of public policy." The agreement in question not being unlawful, one is bound to enforce the same.

The decision in *Bhagwan Dat Shastri v. Raja Ram* (2) proceeded on the assumption that the plaintiff in that suit "undertook to perform some kind of *puja*, which is referred to as "*Anushthan*," in order to cause the defendant to be successful in a suit which he had before the Courts. In the event of his success, the plaintiff was to get one-tenth of the decree money . . . The finding of the Court below is that the plaintiff undertook by prayer (*prarthana*) to bring extraneous influence to bear on the mind of the Court trying the defendant's suit. We think that the circumstances of this case distinguish it from one in which one person should merely have undertaken to pray to a righteous Deity for the success of another's suit, for in such a case, the Deity, being righteous, would be understood only to exercise an influence in a just cause. In the present case, the intention of the parties evidently was that the plaintiff should exercise some influence unauthorized by law on the mind of the Court."

The learned Judges who decided the Allahabad case, while granting that there would be nothing wrong in one person merely undertaking to pray to a righteous Deity for the success of another's suit, base their decision on

(1) [1902] A.C., 484, p. 491.

(2) (1927) I.L.R., 49 All., 705.

the special facts of the case before them, that "the intention of the parties was that the plaintiff should exercise influence unauthorized by law on the mind of the Court." But in the case before me, having regard to the allegations in the plaint, I do not think that the Court would be warranted in presuming that the plaintiff undertook by prayer to bring extraneous influence to bear on the mind of the Court trying the defendant's suit, No. 162 of 1924. All that I am concerned to say at present is that an agreement, by the defendant to the plaintiff, to pay a particular amount to the plaintiff for prayers offered by the plaintiff in the defendant's name to God Subrahmanya for His Divine Blessings to the defendant, and for the success of the defendant in Suit No. 612 of 1924, could not be presumed to be contrary to public policy.

No doubt, it strikes one *prima facie* as curious that the defendant, a Mussalman, should agree with the plaintiff, a Hindu, that plaintiff should offer prayers to a Hindu God "Subrahmanya" in defendant's name for Divine Blessings and for success of the defendant in his suit against a firm for dissolution of partnership and for his share of the profits. The defendant may perhaps be able to show that the agreement Exhibit A is vitiated, but as the suit has not been tried on the merits, it is right that one should not say more than is absolutely necessary at this stage.

I am of opinion that the dismissal of the suit on the ground that on the face of it the agreement set out by the plaintiff is contrary to public policy could not be sustained. The parties at one stage seemed agreeable to report settlement to the Court, but as the same has not been done, there is no alternative but to reverse the decision of the learned Judge and remand the suit for disposal according to law. The costs of this appeal

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will abide the result. The Court-fee paid on the appeal memorandum will be refunded to the appellant on his application.

B.C.S. .

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1929,
April 18.

THE SABAPATHI PRESS COMPANY, LIMITED,
(DEFENDANT), APPELLANT,

v.

R. SABAPATHI RAO AND EIGHT OTHERS (PETITIONERS),
RESPONDENTS.*

Indian Companies Act (VII of 1913), sec. 166—Petition for winding up—If can be presented by shareholders who have fully paid up their share capital—Sec. 162 (vi)—Nature of circumstances rendering winding up “just and equitable.”

A petition for the winding up of a company under section 166 of the Indian Companies Act (VII of 1913) presented by shareholders who have fully paid up their share capital is maintainable.

In re *National Savings Bank Association*, (1866) 1 Ch. App., 547, and In re *Anglesea Colliery Company*, (1866) 1 Ch. App., 555, followed.

Held, further, on the facts found, that circumstances existed which would render it just and equitable for the Court to direct the winding up of the company under section 162 (vi) of the Act.

Lock v. John Blackwood, Ltd., [1924] A.C., 783, referred to.
ON APPEAL from the judgment of Mr. Justice BEASLEY, dated 16th November 1927, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High

* Original Side Appeal No. 10 of 1928.

Court in O.P. No. 94 of 1922 [In the matter of the Indian Companies Act (VII of 1913) and In the matter of the Sabapathi Press Company, Ltd., Bellary].

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K. Venkata Rao, Chairman of the appellant-company, in person.

B. Somayya and T. R. Arunachala Ayyar for respondents.

JUDGMENT.

RAMESAM, J.—The first point argued in this appeal is a question of law. It has been contended before us by the Chairman of the Sabapathi Press Company, Ltd., who argued the case personally, that this petition for winding up filed by some shareholders who have paid up their share capital fully is not maintainable. Under section 166 of the Companies Act, an application to the Court for the winding up of a company shall be by petition presented either by the company or by any creditor or creditors, contributory or contributories, etc. Section 156 of the Act runs thus :

“In the event of a company being wound up, every present and past member shall, subject to the provisions of this section, be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, with the qualifications following . . . ”

Clause (iv) lays down the following qualification :—

“In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount (if any) unpaid on the shares in respect to which he is liable as a present or past member.”

It is therefore contended before us that a member who has fully paid up his share is not liable to contribute anything under this clause, and therefore he is not a contributory within the meaning of section 166. Section 158 defines the term “contributory.” It means

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"every person liable to contribute to the assets of a company in the event of its being wound up, and, in all proceedings for determining, and in all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory."

The corresponding sections of the then English Act were the subject of consideration in English Courts in *In re National Savings Bank Association*(1). The question was considered by KNIGHT BRUCE and TURNER, L.JJ., in a case which came up on appeal before them from an order of the Master of the Rolls. Section 74 of the English Act then under consideration is the same as section 158. Section 38 corresponds to our section 156. It was held by the Lords Justices that all past members of the company were liable to contribute and the qualification that a member shall not be liable to pay more than the unpaid amount of his share does not make him the less a contributory in the particular case where his share capital is fully paid up. The case follows another decision in *In re Anglesea Colliery Company*(2) reported in the same volume at page 555. Following those decisions, we hold that this petition is maintainable. In some cases it has been laid down as a matter of practice that the petition by a single shareholder ought not to be allowed, unless it is supported by other shareholders or creditors. In the present case, the petition is supported by no less than 84 shareholders. The petition also alleges that, in the event of winding up, the petitioners have a tangible interest in the surplus assets. We, therefore, do not see any kind of objection to the maintainability of this petition.

The next point related to the grounds on which the company is sought to be wound up. Section 162, clause (vi) says that a company may be wound up by the

(1) (1888) 1 Ch.App. Cases, 547.

(2) (1886) 1 Ch.App., 555.

Court, if the Court is of opinion that it is just and equitable that the company should be wound up. Clauses (i) to (v) of the section do not apply. A similar clause was the subject of construction by the Privy Council in *Loch v. John Blackwood, Ltd.*(1). Following that case, our brothers, SPENCER and SRINIVASA AYYANGAR, JJ., reversed in *Sabapathi Rao v. Sabapathi Press Company, Ltd.*(2), the original order of KUMARASWAMI SASTRI, J., dismissing the petition, and remanded the case back for consideration on the ground that the reasons alleged in the petition will, if made out, be enough to sustain an order of winding up as just and equitable. The learned Judge, our brother BEASLEY, J., has now found that on one occasion, the press was auctioned and leased out to K.V.S.R. & Co. and that on the next day it was sub-leased to Pola Sankariah for Rs. 10,523. Again, in another year, the same press was leased out to Mr. Ramachander, son of the Chairman, Mr. Venkata Rao. It was then sub-leased to Pola Sankariah for Rs. 14,300. The learned Judge observes that the very large profits made by intermediaries make the transactions not altogether proper. The next point the learned Judge relied on is that suits had to be filed against the company for the recovery of dividends. Mr. Venkata Rao sought to explain this fact by saying that sometimes the shareholders would not draw their dividends, so that they might make this complaint, and various other explanations are given in connexion with the other shareholders. But whatever the explanations may be, there is no doubt that there are numerous cases of shareholders having had to sue the company for recovery of their dividends. The learned Judge also referred the matter to the Official Referee on two points,

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(1) [1924] A.C., 783.

(2) (1924) I.L.R., 48 Mad., 448.

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that is, to look into the accounts and also examine certain dividend warrants for the purpose of satisfying himself on the questions as to whether dividends had been paid and whether Mr. Venkata Rao was authorized by the persons whose names appear on the dividend warrants to give an acquittance or receipt on their behalf. On both these questions, the report of the Official Referee was against Mr. Venkata Rao. It is said that Mr. Venkata Rao had no opportunity of explaining these matters. On the other side, it is stated that his Counsel, Mr. Sydney Smith, did not question the correctness of the report. The learned Judge also observes that there are other matters which he need not go into. Having regard to all those circumstances, we think it is not a matter in which we should differ from the discretion of the learned Judge.

We dismiss this appeal with taxed costs, on the higher scale, of the petitioners. The taxed costs of the Official Liquidator will be recovered out of the estate. The costs of the respondents may be paid out of the sum of Rs. 800 which has been deposited by the appellants as security for costs.

B.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.*

SUBBA RAO (PLAINTIFF), APPELLANT,

v.

VENKATARATNAM AND NINE OTHERS (DEFENDANTS 1 TO 8
AND 10 AND 12), RESPONDENTS.*

1929,
August 1.

*Civil Procedure Code (V of 1908), O. XXXIII, rr. 2 and
8—Plaint with insufficient court-fee—Conversion into a
pauper suit—Jurisdiction of Court to convert.*

Where a plaint had been admitted with a certain court-fee and a written statement had been put in and issues settled and the Court, at the trial of an issue as to the court-fee, required additional court-fee which in amount was so large that the plaintiff could not pay it, an application for permission to continue the suit as a pauper should not be dismissed because it was not in accordance with rules 2 and 8 of Order XXXIII, Civil Procedure Code. In such a case, the Court can in its inherent power allow the application, if the plaint disclosed a subsisting cause of action, and the plaintiff is after notice to the opposite side and the Government found to be a pauper.

Thompson v. The Calcutta Tramway Company, (1893) I.L.R., 20 Calc., 319, followed.

APPEAL *in forma pauperis* against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Suit No. 8 of 1923.

C. Rama Rao for appellant.

P. Somasundaram for respondent.

The facts and arguments appear from the judgment.

The JUDGMENT of the Court was delivered by

KUMARASWAMI SASTRI, J.—In this case the plaintiff is the appellant. He filed the suit for partition and

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delivery to him of his share in the properties, alleging that he is a member of an undivided family with defendants 1 to 6, that the immovable properties in the plaint schedule are joint-family properties, and praying that the decree in Suit No. 24 of 1922 should be set aside as not binding on him. He paid a stamp duty of Rs. 250 valuing the suit as one by a coparcener to be in possession with the other coparceners. The suit was filed on the 17th April 1923, written statements were filed and preliminary objection was taken as to the valuation of the suit and the court-fee paid. Issue 12 is "Are the valuation of the suit and the court-fee paid not correct?" The Subordinate Judge in dealing with it disposed of the preliminary point and held that the valuation was not correct. He held that the plaintiff should not value the suit under section 7, paragraph 4 (b) and was not entitled to put his own valuation on the property. He held that the amount payable was prescribed by section 7, paragraph 5, of the Court Fees Act. When he held this, the plaintiff put in an application to be permitted to continue the suit *in forma pauperis* on the ground that he was unable to pay the heavy stamp duty of Rs. 1,523 and odd which would be payable by him in addition to the fee already paid. He put in the usual application through his pleader to allow him to continue *in forma pauperis*. The Subordinate Judge dismissed the application on the short ground that it was not in the form prescribed by the Code and that it was not presented by the plaintiff in person and hence the appeal. The first question is whether the Subordinate Judge was right in dismissing the application. It is now clear on the authorities that in a case like the present it is open to the plaintiff to apply to continue the suit *in forma pauperis*. We need only refer to *Thompson v. The Calcutta Tramway*

Company(1), and *Revji Patil v. Sakharam*(2). Although there is no direct decision in the Madras Court on the point, the learned Judges who decided *Solayappa Chetty v. Lakshmanan Chetty*(3) express no dissent from the view that such an application would lie. If such an application lies, then the question is whether the Subordinate Judge was right in holding that it should be in the form prescribed in rule 2 of Order XXXIII, and presented in person as required by rule 3. It is difficult to see how these rules can apply to a case like the present. Rule 2 contemplates that the application itself should be in the form of a plaint. It should contain all the particulars required as regards plaintiffs in suits; there should be a schedule of any movable and immovable property belonging to the applicant and its estimated value and the application should be signed and verified in the manner prescribed for signing and verification of pleadings. Rule 3 says that the application should be presented by the applicant in person unless he is exempted from appearing in Court in which case the application may be presented by an authorized agent who can answer all material questions relating to the application and may be examined in the same manner as the party. Rule 4 is that when the application is in proper form and duly presented to the Court, it may, if it thinks fit, examine the applicant or the agent when the applicant is allowed to appear by agent regarding the merits of the claim and the property of the applicant. Rule 5 says that the application shall be rejected if it is not, *inter alia*, framed and presented in the manner prescribed by rules 2 and 3. Then we come to rule 8 which says that where the application is granted, it shall be

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(1) (1893) I.L.R., 20 Cal., 319.

(2) (1884) I.L.R., 8 Bo n., 615.

(3) (1919) 38 M.L.J., 146.

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numbered and registered and shall be deemed the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit. Now the question is, where, as in the present case, the plaint has already been filed with a stamp duty which is found to be inadequate, where a written statement has been put in and issues settled and the Court at a trial of an issue as to the court-fee wants additional court-fee which in amount is so large that the plaintiff could not pay it, is the application for permission to continue the suit *in forma pauperis* to be dismissed, because it is not presented as required by rule 8 which, *ex hypothesi*, requires that the application should be in the form of a plaint and when admitted is to be numbered and registered as a plaint. It is obviously impossible in a case like the present. There is already a plaint registered and numbered containing all the allegations, and an application to continue it *in forma pauperis* could not be treated as a plaint or registered as a plaint. It is, therefore, obvious that it is not possible to comply with this provision. In such cases the question is what is to be done. It has been held as we said before that it is competent to the Court to allow in its inherent power the party to apply to continue the suit *in forma pauperis*. If that power exists, there should certainly be some power in the Court by which that procedure can be followed up. There is no use of saying that the Court can do it and at the same time requiring the party to do something which is impossible, under rules 2 and 8. In such cases, the proper thing would be to see if the plaint discloses a cause of action and

issue notice to the opposite side and to the Government to see if the plaintiff is really a pauper, unable to pay the additional stamp duty. If that is inquired into and found, he should be allowed to continue the suit *in forma pauperis*. In the present case, there is no doubt that on the plaint there is a sufficient cause of action. It is not barred on the face of it and there is no reason for any inquiry except the inquiry as to whether the plaintiff is or is not able to pay the large additional fee demanded. We are therefore of opinion that the Subordinate Judge is wrong and that the matter should be tried on the lines indicated above. If the plaintiff is found a pauper, of course the other issues will go on as if the proper stamp duty had been paid.

One other point has been raised by the appellant's advocate, viz., that the order of the Subordinate Judge wrong in requiring him to pay additional duty. In view of the decision on the other question, it is unnecessary to decide this point. We think that when occasion should arise for the plaintiff or the defendant to pay stamp duty, an inquiry as to the proper court-fee payable should be held after notice to the Government. We allow the appeal and send the case back to be disposed of in the light of the observations in our judgment. The costs of the appeal will abide and follow the result.

There is no question of any court-fee paid to the Government on the appeal memorandum, because, even if it had been paid, the appellant would be entitled to refund.

N.B.

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APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar.

BRAHMANANDAM, APPELLANT,

v.

SECRETARY OF STATE FOR INDIA AND ANOTHER,
RESPONDENTS.**Indian Court Fees Act (VII of 1870), sec. 8—Court-fee payable on an appeal for additional compensation under Land Acquisition Act (I of 1894).*

In an appeal to the High Court under the Land Acquisition Act claiming additional compensation, the court-fee payable under section 8 of the Court Fees Act on the appeal is not merely on the additional amount claimed in the appeal but also on the 15 per cent payable thereon in case of success.

APPEAL sought to be preferred against the decree of the Court of the Subordinate Judge, Ellore, in C.C. No. 15 of 1926 in O.P. No. 24 of 1926.

V. Viyanna for appellant.—Amount of compensation awarded is determined by the considerations mentioned in clauses (i) to (vi) of section 23 (1) of the Land Acquisition Act and not by reference to section 23 (2) also which deals with the 15 per cent, which is only a solatium for the compulsory nature of the acquisition. Hence the same expression and also the expression "amount claimed" in section 8 of the Court Fees Act should be interpreted so as not to include the 15 per cent; see *The Secretary of State for India in Council v. Shanmugaraya Mudaliar*(1).

Government Pleader (P. Venkataramana Rao) for the respondents.—Several sections in the Land Acquisition Act (e.g.), 11, 13, 15, 23, 24 and 31 speak of the amount of compensation determinable and determined as including the 15 per cent. Section 15 enacts that the amount of compensation

awardable shall be determined according to sections 23 and 24 which includes section 23 (2) under which, the 15 per cent is added. The case quoted by the appellant was under the old Act X of 1870, under which, the 15 per cent was awarded under a separate section. See also Stamp Register No. 9324 of 1923 and *Mahomed Ali Amjad Khan v. Secretary of State for India*(1).

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JUDGMENT.

The question that has been referred to me is whether an appellant whose lands were acquired under the Land Acquisition Act (I of 1894), but who, being dissatisfied with the amount of compensation awarded to him by the Court on a reference made to it under section 18 of the Act, appeals to the High Court, is bound to include in the valuation of his appeal the amount of 15 per cent of the excess market value, and pay court fee thereon, or whether he is entitled to value his appeal only at the excess market value claimed by him and pay court fee on that amount only, while insisting in case of success in the appeal that he should be decreed not only the excess market value claimed by him but also 15 per cent on the same.

The answer to this question turns on the proper construction to be placed on section 8 of the Court Fees Act. Section 8 runs in these terms:—

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

It was argued on behalf of the appellant that, under section 23, sub-section (1) of the Land Acquisition Act, the amount of compensation to be awarded is determined

* Stamp Register No. 17672 of 1923.

(1) (1893) I.L.R. 18 Mad., 309.

(1) (1903) I.L.R., 30 Cal., 501.

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by the considerations mentioned in clauses (i) to (vi) of the section and that in construing section 8 of the Court Fees Act, the expression "the amount awarded" should be taken to cover only the amount awarded, having regard to the considerations mentioned in clauses (i) to (vi) only of section 23, and that the expression, "amount claimed", in section 8 should also receive a similar construction. I am unable to accede to that contention. Under the Land Acquisition Act, it is the amount of compensation that should be allowed for the land that has to be determined; and in determining the amount of compensation the Court has to take into consideration not only the provisions of clauses (i) to (vi) of section 23, sub-section (1), but also the provisions of sub-section (2) of that section. Sub-section (2) of section 23 expressly enacts:—

"In addition to the market value of the land as above provided, the Court shall in every case award a sum of 15 per centum on such market value, in consideration of the compulsory nature of the acquisition."

As I understand the Act, the amount of compensation to be awarded includes not only the market value, but also the 15 per cent on such market value. A reference to the other sections of the Land Acquisition Act, in my opinion, makes this clear. Under section 11, the Collector shall make an award of the compensation which in his opinion should be allowed for the land, and also "the apportionment of the said compensation among the claimants." Again, under section 31, "the Collector shall tender payment of the compensation awarded by him to the persons interested;" and if they did not consent to receive it,

"the Collector shall deposit the amount of compensation in the Court to which a reference under section 18 would be submitted."

It is clear that the expression "amount of compensation awarded by the Collector" in section 31 includes not only the market value but also the 15 per cent thereon, since it is clear that the Collector is bound to tender to the claimants the said 15 per cent also and to deposit the same in Court, if the claimants did not consent to receive the same. Again, section 15 of the Act enacts that

"in determining the amount of compensation, the Collector shall be guided by the provisions contained in sections 23 and 24,"

that is, not only by the provisions of sub-section (1), clauses (i) to (vi) of section 23, but also by sub-section (2) of section 23.

It seems to me to be clear that the extra amount of compensation claimed by the appellant in an appeal should under section 8 of the Court Fees Act include also the 15 per cent of the market value and that he should pay court fees on the total amount including the 15 per cent. He cannot, it seems to me, value his appeal only at the excess market value claimed by him in the appeal, and at the same time in case of success, not only claim to have that excess market value decreed to him but also claim that the appellate decree should automatically give him an additional 15 per cent of the said excess market value. An appeal is different from the claim put forward by him before the Collector. When once the Court, on a reference to it under section 18 of the Land Acquisition Act, determines the amount of compensation to be awarded for the land acquired, the claimant, if dissatisfied with the amount of compensation so awarded by the Court, should, in case he prefers an appeal, value his appeal at the figure which represents the difference between the amount of compensation awarded to him and the amount of

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compensation that he claims in the appeal. The amount of compensation awarded to him includes, in my view, the 15 per cent also of the market value, and the extra amount of compensation that he claims in the appeal should also include the 15 per cent of the excess market value which he claims in the appeal.

Of course it is open to an appellant in a land acquisition appeal, as in any other appeal in which he claims a sum of money from the other side, to give up a portion of his claim and confine his claim to any particular amount to which he may restrict his claim in appeal. In such cases, he is of course bound to pay court fee only on the amount to which he has so confined his claim in the appeal; but in such a case, in the event of success in his appeal, the decree of the appellate Court should award only the amount claimed by him in the appeal, and not more. *Mahomed Ali Amjad Khan v. Secretary of State for India*(1). In the case before me, the appellant, while valuing his appeal at the extra market value only, claims in the event of success an extra 15 per cent also. To entitle him to do so, I think, on a proper construction of section 7 of the Court Fees Act, that he is bound to include in the valuation of his appeal the extra 15 per cent also and pay the court fee due on the total amount.

No reported decision on the exact point that I have to decide now has been brought to my notice either by the learned Advocate for the appellant or by the learned Government Pleader. The appellant, however, relied on the observations of the Privy Council in the *Mahabhalipuram Land Acquisition case, The Secretary of State for India in Council v. Shanmugaraya Mudaliar*(2). The observations relied on are at pages 376,

(1) (1903) I.L.R., 30 Calo., 501.

(2) (1893) I.L.R., 18 Mad., 369.

377 and 379. I am of opinion that the observations relied on by the appellant do not really help me in the decision of the present question. The Privy Council had not to decide any question as to the proper amount of court fee payable in a land acquisition appeal. The decision itself was passed under the provisions of the Land Acquisition Act (X of 1870).

The learned Government Pleader drew my attention to sections 11, 13 and 24 of the old Act of 1870 and also to sections 11, 15 and 23 of the present Act. Subsection (2) of section 23 of the present Act (I of 1894) does not find a place in section 24 of Act X of 1870. On the other hand, section 42 of the old Act provided as follows:—

“In addition to the amount of any compensation awarded under part 2 or part 3 of this Act, the Collector shall in consideration of the compulsory nature of the acquisition pay 15 per centum on the market value mentioned in section 24.”

The observations of the Privy Council relied on by the learned Advocate for the appellant were made with reference to the provisions of section 42 of the old Act, and as already mentioned, do not help me in deciding the question of court fee now referred to me. I may note that in cases of appeals by the Government in Land Acquisition cases, it has been held in S.R. No. 9324 of 1923 that the Government should pay *ad valorem* court fee on the amount of compensation decreed to the claimant to which objection is taken in appeal.

For the above reasons, I have come to the conclusion that the appellant in the present appeal, in case he wishes to have the 15 per cent also included in the appellate decree in case of his success, is bound to include the said 15 per cent also in the valuation of his appeal and pay court fee on the total amount.

I answer the question referred to me accordingly, and give leave to the appellant to amend the valuation

given in the appeal memorandum, should he elect to do so, and pay court fee thereon within one week after reopening of the High Court in July 1929.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar.

1929,
 Aug. 15.

ONTHATH SABJU SAHIB (DEFENDANT), APPELLANT,

v.

THE MALABAR DISTRICT BOARD (PLAINTIFF),
 RESPONDENT.*

Malabar Compensation for Tenants' Improvements Act (I of 1900)

—Lease by President of District Board of roadside poramboke lands—Lease providing that lessee should vacate land, when required, without claiming any compensation for any improvements—Notice to quit—Construction of substantial building on land by lessee—Claim by lessee for compensation for building, whether can be made under the Act—Roadside poramboke lands, whether included under the Act for purposes of compensation.

Where the District Board of Malabar leased certain lands forming roadside poramboke to a lessee under an express condition that he should quit the lands, when required, without claiming any compensation for improvements of any sort made by him thereon, and the lessee, on being required to quit, claimed compensation for a substantial building erected thereon by him, under the Malabar Compensation for Tenants' Improvements Act;

Held, that the Act applied only to leases of agricultural holdings or building sites, and not to leases of roadside poramboke lands; and that, consequently, the lessee could not claim any compensation under the Act.

* Second Appeal No. 614 of 1928.

Chathukutty v. Kunhappu, (1927) I.L.R., 50 Mad., 813, followed; and Second Appeal No. 1445 of 1889 (unreported), referred to.

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APPEAL against the decree of the District Court of North Malabar in A.S. No. 88 of 1927 preferred against the decree of the Court of the District Munsif of Badagara in O.S. No. 565 of 1925.

The material facts appear from the judgment.

M. C. Sridharan for appellant.

V. P. Karunakaran Numbiyar for the respondents.

JUDGMENT.

On the 12th March 1923, the District Board of Malabar passed proceedings permitting the President of the District Board to lease a particular roadside poramboke vested in the District Board, for occupation by the present defendant. The proceedings made it a condition for allowing such temporary occupation that the applicant should pay a sum of Rs. 6 a year and that he should deliver back possession of the plot without claiming any compensation for improvements of any sort that he might make on the property. On such conditions, the President, District Board, Malabar, leased to the defendant the roadside poramboke on the 4th April 1923, as per Exhibit A. Subsequently, as it was resolved to take possession of the property, a notice to quit, Exhibit B, was served upon the defendant on the 7th May 1925, requiring him to quit the premises and deliver possession to the District Board. The defendant not having done so, the President, District Board, Malabar, has instituted the suit which has given rise to this second appeal to recover possession of the property. The main plea of the defendant was that he was entitled to be paid the value of the improvements effected by him on the property before surrendering possession, and he relied on the provisions of the Malabar Compensation

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for Tenants' Improvements Act. The District Munsif of Badagara who tried the suit was of opinion that the provisions of the Crown Grants Act, XV of 1895, applied to the case and accordingly came to the conclusion that the rights of the parties should be adjudicated according to the tenor of the document. The document being specific on the point that the defendant should not claim the value of any improvements that he might make on the property, the District Munsif came to the conclusion that the plaintiff was not bound to pay anything in respect of the improvements. The defendant preferred an appeal to the lower appellate Court and the learned District Judge of North Malabar differed from the District Munsif as regards the applicability of the Crown Grants Act to the case in question. He, however, was of opinion that Malabar Act, I of 1900, did not apply to the present case, because the present case related to a road margin in the heart of Badagara bazaar, by the side of the principal public offices and at the junction of three roads, and he was accordingly of opinion that the land in question could not be said to be an *agricultural holding* within the meaning of the Malabar Act. The learned District Judge also relied on a decision of this Court reported in *Chathukutty v. Kunhappu*(1), where the learned Judge, JACKSON, J., held that Malabar Act, I of 1900, applies only to improvements effected to agricultural holdings and vacant kudiyruppu (building-sites). The learned District Judge was of opinion that the roadside poramboke in question which was leased to the appellant could not be said to be an *agricultural holding* or a building-site (kudiyruppu) available for purposes of being built upon. It was roadside poramboke proper, and as the same was not required immediately for any purpose by the District Board, it was thought that

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it may be leased to the defendant temporarily but on the specific terms and conditions mentioned in the lease. The learned District Judge (Mr. A. V. GOVINDA MENON) observed as follows in paragraph 2 of his judgment:—

“It would be a perversion of common sense to hold that when, as here, in an urban area like Badagara, a tenant agrees to occupy a road margin for a short term and agrees with the District Board (in which the road is vested) to go away whenever called upon, without claiming anything for any fixture he might erect upon the site, such a contract comes within the mischief attempted to be struck at by the Improvements Act.”

The defendant has preferred this second appeal, and on his behalf it was argued by his learned Advocate that the decision of this Court referred to by me, above, viz., *Chathukutty v. Kunhappu*(1), requires reconsideration. The learned Advocate submitted that the policy of the Malabar Compensation for Tenants' Improvements Act was to encourage the making of improvements in respect of all kinds of properties in Malabar, and that there was nothing in any of the provisions of the Act which restricted the scope of the Act to agricultural lands or vacant kudiyruppu (building-sites), as mentioned in that decision. The learned Advocate accordingly submitted that that decision should be reconsidered as the question related to a matter of great importance in Malabar. On the other side, the learned Advocate who appeared for the District Board, drew my attention to the definition of tenant in section 3 of the Act, where reference is made to “cultivation” and “to cultivate.” But I am inclined to think on a reading of sub-clause (1) of section 3 as a whole, that the natural construction is to limit those words to the case of “waste lands” mentioned in the last portion of the sub-section.

(1) (1927) I.L.R., 50 Mad., 813.

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Then it was argued that there were decisions under the prior Act of 1887 to the effect that the Act did not apply to the case of buildings in towns. It was pointed out that, in the judgment of MUTTUSWAMI AYYAR and WEIR, JJ., in Second Appeal No. 1445 of 1889, a case from Calicut, their Lordships observed:

"The dwelling houses described in section 3, clause 2, of the Act are grouped together with farm buildings, and the term 'improvement' itself is defined in the Act as 'a work which adds to the value of a holding.' In their ordinary sense, the words appear to us to refer to dwelling houses appurtenant to a holding for agricultural purposes, and not to dwelling houses let within the limits of a town for purposes of residence only."

Again they say,

"The dwelling house for which compensation is claimed in this suit forms admittedly no part of an agricultural holding. The house, it is stated, is situated in a favourite suburb of the town of Calicut. We are, therefore, of opinion that the Act does not apply, and section 7 of the Act does not render inoperative the restrictive covenant set out in Exhibit 'A.'"

Their Lordships accordingly held that the Malabar Act, I of 1887, did not apply to such a case, and they disallowed compensation in respect of the said building. The present Act, I of 1900, has not by any express provision made the point in any way clearer, but the object of the present Act would seem to be to secure to the tenants better (higher rate of) compensation for improvements in respect of which they would be entitled to compensation under the prior Act or by custom. At page 345 of *Malabar Law and Aliyasanthana Law* by the late Mr. Justice SUNDARA AYYAR, edited by Mr. Sitarama Rao, the following passage occurs:—

"It appears, however, that the customary rule as to payment of compensation applied only to agricultural tenancies—vide Logan's Manual, Vol. II, Appendix III (cxc)."

Though the question was discussed before me, no new and further materials have been placed before me to

induce me to say that the decision in 50 Mad. requires reconsideration. On the other hand, though it was observed at page 814 of 50 Madras, that "curiously enough, the question appears to be *res integra*," it now appears that a bench of this Court in effect decided a similar point in 1890 in S.A. No. 1445 of 1889 from South Malabar. It also appears from the speech of the Hon'ble S. Subrahmanya Ayyar in his final observations on this Bill, that the question was raised when the Bill was being considered. He said

"The Palghat Sarvajana Sabha entertains a doubt as to whether the definition of the word 'tenant' would not include lessees of warehouses and mercantile shops. It may be pointed out that the scope of the Bill does not admit of such an interpretation, and that the Transfer of Property Act provides for leases other than leases for agricultural purposes"—(*Fort St. George Gazette Supplement*, dated 2nd November 1886).

I therefore think that absolutely no grounds have been made out why I should not follow the decision of this Court in *Chathukutty v. Kunhappu*(1). As I said, the finding in this case is that the suit land is a roadside poramboke and as it was not thought necessary to keep it as such by the District Board at that time, it was suggested that the same may be handed over to the defendant on the particular terms and conditions mentioned in Exhibit A, for temporary occupation. Further, the erection of substantial buildings would, I think, in the present case, be inconsistent with the purpose for which the land was let; see definition of "improvement" in section 3 (3) of the Act. Nor could there be any custom applicable to lease of porambokes like the one before me.

In this view it is not necessary for me to express an opinion on the question whether the Crown Grants Act

(1) (1927) I.L.R., 50 Mad., 813.

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would apply to such a case. *Prima facie*, there are serious obstacles in the way of accepting the contention which found favour with the first Court on this point. Though it is true that the Government may have some rights in the underground soil of public roads, which according to the Act vest in the Local Boards for certain purposes, it does not, in my opinion, follow that the Local Board or the President is thereby an agent of the Government when it or he deals with such properties. On the other hand, a reading of sections 160 and 199 of the Madras Local Boards Act leads to the conclusion that such roads, as roads and for communication purposes, vest in the Local Boards which are entitled to deal with the same in the way authorized by law under section 160 (3). The President of the Local Board may, with the permission of the Board, grant leases of roadside poramboke according to the rules framed by the Government, under section 199 (d). Local Boards may acquire property and lease the same, subject to rules made by Government. Though the Local Boards are bound by rules so framed by Government, they are so bound not because the Government happen to be the owner of the subsoil but because the rules when framed become part and parcel of the Local Boards Act. I therefore think, as at present advised, that this case cannot be brought under the Crown Grants Act. But, as I said, having come to the conclusion that the Malabar Compensation Act does not apply, it does not matter for the purpose of this case whether the Crown Grants Act applies or not.

I think the District Judge was right, and the Second Appeal is dismissed with costs. I allow the appellant three months' time for removal of the buildings.

K.R.

ORIGINAL SIDE.

Before Mr. Justice Kumaraswami Sastri.

V. V. SOOBRAMIAH CHETTY AND THREE OTHERS, PLAINTIFFS,

1928,
August 24.

v.

NATARAJA PILLAI AND SEVEN OTHERS, DEFENDANTS.*

Gotraja sapindas—Preferential heir amongst—Determination of—If seven and not merely three degrees in each branch to be reckoned.

For the purpose of determining which of two *gotraja sapindas* is the preferential heir, only three and not seven degrees in each branch have to be reckoned, and after the third degree in one branch, the three degrees in the next collateral branch must be considered and so on. Hence, the great-grandson of the great-grandfather of the propositus is a preferential heir to the son of the great-grandson of the grandfather of the propositus.

Budha Singh v. Laltu Singh, (1915) I.L.R., 37 All., 604 (P.C.), referred to.

SUIT for a declaration that the plaintiffs 1, 2 and 3 are absolutely entitled to the properties mentioned in the plaint.

The plaintiffs 1 to 3 claimed certain properties as having been transferred to them by one Subraya Chetti (the fourth plaintiff), who claimed to have succeeded to them as reversioner on the death, issueless and intestate, of Vasavambal, widow of Sadasiva Chetti. Sankara Chetti, the third defendant, claimed the properties as the next reversioner to Vasavambal and Sadasiva, alleging that Sadasiva was adopted to Chinnapapu Chetti. The first and second defendants claimed under a transfer from the third defendant, and also independently of the transfer, as the illegitimate sons of Sadasiva. The

* C.S. No. 53 of 1924.

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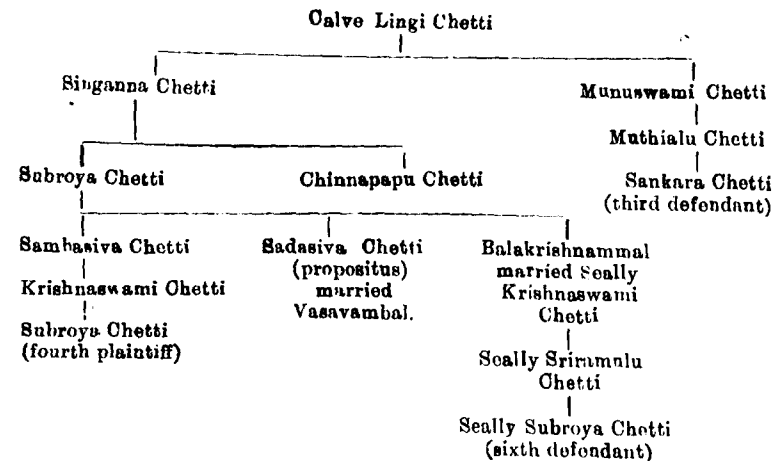
sixth defendant made a claim as the adopted son of Vasavambal. The other defendants were formal parties.

Of the issues settled, the two that are relevant for the present report are:

(5) Was Calve Sadasiva Chetti adopted by Chinna-papu Chetti, and if so is it valid?

(6) Is Calve Sankara Chetti, the third defendant, the nearest reversionary heir of Calve Vasavambal or Calve Subbaraya Chetti, the fourth plaintiff?

The following genealogical table sets out the relationship between the parties:—



V. Raghunatha Sastri for plaintiffs.

T. L. Venkatrama Ayyar for defendants 1 and 2.

S. Parthasarathi Ayyangar for defendant 3.

V. Ramaswami Ayyar for defendant 6.

JUDGMENT.

[His Lordship, after setting out the contentions of the parties, dealt with the evidence relating to issue No. 5, and held that the adoption had been clearly proved.]

The next question is, whether the fourth plaintiff would still be the next reversioner. I have already set

out in the genealogical table the relationship between the parties and the competition is between Subroya Chetti, the fourth plaintiff, on the one side, and Sankara Chetti, the third defendant, on the other.

There can be little doubt that both of them are *sapindas* to Sadasiva. The contention of the plaintiffs is, you must exhaust the direct descendants of his father to the seventh degree before you go to collaterals, and that Subroya Chetti would therefore be the nearer *sapinda* entitled to succeed. The contention for the first defendant is that, under Hindu Law, in determining which of two *sapindas* is the nearer heir, you have to go three degrees in each branch, and after the third degree, you must go three degrees to the next collateral branch, and so on, and that applying this test, the third defendant would be the nearer *sapinda*.

I can find little authority for the contention of Mr. Raghunatha Sastri for the plaintiffs that you must exhaust the *sapindas* to the seventh degree in the nearest branch before you can go to any other branch.

The text of Manu which forms the basis of *sapinda* succession to collaterals is found in verses 186 and 187. Verse 186 runs as follows:—

“To three (ancestors) water must be offered, to three the funeral cake is given, the fourth (descendant) is the giver of these oblations, the fifth has no connection with them.”

Verse 187 says—

“Always to that relative (within three degrees) who is nearest to the (deceased) *sapinda*, the estate shall belong; afterwards, a *sakulya* shall be the heir, then the spiritual teacher, or the pupil.”

The words in Manu are *Anantaraha sapindath*. (See Manu—Sacred Books of the East). The Mitakshara in dealing with *sapratibandha* succession in Chapter 2, section 5, does not specifically state to what degree each

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line should be exhausted, before going to the next line. The words *putrah* and *sunavah* have, however, been held to mean the three descendants by their Lordships of the Privy Council in *Budha Singh v. Lattu Singh*(1). It is admitted by the plaintiffs' vakil, that, unless by the words *putrah* or sons, you must exhaust seven lineal descendants before you go to the next ascending line, the fourth plaintiff will not be a nearer heir than the third defendant. It is clear that if Sadasiva Chetti was adopted to Chinnapapu Chetti and if by "son" you only include three degrees of descendants, the fourth plaintiff will be excluded by the third defendant.

The consensus of opinion seems to be that you must break off when you come to the third degree, in determining the question who is the nearer sapinda, and go to the next collateral line.

The line of succession is dealt with by Mayne in paragraphs 570 (a), 571, 572, and it will be seen from the table of Agnatic *Sapindas* that it is only three degrees that are taken in each branch. It will be seen from the table that the son, grandson and the great-grandson succeed in order, in their absence the estate goes to the widow, daughter and daughter's son, then to the mother, then to the father, then to the brother, nephew, grand-nephew: in their absence, it goes to the grandmother, then to the grandfather: and then to the three descendants and so on.

Professor Jolly in his Tagore Lectures on Hindu Law gives a table at page 212 which is substantially the same as that given by Mayne. He points out that the first part of this table is in accordance with the systems of Apararka and Nanda Panditha.

(1) (1915) I.L.R., 37 II., 624 (pages 611 to 613).

Jogendra Chunder Ghose in his Principles of Hindu Law adopts a similar rule (pages 118 and 119).

The same view is taken by Sarvadhikari in Lecture 13, where he refers to the order of succession under the Mitakshara Law, and in the table of succession which he gives in that Lecture. In Lecture 10, he gives the views of the commentators.

West and Buhler, however, incline to a different view, but, so far as I can see, the preponderance of authority, both as regards text writers and commentators, is the other way.

Turning to the decided cases, the question was considered by their Lordships of the Privy Council in *Budha Singh v. Lattu Singh*(1), and it was held that the great-grandson of the grandfather of the deceased, who was also the grandson of his paternal uncle, was the preferential heir as against the grandson of the deceased's great-grandfather. Their Lordships, after an exhaustive review of the authorities and the texts, observe at page 620—

"Dr. Raj Kumar Sarvadhikari's construction appears to them to rest on a logical foundation, and his views seem to be consistent and clear. In effect, he says that the Mitakshara propounds a definite scheme of succession; lineal male descendants of the deceased owner down to and including the third degree, who constitute the first class of propinquous relations (the nearest sapindas) inherit in succession in the first instance. In their default, the widow and daughter take by express provision of the law. The daughter's son comes in similarly. In their absence, the inheritance ascends; each ascending line begins with a female, and each has to be exhausted in accordance with the rule of propinquous sapinda relationship before the next in order can take; so that the parents and 'their three successive descendants' take first; then the paternal grandmother and the paternal grandfather and 'their three successive descendants' come next, and so on."

(1) (1915) I.L.R., 37 All., 604.

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Their Lordships then refer to the fact that the view of Dr. Jolly is in substantial agreement with the view of Dr. Raj Kumar Sarvadhikari.

The view taken in Madras, which was based upon a narrower construction propounded by the Smriti Chandrika and the Subodhini, was that instead of three descendants you must take only two, and their Lordships refer to *Suraya v. Lakshminarasamma* (1), and *Chinnasami Pillai v. Kunju Pillai* (2), and disapprove of the narrower construction, and observe :

"However, the two Madras decisions have received the respectful consideration of their Lordships. They have already given reasons for holding that in the Mitakshara as expounded in the Benares school, the word *putra* and its synonym employed by Vijnaneswara in connexion with brothers and uncles must be understood in a generic sense, as in the case of the deceased owner, and that the descendants in each ascending line, up to the fixed limit, should be exhausted at any rate to the third degree, before making the ascent to the line next in order of succession."

Their Lordships also state that, even under the Mitakshara, in cases of competition between collaterals, preference is given to one who has the right to confer spiritual benefit, and observe :

"It seems to their Lordships that there is another ground on which the plaintiff must fail. It is admitted that the defendant confers greater benefit on the deceased by the offerings he makes to the manes of the common ancestor. Now, it is absolutely clear that under the Mitakshara, whilst the right of inheritance arises from sapinda relationship, or community of blood, in judging of the nearness of blood relationship or propinquity among the gotraja, the test to be applied to discover the preferential heir is the capacity to offer oblations. Mitra Misra, the author of the *Viramitrodaya*, an authoritative commentary on the Mitakshara, lays down this doctrine in express terms. He says 'when there are many claimants to the heritage among gotrajas and the like, then the fact of conferring benefits on the

(1) (1881) I.L.R., 5 Mad., 291.

(2) (1911) I.L.R., 35 Mad., 152.

proprietor of the wealth by means of the offering of oblations and the like only excludes those that do not confer such benefits.' Dr. Raj Kumar Sarvadhikari renders the last part of this passage thus: 'The benefit conferred on the late owner by the offering of the cake and the water determines the title to inheritance.'"

In the case of *Bhyah Ram Singh v. Bhyah Ugar Singh*(1), the Board affirmed this rule in the following words:—

"When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

In *Suraya v. Lakshminarasamma*(2), the learned Judges held that, according to the law of succession current in the Madras Presidency, the term "sons" used in the Mitakshara, Chapter II, section 4 (7), and section 5 (1), does not include grandsons.

In *Chinnasami Pillai v. Kunju Pillai*(3), the learned Judges were of opinion that the word "sons" in the Mitakshara, Chapter II, section 1, verse 2, section IV, verses 7 and 8, and in section V, verse 1, should not be given an extended meaning so as to include grandsons, and they approved of *Suraya v. Lakshminarasamma* (2) and did not follow the decision in *Kalian Rai v. Ramachandra*(4).

As their Lordships of the Privy Council in *Budha Singh v. Lattu Singh*(5), referred to above, followed the view in *Kalian Rai v. Ramachandra*(4) and disapproved of the two Madras decisions, it is unnecessary to deal with those decisions at any length.

So far as I can see, in the case of competition between *gotraja sapindas*, the difference of opinion has always been whether to take it to three degrees or two

(1) (1870) 13 M.I.A., 373.

(2) (1881) I.L.R., 5 Mad., 291.

(3) (1911) I.L.R., 35 Mad., 152.

(4) (1901) I.L.R., 24 All., 128.

(5) (1915) I.L.R., 37 All., 604

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degrees, and there is no case which says that you must exhaust seven degrees in one line before you can go to the next. In fact, such a construction would be contrary to the principles of collateral succession laid down by commentators and text writers. As pointed out in the Madras cases, the construction that you must exhaust seven degrees is against the whole scheme of collateral succession and would postpone the heirs specifically mentioned in the Mitakshara as entitled to preference.

Mr. Raghunatha Sastri for the plaintiffs relied on *Rutcheputti Dutt v. Rajunder Narain Rae* (1) and *Bhyah Ram Singh v. Bhyah Ugar Singh* (2) and *Kesar Singh v. Secretary of State for India* (3). But these cases are not cases of competition between *sapindas*. In *Bhyah Ram Singh v. Bhyah Ugar Singh* (2), their Lordships of the Privy Council observe at page 392 :

"This is not a case of priority between two persons claiming as heirs, or between two classes of heirs; it is one of asserted exclusion from inheritance, raised by persons not competitors in the prescribed degrees of heirs. The question of preference is distinct from that of entire exclusion. When a question of preference arises, as preference is founded on superior efficacy of oblations, that principle must be applied to the solution of the difficulty."

I think it is clear that the third defendant is the preferential heir to the fourth plaintiff. In this view of the case, the plaintiffs' suit fails, as they have to establish that the fourth plaintiff is entitled to succeed to the property of Vasavambammal or Sadasiva Chetti as the next *sapinda*.

It is unnecessary to consider the other issues raised in the case.

(1) (1889) 2 M.I.A., 133.

(2) (1870) 13 M.I.A., 373.

(3) (1926) I.L.R., 49 Mad., 652.

I decide nothing as between the defendants.

This suit fails and is dismissed with costs, two sets—one for defendants 1 and 2, and the other for the sixth defendant.

The other defendants will bear their own costs.

Plaintiffs will take their taxed costs out of the trust estate.

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APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Anantakrishna Ayyar.

VEERA KORAVAN AND TWO OTHERS PRISONERS.*

1929,
July 4.

Criminal trial—Practice of tendering for cross-examination important eye-witnesses cited by prosecution—Regularity of—Proper procedure.

The practice of tendering important eye-witnesses cited by the prosecution for cross-examination is highly irregular.

In cases where any witness known to the prosecution is able to swear to facts material to the case, the proper procedure to follow is to ask him to give evidence on oath as to the facts known to him, and which are relevant to the case, though other witnesses might have spoken to the same facts. Merely "tendering for cross-examination" is not a practice which should be encouraged, especially in murder cases, as it would be very unfair to the accused.

Queen Empress v. Ram Sahai Lall, (1884) I.L.R., 10 Cal., 1070, followed.

* Referred Trial No. 67 of 1929.

VEERA
KORAVAN,
In re.

TRIAL referred by the Additional Sessions Judge of the Coimbatore Division for confirmation of the sentence of death passed upon the three accused in Case No. 11 of the Calendar for 1929.

Nugent Grant for accused No. 3.

K. Periyaswami Goundar for accused Nos. 1 and 3.

S. Venkatachala Sastri for accused No. 2.

K. Venkataraghavachari for Public Prosecutor (*L. H. Bewes*) for the Crown.

The JUDGMENT of the Court was delivered by

ANANTA-
KRISHNA
AYYAR, J.

ANANTAKRISHNA AYYAR, J.—The three appellants have been convicted by the Additional Sessions Judge of Coimbatore of the offence of the murder of one Muthusami Asari under section 302, I.P.C. The first accused has also been charged with the offence of voluntarily causing grievous hurt under section 325, I.P.C., and the third accused of the offence under section 324, I.P.C. All the four assessors were of opinion that the three accused were guilty of murder under section 302, I.P.C., and the learned Additional Sessions Judge agreed with the said opinion.

[His Lordship then discussed the evidence.]

In these circumstances, we think that the learned Additional Sessions Judge was right in accepting the unanimous opinion of the four assessors that accused 1, 2 and 3 are guilty of the offence of murder. We accordingly confirm the conviction, and also the sentence, as the murder was a brutal one. Accused 1 and 3 have also been found guilty under sections 325 and 324, Indian Penal Code, respectively, but, having regard to the fact that we have confirmed the sentence of death passed by the lower Court, no separate sentence need be passed in respect of the offences under these sections. The appeal preferred by the accused is dismissed.

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—
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AYYAR, J.

Before parting with this case, we think it right to observe that the practice of tendering important eye-witnesses cited by the prosecution for cross-examination is not a practice which should be encouraged. In this case, Muhammad Sultan, cited by the prosecution, is a material witness who was present at the scene of occurrence. He is said to have been standing at the distance of a *mar* from the actual scene of struggle, and would *prima facie* be able to speak to important facts material to the case. Instead of putting him into the box and eliciting facts within his personal knowledge and observation, the prosecution merely “tendered him for cross-examination.” Very discreetly, the defence Counsel put no questions to him. In cases where any witness known to the prosecution is able to swear to facts very material to the case, the proper procedure to follow is to ask him to give evidence on oath as to the several facts known to him, which are relevant to the case, though other witnesses might have spoken to the same facts. Merely “tendering him for cross-examination” is not a practice which should be encouraged, especially in murder cases, as it would be very unfair to the accused. If such a practice is in vogue in other districts also, we think it proper to remark that the same should be put an end to.

As observed by FIELD, J., in *Queen Empress v. Ram Sahai Lall*(1): “Now, it must be understood, and it had recently been pointed out in more than one judgment of this Court, that in conducting a case for the prosecution, all the witnesses who are alleged, or are known, to have knowledge of the facts ought to be brought before the Court and examined.”

(1) (1884) I.L.R., 10 Cal., 1070 at 1072.

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In the present case, it is clear from the evidence of the other prosecution witnesses that Muhammad Sultan was present at the scene of offence and when the offence was being committed. If so, he should have been asked to swear to facts known to him in the ordinary way, and not merely "tendered for cross-examination."

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Anantakrishna Ayyar.

IN THE MATTER OF THANGATHAYEE AMMAL,
A MINOR.

SUBBUSWAMI GOUNDAN (PETITIONER),

v.

KAMAKSHI AMMAL AND ANOTHER (RESPONDENTS).*

Code of Criminal Procedure (V of 1898), sec. 491—Minor wife illegally detained—Husband seeking to recover custody—If entitled to proceed under section—Plurality of remedies provided by law—If husband bound to resort to less expensive and less threatening remedy—Minor with her consent in custody of a person—Another better entitled in law desires custody—If minor "illegally detained" within meaning of section.

A husband seeking to recover custody of his minor wife illegally detained by others is entitled to proceed under section 491 of the Code of Criminal Procedure, and the opposite party cannot be heard to say that, where there are more than one remedy provided for under the law, the less expensive and less threatening remedy should be resorted to by the petitioner. *Bryant v. Bull*, (1879) 10 Ch.D., 155, followed.

If a minor, even though with her own consent, remains in the custody of a person, he must be held to have illegally detained

* Criminal Miscellaneous Petition No. 468 of 1929.

her within the meaning of section 491, if another person, who is better entitled in law to have the custody of the minor, desires to have that custody. *Abraham v. Mahtabo*, (1889) I.L.R., 16 Calc., 487, referred to.

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PETITION praying that the High Court may be pleased to issue a writ of *habeas corpus* directing the respondents to produce Thangathayee Ammal, the minor wife of the petitioner herein, before the Court to be dealt with according to law, and to hand over the custody of the said minor to the petitioner herein.

K. S. Jayarama Ayyar for petitioner.

Md. Asker Ali for respondents.

JUDGMENT.

This is a petition praying for an order directing the bringing up to the Court of a minor married girl, and also for an order directing that she be handed over to her husband, who is the petitioner. The young girl is the wife of the petitioner, and the first respondent is the mother of the minor girl, and the second her step-brother. The petition is founded on the allegation that, after the marriage, the wife having got into the custody of the two respondents, they have illegally detained her. If these facts are proved, then it is quite sufficient for us to make the order prayed for, if we are satisfied that it is in the interests of the wife that she should be handed over to the care of the person who should naturally have her in his charge, namely, her husband. The petitioner married this young girl on the 9th March 1927. She is said to have been about 10 or 11 years of age then, the evidence as to the exact age of these children is usually rather indefinite and vague, but, assuming her age to have been 11 years, she is now just over 13 years. She is of the Gounda class, and according to the petitioner, it is the custom of that caste for

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wives even before they have attained puberty to reside under the husband's roof. In this case, it is asserted by the petitioner that she resided under his roof and under the roof of his mother for some seven, eight, or nine months. That assertion is denied by the respondents, who say that except for two periods, each of them of about 8 days, she has all along since the marriage resided with the respondents. The petitioner's case is that, after the marriage, she was living with him at Sindupatti, where he was then Sub-Registrar, and that afterwards she was living with his mother at his family house at Pannaipuram. Whilst there, there was, according to him, an outbreak of plague, and having the health and safety of his wife to consider, she was then sent home to the respondents, where she has been living since. As I have stated, the respondents' case is that this is untrue, and that, except for these two periods of 7 or 8 days at a time, she has never resided under the roof of her husband. Last year, the petitioner met with a very serious motor accident which necessitated his having to take leave for a year, and during that time he was not nursed by his wife. On his return from leave, his wife attained puberty—this was some six months ago according to him—and he wished to consummate the marriage and sent word to the respondents stating his willingness to do so, but the respondents refused to send the girl, and there is no question that the puberty ceremonies did not take place until two or three months after the girl attained puberty. The petitioner's case is that, during this time, the respondents were attempting to extort from him a large sum of money and some lands, as a condition for allowing the girl to return to him; and evidence upon this point has been called, and it is abundantly clear to us that, whatever may be the real facts with regard to that, the petitioner had to pay

Rs. 100 to the respondents towards the expenses of the puberty ceremonies

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Counter-affidavits have been filed by the first and second respondents. The first respondent has not signed her own affidavit but it is signed on her behalf by the second. Both the affidavits contain largely matters which are entirely irrelevant and which, if true, would merely be reasons for not allowing the young girl to have married the petitioner at all. They do not set forth any valid reasons for detaining the girl after her marriage and refusing to allow her to return to her husband. However, it is asserted that, on the occasion of her first visit to her husband after the marriage, which, it is alleged by the respondents, was only for some eight days, and on this occasion she was accompanied by her mother, the wife was subjected to ill-treatment, the story being that she was sent by the petitioner to fetch water, and as there was some delay in getting it, he abused her, kicked her, and beat her, and later on sent her away. That is the story put forward by the respondents and is the one reason which is largely relied upon by them here as a justification for the girl being with them, as it is alleged that the girl is unwilling to return to her husband. We may say also that it is the case of the respondents that they have not detained her against her will; on the contrary it is their case that they are and have been all along most anxious that she should return to her husband and have endeavoured to get her to do so. But they say that this young girl is extremely self-willed, and under no circumstances would she ever think of or be willing to return to her husband, the reason for this being that she fears a further outbreak of ill-treatment. So that, the respondents' case is that they have not detained her and have always been willing that she should return to her husband, but that she,

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of her own free will, remained with them, and no persuasions or inducements would get her to rejoin her husband.

We ordered the girl to be brought here and also ordered the attendance of both the respondents and the petitioner. We questioned the wife in chambers, and the conclusion we have come to with regard to her—and it is a very definite and clear conclusion—is that she has been tutored by the respondents. That appears to us to be beyond all question. With regard to certain questions put to her touching important matters in the case, she pretended that she knew nothing of them at all, and she is obviously an untruthful person, because it is said that she was taken to Madura and stayed there for some time for the purpose of undergoing treatment to her eyes, which she herself denied, but even her mother the first respondent admitted, although reluctantly, that this was the case. When asked whether she was willing to return to the petitioner, she, definitely and with a great show of resolution, said that nothing could ever induce her to return, and that she would rather die than return to him. We are satisfied that, in so saying, she was not expressing her own opinion at all, but that she was told to say this by her mother and the second respondent. That being so, much of the argument which has been addressed to us on behalf of the respondents as to the duty of the Court to consider the wishes of the wife disappears. If, however, this declaration of the wife that she was not willing to return to her husband were true, then we would have to consider what the duty of the Court is. Whilst it is quite unnecessary, in our view of the circumstances, to consider that position, we must state that we consider that, in the case of a girl of only 13 years of age, her consent or otherwise is quite immaterial. What we would have to consider

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would be the welfare of the minor wife, and in doing so, the fact that she prefers to reside elsewhere than with her husband, although, had she been old enough to form a good opinion, this would have been a very important circumstance for consideration, would not in our view be entitled to very much or any weight at all. We have also come to the conclusion that the assertion that she was ill-treated when she was residing under her husband's roof is a pure invention. The only evidence with regard to this is the statement of the young wife herself which, for the reasons we have already stated, we decline to attach any weight to, and that of her mother, the first respondent, who professes to have been an eye-witness of it. But there is this important fact to be considered. In the affidavit which was sworn to on the first respondent's behalf by the second respondent, no allegation whatever is made that the young girl was beaten or kicked by her husband. The only reference to this occurs in the affidavit of the second respondent, and he does not profess to have been an eye-witness of it, and it is therefore entirely hearsay. We do not think that, had this young girl been subjected to ill-treatment, she would have been allowed, even accepting the respondents' case, to have gone back again to her husband, nor do we think it in the least likely that either of the respondents would have been anxious that she should return to him, as they say they are. The whole case appears to us to be a pure concoction, and we shall dismiss the charge of cruelty as being entirely untrue. We have to consider the welfare of the minor, and in this connection we are bound to say that we think that it is to the advantage of this young girl that she should return at the earliest possible moment to her husband, who is a well-to-do man, a Bachelor of Arts, a Sub-Registrar, and so far as we can see, perfectly

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respectable. It must always be to the advantage of a wife to return to her husband, and it is very difficult to believe that Hindu parents of a young wife would ever consider that it was better for her to remain with them than to go to her husband, after she had attained puberty. It is not necessary for us to consider why it is that the respondents have kept this girl from her husband. But there is evidence which we think we are entitled to rely on, that the respondents attempted to make terms upon which this young girl would be allowed to return to her husband. There is the evidence of Chinnaswami Goundan, who is a relation of the respondents and also a connection by marriage of the petitioner, and who lives next door to the respondents, that the respondents were demanding Rs. 5,000 and some lands, as a condition for allowing the girl to return to her husband. We think that it is most probable that that correctly represents the facts. It was pressed upon us on behalf of the respondents that this was most unlikely, because at the time of the marriage the respondents could have insisted, as a condition for giving their permission to the petitioner to marry this young girl, on the payment of a very substantial sum of money. Although, in some cases, this no doubt would be a very cogent argument, we think that in this case no such terms were exacted, because the respondents were anxious that this girl should marry the petitioner, and therefore did not want to risk the marriage going off by insisting upon onerous terms.

Another argument addressed to us, which seems to us to have no force at all, was that the proceedings under section 491 of the Criminal Procedure Code were not the appropriate ones. On the facts of this case, it was argued that the relief should have been sought under the Guardian and Wards Act, which would not have put upon the respondents the expense that these proceedings

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have done, because the enquiry could have been had locally and therefore been less expensive than this. It is said that, by adopting these proceedings, the petitioner has given evidence of his vindictiveness and that he has really used this Court as a means of extortion, that is to say, by bringing these proceedings, he has as it were exercised an unfair pressure on the respondents. This is an argument which we cannot accede to. We are very far from saying that in a case such as this the remedy of the husband could be under the provisions of the Guardian and Wards Act, but it is not necessary for us to express an opinion beyond saying that we think it is very doubtful. Even assuming that that remedy were open to the petitioner, it is clear that the remedy under section 491 of the Criminal Procedure Code is one which is open to the petitioner, and the respondents cannot be heard to say that, where there is a remedy provided by law, that remedy should not be resorted to, because there is another remedy less expensive and less threatening. BACON V.C. in *Bryant v. Bull*(1), when he had to deal with a similar argument, said that it did not matter how many remedies were open to a person—there might be 5,000—he was entitled to avail himself of any one of them, and that what had to be shown was that the remedy that he did avail himself of was not open to him. It is quite clear that the petitioner is entitled to come here under section 491 of the Criminal Procedure Code. We are satisfied that there is no force in the argument addressed to us.

Another argument put forward was that the wife had not been illegally detained. This of course was founded on the assertion that she consented to live with the respondents and is unwilling to return to her

(1) (1879) 10 Ch.D., 155.

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husband. As we have already expressed the view that she is not unwilling to return to her husband, much of the force of this argument is lost. But it is quite clear from *Abraham v. Mahtabo*(1) that, even if a minor does consent and remains in the custody of those who are charged with illegally detaining her, that does not matter, but the persons who keep her even with her consent are to be held to have illegally detained her, if a person who is better entitled in law to have the custody of that person desires to have that custody. That was a case under section 552 of the Criminal Procedure Code, but we think that the reasons given for deciding the case in that way are equally applicable to the facts of this case.

Under these circumstances, we find that the petitioner is entitled to have the order he asks for. We direct the respondents to hand over the minor wife to his custody. The wife will be handed over now in Court to her husband.

B.C.S.

APPELLATE CRIMINAL.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Cornish.*

1929,
August 1.

SAMI KARUPPA TEVAN (2ND ACCUSED), APPELLANT.*

Criminal Tribes Act (VI of 1924), sec. 23 (1) (b)—Long interval of time between accused coming out of prison after serving last sentence and commission of offence—If a "special reason to the contrary" with in meaning of section.

Under the Criminal Tribes Act (VI of 1924), the fact that there has been a long interval of time, between the accused person coming out of prison after serving his last sentence and

the commission of the offence, would be a "special reason to the contrary" within the meaning of section 23 (1) (b) of the Act, so as to entitle a Court to impose on the accused a lesser sentence than transportation for life.

In re Mayandi Thevan, (1926) I.L.R., 50 Mad., 474, referred to.

APPEAL against the order of the Court of Session of the Madura Division in Case No. 110 of the Calendar for 1928.

No one appeared for the appellant.

Public Prosecutor (L. H. Bewes) for the Crown.

The JUDGMENT of the Court was delivered by

BEASLEY, C.J.—There were three accused in Sessions BEASLEY, C.J.
Case No. 110 of 1928 in the Sessions Court at Madura, and they were charged with house-breaking by night and theft in a building, punishable under sections 457 and 380, I.P.C. The second accused was charged in addition with liability to enhanced punishment under section 75, I.P.C., and section 23 (1) (b) of Act VI of 1924. The case was tried by the Sessions Judge sitting with a jury, and they unanimously found the first accused not guilty of any offence, and the second and third accused guilty under sections 457 and 380, I.P.C. The first accused was acquitted; the third accused was sentenced to six months' rigorous imprisonment as the offence was not a very serious one, having regard to the value of the stolen property. The second accused, the appellant here, was sentenced to transportation for life: that was, in the view of the learned Sessions Judge, the only sentence which could be passed upon him, because he had been previously convicted on two occasions, and the section says that, where the accused is found guilty of a certain offence specified in the Act, and he has had two previous convictions, he is to be sentenced to transportation for life, unless there are special reasons to the

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contrary. The learned Sessions Judge was not able to find any special reasons to the contrary. The question as to what are such special reasons as would entitle the Court to award a lesser sentence than that specified by the section, namely, transportation for life, has been considered by a Bench of this Court in *In re Mayandi Thevan*(1). In that case, the offence of which the accused was charged was not one of a serious nature, and the trial Judge sentenced him to eighteen months' rigorous imprisonment. He had, however, overlooked the fact that he was a member of a criminal tribe, and the case came up before that Bench for enhancement of the sentence. The Bench found themselves in a position of difficulty, because they were unable to do anything else but enhance the sentence to one of transportation for life, as there had been two previous convictions against the accused; and in considering what the words "special reasons to the contrary" which occur in that section mean, they held that the mere fact that the offence is not of a serious nature cannot form a special reason to the contrary in reducing the sentence, and such a special reason must be something apart from the nature of the offence, such as youth, age, illness or sex. It cannot be supposed that the Bench, in stating what the special reasons are, intended to deal exhaustively with them. There may be other reasons, and we think that one special reason would be the interval of time which has elapsed between the accused person coming out of prison after serving his last sentence and the commission of the offence. Circumstances such as those are always taken into consideration by English Courts in awarding sentences; and where the accused has not been convicted for some

years, that fact has usually been taken into consideration in passing upon him a lesser sentence than would ordinarily be passed upon a previously convicted person. In this case, the previous convictions were (1) for the offence of dacoity and (2) for dacoity with attempt to cause grievous hurt, which of course is a far more serious offence. In respect of the first offence, he was sentenced to five years' rigorous imprisonment in February 1911, and in respect of the second offence, he was sentenced to seven years' rigorous imprisonment in March 1911. Presumably these were convictions at separate trials, and we must assume that the sentences must have been served consecutively. Therefore in March 1911 the accused had to serve sentences amounting to twelve years' rigorous imprisonment. That would take him to 1923, but he would have earned a considerable remission of sentence and presumably would have been discharged from prison in about 1920. He would, therefore, have been seven or eight years without being convicted of any offence, and we feel that this is a matter which we ought to consider favourably in construing the section, and should hold that it is a special reason for awarding him a lesser sentence than that specified in the section, namely, transportation for life. Upholding the conviction, we reduce the sentence to one of seven years' rigorous imprisonment.

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(1) (1926) I.L.R., 50 Mad., 474.

APPELLATE CIVIL.

*Before Mr. Justice Ramesam, Mr. Justice Jackson and
Mr. Justice Reilly.*

1928,
December
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SUBBAYYA (FIRST DEFENDANT), APPELLANT,

v.

ANANTA RAMAYYA (PLAINTIFF), RESPONDENT.*

Hindu Law—Suit for partition by a son against his father and step-brother—Provision for marriage expenses of daughters—Marriage done and expenses incurred by father after suit and before decree—Liability of plaintiff for his share of marriage expenses incurred by father—Charge on plaintiff's share for future marriage expenses of unmarried daughters—Right of daughter in the joint-family property—Obligation for marriage expenses, nature of—Partition in father's lifetime—Liability of son's share in a suit for partition for marriage expenses of his sisters—Right of son for marriage expenses of his daughter, if any, living at partition.

In a suit for partition, instituted by a Hindu governed by the Mitakshara Law, against his father and his step-brother, the father claimed a provision for the marriage expenses of his daughters, one of whom was married subsequent to the suit and before decree and two others were unmarried, and the plaintiff contended that he or his share in the family property was not liable therefor, after the disruption of the coparcenary.

Held (by RAMESAM and REILLY, JJ., JACKSON, J., *dissenting*), that the right of the daughter to her marriage expenses and maintenance is based on her right to or interest in the joint-family property, and not based on the natural obligation of a father to maintain his children;

that this obligation of the family property is not affected by a partition between the father and his sons; but the son's share, on partition, is liable for the marriage expenses of the daughter of the father in proportion to the son's share in the property divided;

* Second Appeal No. 923 of 1925.

that, on the other hand, for the marriage expenses of the daughter of the son, if any, the share of the father or of a collateral after partition is not liable;

and that, consequently, the plaintiff should pay his father his one-third share of the sister's marriage expenses incurred after suit and his one-third share in the property should be charged with a third of the expenses of the marriages of his unmarried sisters, to be paid as and when they were incurred; *Ramalinga Annavi v. Narayana Annavi* (1922) I.L.R., 45 Mad., 489 (P.C.), distinguished.

SECOND APPEAL against the decree of the Additional Subordinate Judge of Bapatla in Appeal Suit No. 58 of 1924, preferred against the decree of the Court of the District Munsif of Tenali in Original Suit No. 754 of 1922.

This second appeal arises out of a suit for partition, in a joint Hindu family, instituted by the plaintiff, who was the son of the first defendant, against the latter and his step-brother, the second defendant, and others. The first defendant had four daughters, three of whom were unmarried at the date of suit, one of them being however married during the pendency of the suit at a cost of rupees two thousand incurred by the father. The father claimed in the suit that the plaintiff's share was liable for one-third share of the expenses thus incurred, and that a charge on the plaintiff's share should be decreed for the expenses to be incurred for the marriages of his other daughters. The District Munsif decreed accordingly. The Subordinate Judge on appeal reversed this portion of the decree. The first defendant preferred this second appeal.

P. Satyanarayana for appellant.—Unmarried daughters in a Hindu joint-family are legally entitled to be maintained and have their marriage expenses met out of the joint-family property. They have an interest in the joint-family property. The obligation to maintain and get them married is not a mere personal obligation of her father. The daughter had originally, in the ancient Hindu Law, a right to a share in the joint-family

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respectable. It must always be to the advantage of a wife to return to her husband, and it is very difficult to believe that Hindu parents of a young wife would ever consider that it was better for her to remain with them than to go to her husband, after she had attained puberty. It is not necessary for us to consider why it is that the respondents have kept this girl from her husband. But there is evidence which we think we are entitled to rely on, that the respondents attempted to make terms upon which this young girl would be allowed to return to her husband. There is the evidence of Chinnaswami Goundan, who is a relation of the respondents and also a connection by marriage of the petitioner, and who lives next door to the respondents, that the respondents were demanding Rs. 5,000 and some lands, as a condition for allowing the girl to return to her husband. We think that it is most probable that that correctly represents the facts. It was pressed upon us on behalf of the respondents that this was most unlikely, because at the time of the marriage the respondents could have insisted, as a condition for giving their permission to the petitioner to marry this young girl, on the payment of a very substantial sum of money. Although, in some cases, this no doubt would be a very cogent argument, we think that in this case no such terms were exacted, because the respondents were anxious that this girl should marry the petitioner, and therefore did not want to risk the marriage going off by insisting upon onerous terms.

Another argument addressed to us, which seems to us to have no force at all, was that the proceedings under section 491 of the Criminal Procedure Code were not the appropriate ones. On the facts of this case, it was argued that the relief should have been sought under the Guardian and Wards Act, which would not have put upon the respondents the expense that these proceedings

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have done, because the enquiry could have been had locally and therefore been less expensive than this. It is said that, by adopting these proceedings, the petitioner has given evidence of his vindictiveness and that he has really used this Court as a means of extortion, that is to say, by bringing these proceedings, he has as it were exercised an unfair pressure on the respondents. This is an argument which we cannot accede to. We are very far from saying that in a case such as this the remedy of the husband could be under the provisions of the Guardian and Wards Act, but it is not necessary for us to express an opinion beyond saying that we think it is very doubtful. Even assuming that that remedy were open to the petitioner, it is clear that the remedy under section 491 of the Criminal Procedure Code is one which is open to the petitioner, and the respondents cannot be heard to say that, where there is a remedy provided by law, that remedy should not be resorted to, because there is another remedy less expensive and less threatening. *BACON V.C.* in *Bryant v. Bull*(1), when he had to deal with a similar argument, said that it did not matter how many remedies were open to a person—there might be 5,000—he was entitled to avail himself of any one of them, and that what had to be shown was that the remedy that he did avail himself of was not open to him. It is quite clear that the petitioner is entitled to come here under section 491 of the Criminal Procedure Code. We are satisfied that there is no force in the argument addressed to us.

Another argument put forward was that the wife had not been illegally detained. This of course was founded on the assertion that she consented to live with the respondents and is unwilling to return to her

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husband. As we have already expressed the view that she is not unwilling to return to her husband, much of the force of this argument is lost. But it is quite clear from *Abraham v. Mahtabo*(1) that, even if a minor does consent and remains in the custody of those who are charged with illegally detaining her, that does not matter, but the persons who keep her even with her consent are to be held to have illegally detained her, if a person who is better entitled in law to have the custody of that person desires to have that custody. That was a case under section 552 of the Criminal Procedure Code, but we think that the reasons given for deciding the case in that way are equally applicable to the facts of this case.

Under these circumstances, we find that the petitioner is entitled to have the order he asks for. We direct the respondents to hand over the minor wife to his custody. The wife will be handed over now in Court to her husband.

B.C.S.

APPELLATE CRIMINAL.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Cornish.*

1929,
August 1.

SAMI KARUPPA TEVAN (2ND ACCUSED), APPELLANT.*

Criminal Tribes Act (VI of 1924), sec. 23 (1) (b)—Long interval of time between accused coming out of prison after serving last sentence and commission of offence—If a "special reason" to the contrary "with in meaning of section.

Under the Criminal Tribes Act (VI of 1924), the fact that there has been a long interval of time, between the accused person coming out of prison after serving his last sentence and

(1) (1889) I.L.R., 16 Cal., 437.

* Criminal Appeal No. 107 of 1927.

the commission of the offence, would be a "special reason to the contrary" within the meaning of section 23 (1) (b) of the Act, so as to entitle a Court to impose on the accused a lesser sentence than transportation for life.

In re Mayandi Thevan, (1926) I.L.R., 50 Mad., 474, referred to.

APPEAL against the order of the Court of Session of the Madura Division in Case No. 110 of the Calendar for 1928.

No one appeared for the appellant.

Public Prosecutor (L. H. Bewes) for the Crown.

The JUDGMENT of the Court was delivered by

BEASLEY, C.J.—There were three accused in Sessions BEASLEY, C.J.
Case No. 110 of 1928 in the Sessions Court at Madura, and they were charged with house-breaking by night and theft in a building, punishable under sections 457 and 380, I.P.C. The second accused was charged in addition with liability to enhanced punishment under section 75, I.P.C., and section 23 (1) (b) of Act VI of 1924. The case was tried by the Sessions Judge sitting with a jury, and they unanimously found the first accused not guilty of any offence, and the second and third accused guilty under sections 457 and 380, I.P.C. The first accused was acquitted; the third accused was sentenced to six months' rigorous imprisonment as the offence was not a very serious one, having regard to the value of the stolen property. The second accused, the appellant here, was sentenced to transportation for life: that was, in the view of the learned Sessions Judge, the only sentence which could be passed upon him, because he had been previously convicted on two occasions, and the section says that, where the accused is found guilty of a certain offence specified in the Act, and he has had two previous convictions, he is to be sentenced to transportation for life, unless there are special reasons to the

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contrary. The learned Sessions Judge was not able to find any special reasons to the contrary. The question as to what are such special reasons as would entitle the Court to award a lesser sentence than that specified by the section, namely, transportation for life, has been considered by a Bench of this Court in *In re Mayandi Thevan*(1). In that case, the offence of which the accused was charged was not one of a serious nature, and the trial Judge sentenced him to eighteen months' rigorous imprisonment. He had, however, overlooked the fact that he was a member of a criminal tribe, and the case came up before that Bench for enhancement of the sentence. The Bench found themselves in a position of difficulty, because they were unable to do anything else but enhance the sentence to one of transportation for life, as there had been two previous convictions against the accused; and in considering what the words "special reasons to the contrary" which occur in that section mean, they held that the mere fact that the offence is not of a serious nature cannot form a special reason to the contrary in reducing the sentence, and such a special reason must be something apart from the nature of the offence, such as youth, age, illness or sex. It cannot be supposed that the Bench, in stating what the special reasons are, intended to deal exhaustively with them. There may be other reasons, and we think that one special reason would be the interval of time which has elapsed between the accused person coming out of prison after serving his last sentence and the commission of the offence. Circumstances such as those are always taken into consideration by English Courts in awarding sentences; and where the accused has not been convicted for some

(1) (1926) I.L.R., 50 Mad., 474.

years, that fact has usually been taken into consideration in passing upon him a lesser sentence than would ordinarily be passed upon a previously convicted person. In this case, the previous convictions were (1) for the offence of dacoity and (2) for dacoity with attempt to cause grievous hurt, which of course is a far more serious offence. In respect of the first offence, he was sentenced to five years' rigorous imprisonment in February 1911, and in respect of the second offence, he was sentenced to seven years' rigorous imprisonment in March 1911. Presumably these were convictions at separate trials, and we must assume that the sentences must have been served consecutively. Therefore in March 1911 the accused had to serve sentences amounting to twelve years' rigorous imprisonment. That would take him to 1923, but he would have earned a considerable remission of sentence and presumably would have been discharged from prison in about 1920. He would, therefore, have been seven or eight years without being convicted of any offence, and we feel that this is a matter which we ought to consider favourably in construing the section, and should hold that it is a special reason for awarding him a lesser sentence than that specified in the section, namely, transportation for life. Upholding the conviction, we reduce the sentence to one of seven years' rigorous imprisonment.

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APPELLATE CIVIL.

*Before Mr. Justice Ramesam, Mr. Justice Jackson and
Mr. Justice Reilly.*

SUBBAYYA (FIRST DEFENDANT), APPELLANT,

v.

ANANTA RAMAYYA (PLAINTIFF), RESPONDENT.*

Hindu Law—Suit for partition by a son against his father and step-brother—Provision for marriage expenses of daughters—Marriage done and expenses incurred by father after suit and before decree—Liability of plaintiff for his share of marriage expenses incurred by father—Charge on plaintiff's share for future marriage expenses of unmarried daughters—Right of daughter in the joint-family property—Obligation for marriage expenses, nature of—Partition in father's lifetime—Liability of son's share in a suit for partition for marriage expenses of his sisters—Right of son for marriage expenses of his daughter, if any, living at partition.

In a suit for partition, instituted by a Hindu governed by the Mitakshara Law, against his father and his step-brother, the father claimed a provision for the marriage expenses of his daughters, one of whom was married subsequent to the suit and before decree and two others were unmarried, and the plaintiff contended that he or his share in the family property was not liable therefor, after the disruption of the coparcenary.

Held (by RAMESAM and REILLY, JJ., JACKSON, J., *dissenting*), that the right of the daughter to her marriage expenses and maintenance is based on her right to or interest in the joint-family property, and not based on the natural obligation of a father to maintain his children;

that this obligation of the family property is not affected by a partition between the father and his sons; but the son's share, on partition, is liable for the marriage expenses of the daughter of the father in proportion to the son's share in the property divided;

* Second Appeal No. 923 of 1925.

that, on the other hand, for the marriage expenses of the daughter of the son, if any, the share of the father or of a collateral after partition is not liable;

and that, consequently, the plaintiff should pay his father his one-third share of the sister's marriage expenses incurred after suit and his one-third share in the property should be charged with a third of the expenses of the marriages of his unmarried sisters, to be paid as and when they were incurred; *Ramalinga Annavi v. Narayana Annavi* (1922) I.L.R., 45 Mad., 489 (P.C.), distinguished.

SECOND APPEAL against the decree of the Additional Subordinate Judge of Bapatla in Appeal Suit No. 58 of 1924, preferred against the decree of the Court of the District Munsif of Tenali in Original Suit No. 754 of 1922.

This second appeal arises out of a suit for partition, in a joint Hindu family, instituted by the plaintiff, who was the son of the first defendant, against the latter and his step-brother, the second defendant, and others. The first defendant had four daughters, three of whom were unmarried at the date of suit, one of them being however married during the pendency of the suit at a cost of rupees two thousand incurred by the father. The father claimed in the suit that the plaintiff's share was liable for one-third share of the expenses thus incurred, and that a charge on the plaintiff's share should be decreed for the expenses to be incurred for the marriages of his other daughters. The District Munsif decreed accordingly. The Subordinate Judge on appeal reversed this portion of the decree. The first defendant preferred this second appeal.

P. Satyanarayana for appellant.—Unmarried daughters in a Hindu joint-family are legally entitled to be maintained and have their marriage expenses met out of the joint-family property. They have an interest in the joint-family property. The obligation to maintain and get them married is not a mere personal obligation of her father. The daughter had originally, in the ancient Hindu Law, a right to a share in the joint-family

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property. They were entitled to a share on partition of the family property. Partition between male members of the joint-family does not put an end to her right in the property. After her father's death, the texts are clear that the brethren are bound to maintain her and meet her marriage expenses out of the joint-family property, allotting her a fourth share of a son: See Strange's Hindu Law, Vol. I, page 170 and Vol. II, page 313; West and Buhler's Hindu Law, page 754; *Vaikuntam Ammangar v. Kallapiran Aiyangar*(1), Mitakshara, Chapter I, section 7, verse 5 (as to one-fourth share of a son). The obligation for maintenance and marriage of the daughter is not merely on her father alone but also on the other members of the family and on the joint-family property. Even though the daughters may not have a right to demand a partition against their father, still they have an interest in the property. Under the ancient Hindu Law, even the sons who were entitled to a share, could not demand partition in the father's lifetime. Absence of a right to partition does not negative an interest in the property, in the case of the daughter. After her father's death, on partition by her brothers, she is entitled to a provision for marriage to the extent of a fourth share of a son. See Mitakshara, Chapter 7, section 7, verse 14; Katyayana, page 297, Sarkar's Hindu Law (6th edition), page 328. Male coparceners get a share on partition and can also demand partition of their share; but a daughter's right is reduced to an allowance for maintenance and marriage expenses out of the joint-family property in the father's lifetime, and after his death from his coparceners and the joint-family property. The decision of the Privy Council in *Ramalinga Annavi v. Narayana Annavi* (2), relates to the marriage expenses of a male coparcener in a partition suit, and is not applicable to this case. A male coparcener gets his share, apart from marriage expenses, but a daughter gets no share now, but only a provision for maintenance and marriage expenses.

Oh. Raghava Rao for respondent (plaintiff).—The daughter is not entitled to a provision for marriage on a partition: See Mayne's Hindu Law, section 482. She is not entitled to any share or a provision for marriage, on a partition during her father's lifetime; Mitakshara, Chapter I, section 7, placitum 14. She is only entitled to a provision to the extent of a fourth share

(1) (1900) I.L.R., 23 Mad., 512. (2) (1922) I.L.R., 45 Mad., 489 (P.C.).

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of a son, if the partition takes place after her father's death. When the partition takes place in the father's lifetime, his daughters are only entitled to maintenance and marriage provision from their father, and no separate provision can be made in the partition. When a share is mentioned in the texts, relating to a daughter on a partition by the brothers after their father's death, the share is in lieu of marriage expenses, not in virtue of any right or interest possessed by her in the property. See West and Buhler's Hindu Law, pages 704, 709, 710 and 715. The older commentaries, such as Medathithi on Manu, are not binding authorities in Southern India, as against the Mitakshara, Smriti Chandrika, or the Saraswati Vilasa.

The obligation for maintenance and marriage expenses of the daughters is a personal obligation on the father during his lifetime. He could discharge his obligation out of the joint-family property. After his death, the sons, who take the property by survivorship, take it subject to such obligation of the father; the daughter's share, referred to in Mitakshara Chapter I, section 7, verse 14 is in discharge of that obligation of the father, and not in virtue of any proprietary interest of the daughter in the family estate. The sons, after their father's death, who take the family property by survivorship, take such share subject to the obligations of the father in his lifetime, as in the case of his debts. There is no provision in the texts or commentaries whereby any provision should be made for a sister's marriage in a partition in the father's lifetime. The father, taking his share on partition, should meet the expenses of maintenance and marriage expenses of his daughters. If the father had not done so during the continuance of the joint-family, he cannot claim a provision in anticipation at the time of partition, or after a suit for partition. There is only a text for a provision being made for a sister's marriage, on a partition by the brothers after their father's death, and there is no text for such a provision in a partition during the father's lifetime. It is a power vested in the father, to spend out of the family estate at his discretion, and not a right vested in the daughter as a sharer in the property. Every text lays the obligation on the father only. Maintenance and marriage expenses of the daughter are *personal obligations* of the father: See *Rama Rao v. Rajah of Pittapur*(1); *Bai Daya v. Natha Govindlal*(2); Mayne, section 482;

(1) (1918) I.L.R., 41 Mad., 778 (P.C.). (2) (1885) I.L.R., 9 Bom., 279.

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Strange's Hindu Law, Chapter II, pages 34 and 35; Sircar's Hindu Law (6th edition), pages 151 and 155.

The view taken in 26 M., 505, that there is no obligation on the father to get his daughter married is erroneous: See Mayne's Hindu Law, section 451. The obligation is a personal one on the father to maintain and marry the daughters; he could meet the expenses out of the family property if he remained joint; assuming it to be a joint-family obligation, it ceased to exist on a partition suit being filed, for the family became divided. This obligation is similar to the obligation of the father to maintain his illegitimate son. The latter obligation will fall on the father only, after partition.

P. Satyanarayana in reply.—It is admitted by the respondent that (1) so long as the family is joint, the obligation for the daughter's marriage expenses, on the joint-family property, exists, and (2) if partition is made after the father died undivided, the daughter is entitled to a share in the joint-family property in respect of her marriage expenses. If it was originally a joint-family obligation, it cannot become a personal obligation of the father at a partition in his lifetime. The obligation of the joint-family and its property really arises by reason of the daughters' interest and right in the joint-family property. The personal obligation of the father for the maintenance of his children is only as regards such as are "sisu". "Sisu" is defined in *Narada, placitum* 135, as being below 8 years in age; thereafter the obligation is not merely personal to the father; but is also an obligation on the family property. The latter obligation is not inconsistent with the former enjoined on the father.

JUDGMENT.

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RAMESAM, J.—This second appeal arises out of a suit for partition. The plaintiff is the son of the first defendant by the latter's first wife. The second defendant is the son of the first defendant by his second wife. The third defendant is the widow of a predeceased brother of the first defendant. The first defendant has four daughters by his second wife, of whom the first had been married before and the others were all unmarried at the filing of the plaint. The eldest of these was married while the

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suit was pending before the District Munsif, about four months before his judgment, and the other two still remain unmarried. The seventh issue in the case runs thus: "To what provision, if any, is first defendant entitled for marriages of his unmarried daughters?" The District Munsif found that the first defendant spent Rs. 2,000 including dowry and expenses for the marriage during the pendency of the suit, and that the first defendant was entitled to one-third share from the plaintiff. Similarly, he fixed Rs. 2,000 for each of the marriages of the remaining two girls to be married, and the plaintiff's one-third share was charged on his share of the property. There was an appeal by the defendant and also a memorandum of cross-objections by the plaintiff. Among the points for determination stated by the Subordinate Judge are, point 3, namely, "Whether the plaintiff is liable to contribute to the marriage expenses of the daughters of the second wife of the appellant," and point 4, namely, "What were the expenses incurred in marrying the daughter of the appellant who was married after suit." On the fourth point, he found that the expenses of the marriage might reasonably be fixed at Rs. 2,000; but on the third point he held, relying on *Ramalinga Annavi v. Narayana Annavi*(1), that the plaintiff was not liable to contribute out of his share towards the marriage expenses of the first defendant's daughters married after the date of the suit or to be married. Though the decision in *Ramalinga Annavi v. Narayana Annavi*(1) relates to the marriage of a male coparcener, he thought that the principle applies also to the marriage of a female member. This second appeal is filed by the first defendant and before us it was argued on his behalf that all the members of the joint-family are liable to

(1) (1922) I.L.R., 45 Mad., 489 (P.C.).

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contribute to the marriage expenses of the three daughters.

The learned Advocate for the appellant in the course of his arguments referred to a verse of Yajnavalkya quoted at page 239 of Vol. II of Colebrooke's Digest (Bk. V, Ch. 2, V. LXXVII). This verse is also cited in Banerjee's Stridhanam (3rd edition, pages 174-5). बालस्ववसिनीवृद्धगर्भिण्यानुरकन्यकाः । संभोज्यातिथिमृत्वाश्च दंपत्योः शेषभोजनम् ॥. The verse does not occur in the Vyavahara Adhyaya or Book 2 of Yajnavalkya, but in the Achara Adhyaya or Book 1, where it is verse 105. The translation of that verse refers to eating and not to division of the property (vide Vol. 21 of the Sacred Books of the Hindus, Yajnavalkya with Mitakshara, page 227). A similar verse occurs in Vasishta (vide Sacred Books of the East, Vol. 14, Ch. 11 or Dutt's Dharmasastras, page 777) where also it refers to eating. A similar verse also occurs in Manu. It is obvious that Jagannadha misquotes a verse of Yajnavalkya misreading the word "bhoj" (to eat or to feed) as "bhaj" (to divide) and no argument can be rested on this quotation. I refer to this merely to eliminate it from my consideration in the rest of the judgment.

The main contention of the appellant is that daughters are entitled to be maintained by the joint-family including the father. The right is historically the remnant of an original right to a share in the property itself. He contends that partition between the male members does not put an end to the right but the members or at least the members of a branch continue to be liable for her maintenance. We have got a series of cases to show generally that the joint-family property is liable for the marriage expenses of a daughter, and where the father is dead and the property has survived

to the other members, whether sons or not, they are liable for the marriage expenses. (See also Strange's Hindu Law, Vol. II, page 313.) It is unnecessary to refer to these cases in detail, for it is admitted by the respondent that members of the joint-family who get the property by survivorship after the father's death are liable for the marriage expenses of the daughters. We have, for instance, *Tulsha v. Gopal Rai*(1), and *Vaikuntam Ammangar v. Kallapiran Aiyangar*(2), where it is observed :

"That the expenses are to be borne by the family property just in the same way as the cost of maintenance, there seems no doubt upon the authorities (see *Tulsha v. Gopal Rai*(1); West and Buhler, 754; Mayne's Hindu Law, sections 81, 408). The common practice of providing in partition decrees for the marriage expenses of daughters can hardly be accounted for except on the hypothesis that such expenses are properly chargeable on the family property."

The dictum is not only valuable as an authority on the question of law but also as showing a practice to the knowledge of the learned Judges. Other cases are *Bapayya v. Rukhamma*(3); *Bai Mangal v. Bai Rukhmini*(4), which is a case of maintenance of widowed daughters, but incidentally refers to the text relating to the maintenance of unmarried daughters; *Ganga v. Chandrabhagabai*(5), referring to unmarried daughters of disqualified persons; and *Nandan Prasad v. Ajudhia Prasad*(6). These cases arose after the death of the father and are not directly authorities for the liability on partition during the father's lifetime. They are referred to as showing the foundation of the liability which is shown by them to be the possession of the joint-family property. During the father's lifetime,

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(1) (1884) I.L.R., 6 All., 682.

(3) (1909) 19 M.L.J., 666.

(5) (1907) I.L.R., 32 Bom., 275 at 281.

(2) (1900) I.L.R., 23 Mad., 512.

(4) (1898) I.L.R., 23 Bom., 291.

(6) (1910) I.L.R., 32 All., 325.

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if there is no partition, that the whole family is liable for the marriage of the daughters is not denied by the respondent. But he contends that such liability of the joint-family during the father's lifetime was only because of the father's obligation to maintain and bear the marriage expenses of his daughters and the obligation falls upon the joint-family through him, and when there is a partition, it is confined to the father and his share only. It is this position which has got to be examined. If the obligation is merely that of the father and it is only through him that it falls upon the joint-family, the contention of the learned Advocate for the respondent may perhaps be correct. We may examine the history of the law as to the basis of the right of the daughter to be maintained and to be married. It seems to me that so far as the joint-family property is concerned, the obligation is that of all the members of the family, that is, the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint-family. No doubt in all systems of law, a parent is bound to maintain his child till a certain age. For instance, Banerjee in his book on Marriage and Stridhanam, 3rd edition, at page 191, observes :

"that a man should be bound to maintain his legitimate children is natural and obvious ; and the same texts that enjoin him to support his wife may be cited also for the present purpose."

And he quotes Manu IX, 108 ; XI, 9, 10 ; Colebrooke's Digest, Bk. 5, 77 ; Vol. II, Ch. IV, 11, 12 ; 1 Strange, 67. It is doubtful how far this obligation of a parent to maintain a child, which is part of all systems of law including Hindu Law, extends to the marriage of the child. On the other hand, it may be said that the obligation to marry the daughter is not a legal obligation, however much it may be a religious obligation.

That is the view taken in *Seshammal v. Munisami Mudaliar*(1), and *Sundari Ammal v. Subramania Ayyar*(2). In those cases, it does not appear that the father was a member of the joint-family or had ancestral property. The cases were discussed on the footing of the general obligation of a father to maintain or marry his daughter, and it was held that the father was not under an obligation to marry his daughter. On the other hand, it may be said that at least among Brahmans and Vaisyas with whom pre-puberty marriage is compulsory as a religious injunction, the father is legally bound to marry his daughter. But whatever may be the true view as to the liability of a father to marry his daughter considered by himself and by reason of the parental relation and apart from the possession of the joint-family property, so far as the possession of the joint-family property is concerned, there is no doubt that the father is bound to marry his daughter, and that, not because of a religious injunction about pre-puberty marriage, but because of a better reason, namely, the daughter's right to be married is really the historical remnant of a larger right. It is therefore futile to confuse the two obligations, namely, the obligation of the father as a mere parent apart from property and the obligation of the father by reason of the possession of the joint-family property. It is therefore not correct to say that the latter obligation is derived from the former. I think the two are independent and it is not that one is based upon the other. For this purpose we have to examine the growth of the law relating to the rights of brothers and sisters in a joint-family from the earliest times up to the present day. In the very early law of property, the sons had no right to compel partition against the

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(1) (1898) 8 M.L.J., 105.

(2) (1902) I.L.R., 26 Mad., 505.

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wish of the father except in one special case, which was, where he was old, disturbed in intellect or diseased. Omitting this special case, in general, the father may make a partition because he desires it, or because he has no desire for wealth, and is disinclined to pleasure and his wife is incapable of bearing further children. Omitting these three cases, the only case that remains is after his death, when, of course, a partition can be made by sons. These four periods of partition are enumerated in Mitakshara, Chapter I, section 2. It is contended by the learned Advocate for the respondent that this section relates to the self-acquired property of the father and section 5 relates to the ancestral property of the father. I do not agree with this contention for the very cogent reasons given by SUNDARA AYYAR and SADASIVA AYYAR, JJ. in *Srinivasa Iyengar v. Tiruvengadathaiyengar*(1). At page 562, SUNDARA AYYAR, J., observes :

"The contention is that these verses show that section 3, verse 1, dealing with partition after the father's decease . . . relates only to the self-acquired property of the father. To a question put to the appellant's vakil from the Bench, which text, then, provides for the division of the father's ancestral property? his answer was that section 5, verse 1, does so . . . But this verse is intended merely to show that where the brothers have an unequal number of sons, the grandsons take *per stirpes* and not *per capita*."

At page 563, referring to the Smrithi Chandrika, the learned Judge observes :

"There is nothing to show that the author of the Smrithi Chandrika understood the expression "paternal wealth" as meaning the self-acquired property of the father."

Much clearer are the observations of SADASIVA AYYAR, J. at page 567 :

"The distinction between the ancestral and the self-acquired property of a father was not known to the ancient

Hindu Law. The expression "paternal estate" when used in Hindu Law books does not mean the father's self-acquisition alone but merely means the estate which the son can inherit or obtain *through his relation as such son* to his father. In *Venkatarazu v. Kotayya*, I have attempted to show that according to the Shastras, sons had no right in the property which belonged to their father till both their father and mother were dead."

Lower down, he refers to the Mitakshara relying on a text of Gautama inferring the son's rights by birth in the (self-acquired and ancestral) properties of the father. The observations continue up to page 570 on the proper interpretation of the Mitakshara. I generally agree with these remarks. I do not think that it can be said that section 1 refers to the self-acquired property of the father in the modern and technical sense of that term and that section 5 refers to the ancestral property of the father. The object of section 1 was to narrate the four periods of partition of a father's property, that is, the property which was held by the father, whether it was self-acquired or ancestral; it refers to a case where the father was holding the property himself, that is, without being joint with other brothers. In other words, it refers to a case of a father and sons only and discusses the modes of partition in such a family. It describes three modes of partition during the father's lifetime, two of them being practically on his desire, one a special case, and fourthly, after his death. These modes negative the right in the sons to compel partition in general. Section 5 deals with partition of a grand-father's property, that is, where there is not merely a father but a father and his several brothers holding jointly, and they having sons. As there is no division between the members of the second generation, the property is referred to as the grand-father's property, and the text discusses how it is to be divided between

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(1) (1912) I.L.R., 38 Mad., 556.

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members of the third generation. In such cases, no doubt, the section says there is a right by birth, not that such right did not exist in the case of section 1 but only no right to partition. The object of section 5 is to lay down the division by *stirpes*. Placitum 7 of section 5 of the Mitakshara suggests a different conclusion. It is not clear to me that the word "acquired" means in this passage self-acquired in the modern sense of the term. But whatever inconsistencies we may find in the Mitakshara and whatever difficulties we may feel in reconciling sections 1 and 5, the verses of Yajnavalkya are very clear and the observations of BEAMAN, J., quoted by SADASIWA AYYAR, J., in 38 Mad., are very appropriate. All that I am inclined to hold at present is that the four periods of partition mentioned in section 1 are applicable to the grandfather's property also, the division of which should be *per stirpes*. It is not clear to me that the right in the son to compel partition was recognized in the Mitakshara. It seems to me that it is the inference in the modern times from the right by birth. If in the Mitakshara sons themselves have no right to partition, much less could the daughters. But this of course does not mean that the daughters have no interest in the property. Though it is not expressly stated that they have a right by birth, we have got the fact that after the father's death the daughters had a right to a one-fourth share against the brothers. Section VII, verse 5, refers to a fourth part of a brother. How does this right arise? It cannot be said that the sons only were sharers in the property during the father's lifetime and that the daughters had no share, but after the father's death new sharers are introduced and that the sons' share is diminished. At this stage, I may refer to some discussion which took place during the course of the argument as to what is meant by one-fourth share of the

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daughters. The text of Manu quoted at page 294 of Colebrooke's Digest, Vol. II, shows that three-fourths of the whole is taken by the brothers and one-fourth is taken by the sisters, though it is expressed in a round about form, "let each give a fourth part of his own distinct share." The text of Katyayana quoted at page 297 is to the same effect: "For unmarried daughters, a fourth share is ordained, and three shares for sons." But placitum 5 of section VII of Chapter I of the Mitakshara speaks about a fourth part of a brother's share which of course works out to a different fraction. The Smriti Chandrika and other commentaries give their own explanation as to what is meant by this one-fourth share, sometimes saying that it is not a definite share, but means marriage expenses, sometimes giving a different mode of working out the fraction. In this Presidency the whole discussion as to what is the exact mode of working out the fraction is academical, for now it is settled law that the daughters are not entitled to a share, but all the same the discussion shows that the right of the daughter for maintenance up to the going to the husband's house and for marriage expenses is the present remnant of the right to a share. Therefore the right of the daughters in the father's lifetime, however much it cannot be enforced by partition, must still be described as a right or interest in the property. In Sarkar's Hindu Law, 6th edition, page 328, the unmarried daughter's right is thus described:

"Similarly an unmarried daughter acquires an *imperfect right in the father's property* by virtue of which she enjoys the same and is maintained out of it until marriage and is also entitled to a quarter share, if partition takes place before her marriage, that is to say, when she continues as a member of the family."

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I agree with this passage. It seems to me that in the early law both the rights of the sons and the daughters were imperfect rights in the property which cannot be materialized by compelling partition against the wishes of the father, but whereas the sons' right gradually developed into a right to compel partition, the daughters' right first became a right to compel partition against the brothers only and not against the father, and latterly degenerated into merely a right to maintenance and marriage expenses. When the daughter's right is so viewed, Mitakshara, Chapter I, section 7, placitum 14, does not mean that the daughter's interest is not an interest in the property. It only shows that during his lifetime she could not compel partition and should take whatever he gives, which of course does not mean that he is not bound to maintain her or marry her. This is all what is meant by section 482 of Mayne's Hindu Law. The first sentence,

"Where a partition takes place during the life of the father, the daughter has no right to any special apportionment," simply means that the daughter cannot compel partition and ask for a definite share during the father's lifetime, but it does not mean that she has no interest in the property, for she has the right to a fourth share against the brothers after her father's death. I therefore infer that the right of the daughter for marriage expenses and for maintenance is a right over the joint-family property of the father and the brothers, and, though during the father's lifetime she cannot enforce such right in the form of a partition because of placitum 14 of the Mitakshara, still if the father is willing to exercise his discretion in favour of the daughter by giving something towards her marriage expenses, the joint-family property is liable towards such expenses. I have taken pains to trace the early

history of the law and draw the above inference simply for the purpose of showing that the right to get expenses out of the joint-family property is not a right derived from the parental obligation of the father to maintain a child but an independent obligation arising out of the joint-family property law.

The next question that arises is—after partition, on whom does the obligation fall? Mr. Raghava Rao says on the father only, because it is an obligation peculiar to the father by reason of his parental position. We have seen that the obligation existing before the death of the father is not the obligation derived from the parental position. If so, there is no reason why after partition it should fall upon the father. It is true there are cases showing that, while during the continuance of a joint-family the obligation falls on the whole family, after partition, it does not fall upon the whole family but on some branch or branches of the family. For instance, in a partition between a father and two sons, debts contracted by the son not for family necessity will not fall on the whole joint-family but only on his branch, that is, on himself and his descendants, but not on his brother or on his father. But the debts of a father not illegal or immoral will certainly fall upon all branches of the family not only upon the father but upon the branches of each of his sons. In each case we have to see whether there is an obligation peculiar or personal to the head of the particular branch or sub-branch or an obligation to which the whole family is liable. In the case of a father's debts, the whole family is liable; in the case of son's debts, the son's branch only is liable. Similarly in respect of marriage expenses of the daughter of a father, the whole joint-family is liable. Therefore, after partition, the obligation falls upon all the members of the family. But in the case of

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the marriage of a son's daughters, (the case put by my brother JACKSON, J., in his judgment), though during the continuance of the joint-family the whole family must bear the expenses, still, primarily, it is the obligation of the son's branch and the father has nothing to do with it. I do not concede that no part of the family is liable. It stands exactly in the same position as the son's debts as contrasted with the father's debts. Therefore, after partition, it falls upon the son's branch only and not upon the brothers' branches or upon his father. To put the matter briefly, the obligations of an ancestor and his family would fall after partition upon all the members of the family, but the obligation of the head of a sub-branch will fall upon that branch after partition and not on other collateral branches or upon members higher in the genealogical tree. The analogy of the debts which is well-established and well-known makes my meaning clear. But Mr. Raghava Rao says that whereas the law covering debts relates to debts that are incurred, we are here dealing with an obligation which has not yet been incurred but which is to be incurred after partition. But the reply to this argument is that the obligation has been incurred before the partition by the birth of the daughters. It is not a case of obligation which is to be incurred after the partition. Only it is to be completed and materialized at the actual time of the marriage which may be after partition, but this does not mean that the obligation does not arise before the partition. This is easily seen when we remember that the obligation is not merely an obligation to maintain but the present remnant of what was formerly an interest in the property. I, therefore, hold that the obligation of a joint-family does not after partition fall on the father only but on all the members of the family.

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The idea I attempted to express in the last paragraph, namely, that the obligation to marry a girl is binding upon her father or his descendants but not upon his collaterals or his ascendants is also implied in the following dicta. In *Narayana v. Ramalinga*(1), SANKARAN NAYAR, J., says,

"Nor is it necessary for us to decide, as we have been pressed to do, that if provision for future marriages is obligatory, it is so only between *coparceners of one generation*, though the references in the texts to 'brethren' may support that conclusion."

Though they did not decide the point, they might have disallowed the marriage expenses in that case on this ground also. In *Gopalam v. Venkata Raghavulu*(2), SESHAGIRI AYYAR, J., says,

"Such a provision should be made only for persons who are of the same degree of relationship as those who have been married at the expense of the family."

I may here mention that the decision in *Gopalam v. Venkata Raghavulu*(2) was reversed by the Privy Council on another point. *Yerukola v. Yerukola*(3), and particularly the sentence,

Gopalam v. Venkataraghavalu(2) and *Jairam v. Nathu*(4) are distinct authorities against the extension of this concession to persons who are not in the same degree of relationship as those who have been married at the family expense "

are to the same effect. So also in *Jairam v. Nathu*(4), it was held that the children of a brother are not entitled to any sum for the performance of ceremonies on partition. (See also West and Buhler, 4th edition, page 714, where they say "but not of a brother's son.") These dicta will not now apply to marriages of males after the decision in *Ramalinga Annavi v. Narayana Annavi*(5),

(1) (1915) I.L.R., 39 Mad., 587.

(2) (1915) I.L.R., 40 Mad., 632.

(3) (1922) I.L.R., 45 Mad., 648.

(4) (1906) I.L.R., 31 Bom., 54.

(5) (1922) I.L.R., 45 Mad., 489.

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which reversed one of these, namely, *Narayana v. Ramalinga*(1), but will still apply to the marriages of female members of the family.

Mr. Raghava Rao also sought to rely on the analogy of an illegitimate son of a father, whose right to be maintained by a joint-family will fall on the father only, after partition. It seems to me that the sons can never be bound by such an obligation, because it is an immoral obligation. It is not illegal in the sense that the law imposes no obligation on the father; it is certainly legal and, so long as the father is joint and especially when he has no self-acquired property, the joint-family may have to bear the expenses. But after partition, to impose an obligation upon the sons is to make them liable for an immoral obligation of the father. This ground is enough to distinguish the case of an illegitimate son. We are here dealing with an obligation of the father which is both legal and moral.

My general conclusion as to the liability of the joint-family including the father and sons is also supported by Strange's Hindu Law, Vol. I, page 170. Medhatithi, who is a famous commentator on Manu, after quoting Manu 9, V. 118, proceeds to comment on it. At page 53 of the Hindu Law by Ghose, Vol. II, he refers to the text of Narada, "What is left of the father's property after discharging the father's debts (shall be divided by the brothers)." Then he says, "By payment of debts, the duty of marrying a daughter is also intended." This shows that my likening the obligation to marry a daughter with debts is not fanciful but is sanctioned by a commentator. Mr. Raghava Rao contends that Medhatithi is only a commentator on Manu, an ancient Smriti writer, and has not got the same weight as the

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Mitakshara; but the Mitakshara itself is a commentary on the ancient Smriti of Yajnavalkya. I do not mean to say that when Medhatithi and Mitakshara are in conflict, Medhatithi should override Mitakshara in this Presidency. In the present case, there is no such conflict. I have drawn my conclusion from the consideration of the Mitakshara itself and I refer to Medhatithi merely as supporting my inference.

Only one question remains to be discussed, namely, whether the decision in *Ramalinga Annavi v. Narayana Annavi* (1) applies to the case of daughters as held by the Subordinate Judge. In my opinion, the two cases are plainly distinguishable. In the case of male members, the right to maintenance and marriage is a right existing during jointness and it is *in addition to* the claim for partition. When a family is divided, there are no more items of accounts to be settled by coparceners. When the member himself sues for partition, it may be said that he elects to get one advantage and lose another advantage. But, as my learned brother JACKSON, J. pointed out in the course of the argument, the partition may be at the instance of a father or an elder brother. In such a case the conclusion in 45 Mad. looks harder than in the other case because the younger unmarried brother does not choose. But even there it can be said though he loses one advantage, he gets another advantage, namely, being the master of his own property even if he does not desire it. But whatever hardship there may be in the matter, it is clear on the other hand that all mutual rights and liabilities *inter se* between two coparceners are put an end to by partition. It is difficult to say that there is still a claim by one outstanding against the other. It may be that a father

(1) (1922) I.L.R., 45 Mad., 489.

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may anticipate a suit for partition and may set apart a sum for the expenses of the marriage of an unmarried son prior to the suit, and probably future attempts to evade the decision will be made in this direction. The question before me is not to explain or justify the decision of the Privy Council but to see how far it applies to the case of a daughter. In the case of a daughter, her rights to maintenance and to marriage expenses are *not in addition to the right of partition but in substitution for an ancient right to a share* which has now become obsolete. There can be no suit for partition with her as a sharer. In her case, there can be no question of mutual rights and obligations between her and other coparceners being put an end to by partition. We thus see that every circumstance applicable to a male becomes different when attempted to be applied to a female. On principle it is difficult to see how a third person's rights against A and B can be affected by some action between A and B. I have already dealt with the apparent anomaly (for it is only apparent) that rights against a joint-family of certain members may after partition subsist only against some of the members and not against all the members. That is because the obligation is peculiar to one branch and through it only to the whole family. Apart from that, there is no reason why the daughter's rights should be put an end to by partition altogether. It is conceded before us that, after the father's death, brothers, who are liable to the marriage expenses of their sisters, cannot put an end to her right by dividing the property between themselves. I do not see how there should be a different result during the father's lifetime. Similar cases occur in the case of the right to maintenance of widows of predeceased members of the family. Here again the right to maintenance is not put an end to by partition,

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though, with reference to the relationship of the widow to the members of the family, her claim may after partition subsist only against some branches and not against the whole family. Anyhow, in this respect, it is clear that the position of a female is so different from the position of a male member that I hold that 45 Mad. does not apply to a female member. I, therefore, hold that the Subordinate Judge has not correctly decided the third point. I would, therefore, allow a deduction out of the amount to be decreed to the plaintiff of a sum of Rs. 666-10-8 being one-third of the expenses actually incurred for the marriage of one of the daughters after suit. As to the other girls, while holding that the plaintiff is also liable to contribute one-third of the expenses, I think it is not necessary to make an anticipatory provision by way of setting apart a particular sum. It is true that the decision in 38 Mad., where SPENCER, J., directed such a sum should be set apart, was followed in *Gopalam v. Venkata Raghavulu* (1), but this is after all a matter of discretion. Provided we safeguard the rights of parties, there is no harm in not actually setting apart the amount. It may be that the marriage may never come off for reasons which need not be suggested. It is enough to fix a maximum limit for the expenses of marriage and to make it a charge on one of the items of the plaintiff's property for one-third share. Though one girl's marriage has cost Rs. 2,000, I do not see why Courts should encourage habits of extravagance in the matter of dowry. Where the expenses have been actually incurred, it may be, we have no discretion. But where it is to be incurred, we should do nothing to encourage extravagance. I would fix a maximum limit of Rs. 1,500 for

(1) (1915) I.L.R., 40 Mad., 632.

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the expenses of the marriage of each of the two daughters that remain unmarried. Of course, the actual amount may be less; this is only the maximum amount, and it is enough to charge an item of the plaintiff's share for Rs. 1,000 to cover one-third share of the expenses of the marriages of the two girls. The first defendant will give notice before the marriage and before making his claim to the plaintiff's share of the actual amount of the dowry that is settled. This disposes of the Second Appeal.

There is a memorandum of objections filed by the plaintiff. The Subordinate Judge would not enquire into the amount of mesne profits for the year 1922, though the judgment of the District Munsif dealt with it and awarded profits. By a slip, the amount of mesne profits was omitted in the decree; but the plaintiff is certainly entitled to the profits. We call upon the Subordinate Judge to hear objections of both parties as to the quantum of profits for that year and report his finding to the High Court within two months. Though the appellant has not appealed in this matter, I think he is also entitled to be heard on the question of the proper amount. There is no need for him to appeal, because there is no decree against him. That is no reason why his objections ought not to be heard. Seven days will be allowed for objections.

Another objection raised by the respondent is that item 21 was wrongly disallowed by the Subordinate Judge. The question is one of fact and we cannot go into the correctness of the Subordinate Judge's judgment. It may, however, be pointed out that he relies on the evidence of P.W. 3 which shows that the sum was paid to the payee and not to the first defendant. This objection must be disallowed.

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Both parties will bear their own costs both in the Second Appeal and in the memorandum of objections in this Court. The order of the lower Appellate Court as to costs will stand.

JACKSON, J.—In this suit a son sues his father and his step-brother for partition. There are three step-sisters, and the question for determination is whether provision should be made for the cost of their marriages. One of the sisters was married after the institution of the suit, and two are still unmarried. In the Munsif's Court the plaintiff seems to have admitted that the cost of these marriages would fall upon the coparcenary. But the point was taken in the lower Appellate Court, and the learned Subordinate Judge holds, that the liability and cost fall upon the father and not upon the brothers. Therefore any marriage performed or to be performed after the disruption of the joint status cannot be a charge upon the coparcenary. The Subordinate Judge has assumed that after partition the daughter would have no claim upon the family, and applies the ruling in *Ramalinga Annavi v. Narayana Annavi*(1) only to justify his conclusion that partition had occurred before one of the daughters was married, so that the expenses of her marriage could not be charged against the family assets as costs incurred before the family was disrupted. Having found so much, he proceeds,

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"The plaintiff who became divided . . . was not liable to contribute out of his share . . . towards the marriages yet to take place."

That follows upon his assumption of the law, and not upon anything to be found in *Ramalinga Annavi v. Narayana Annavi*(1). What we have to decide is whether his assumption is correct. In the course of

(1) (1922) I.L.R., 45 Mad., 489 (P.C.).

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the discussion two positions stood out in clear contradistinction. It is agreed that the most which a daughter may claim on partition is maintenance, including under that term her marriage expenses. The appellant would have it that this maintenance is claimed as a matter of right against the coparcenary, it being the last vestige of the daughter's original share. The respondent, on the other hand, argues that the share has passed entirely into oblivion. The maintenance is what the daughter may claim from her father, and if it is paid by the coparcenary in the father's lifetime before partition, that is merely because the father happens to be absorbed in the joint-family. As soon as the father divides from the joint-family, the liability to maintain his daughter is his alone. It is no longer a liability chargeable upon family assets. But, if he dies before partition, his liability must be undertaken by the coparcenary, and provision made for it on partition.

If the appellant's view is correct, one would expect every female member who in the old days would have had an actual share, still to have a right of maintenance chargeable on the family property. To take three generations, calling them father, son, and grand-son, the daughter and the grand-daughter would both have their right of maintenance against the family property. But it seems to be conceded that the family would not be held liable for a grand-daughter's marriage expenses, that being an obligation which falls after partition upon the son's share.

Therefore, if the daughter's right is to be traced to her original but obsolete share, there would seem to be a flaw in the logic of the argument so long as the grand-daughter is allowed no such right. Unless it is to be assumed that these provisions in Hindu Law are arbitrary or fortuitous, some logical basis must be

found other than this original right to share. One may start with the primary conception that a father must maintain his children, a proposition which, if we are to delve into pre-historic times, must have been self-evident before the Mitakshara. Then comes the idea of children acquiring coparcenary rights at birth. Does a daughter acquire such a right, or must she be dependent upon her father? The answer to this question seems to be in the Mitakshara, Chapter I, section 7, v. (5) and (14).

"(5) By the brethren, after the decease of their father, sisters should be disposed of in marriage giving them as an allotment the fourth part of a brother's share. (14) Therefore, after the decease of the father, an unmarried daughter participates in the inheritance. But, before his demise, she obtains that only, whatever it be, which her father gives."

I cannot profess to do more than interpret this English version. But it has not been suggested to us that the translation is wrong, it is plain English and seems to mean that the daughter participates in the inheritance after her father's death; but before his death she does not. That too is how the passage is read in Mayne, section 482, Edition IX.

"Where a partition takes place during the life of the father, the daughter has no right to any special apportionment. She continues under his protection till her marriage; he is bound to maintain her, and the expenditure he is to incur is wholly in his discretion."

This can hardly mean that where a partition takes place during the life of the father, the daughter has a right to some apportionment, but the special figure must be decided by the father who is bound to maintain her. If the father is to incur the expenditure, it is not incurred by the family assets. Nor do I interpret the Mitakshara in that way as reading, 'after the decease of the father, an unmarried daughter participates in the inheritance and before his demise she participates in

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the inheritance, only the exact amount must be decided by her father.' If that could be the right rendering, the translation is most unhappy. I may add that, if the father can name the figure of the sum to be apportioned to his daughter out of the common fund on partition, it puts him in a very invidious position.

I do not think that any help is to be gained from the analogy of cases where the father is dead before the partition. All are agreed that in that circumstance the coparcenary is liable; but whether the liability was always upon it, or has fallen upon it because a fellow member is dead, these cases will not help us to decide.

There does not seem to be a single case directly in point. The respondent relies upon the summary of law in *Rama Rao v. Rajah of Pittapur*(1), which, I think, supports his case as far as it goes, but of course is not a direct decision upon the point. The members of an ordinary joint-family governed by the Mitakshara law are placed in categories. First, there are the persons with the inchoate right to raise an action of partition, who, so long as they remain joint, are entitled to have their necessary expenses paid out of the family income—a right of maintenance which begins where coparcenary begins and ceases where coparcenary ceases. It was not suggested that daughters in these days belong to that class, which is confined to the male members of the coparcenary. Then come the maintenance holders who cannot succeed as co-owners. Firstly, idiots, lunatics, and so on, who suffer from a personal disability. Daughters cannot come into that category, because the children of such persons get the full right of coparcenary. Lastly, there is the class of persons whose right of maintenance lies in personal relationship.

(1) (1918) I.L.R., 41 Mad., 778 (P.C.).

The husband is obliged to maintain the wife, the son the parent, and the father the infant child. It is an obligation attaching to the individual, independent of the fact of there being joint-family property. Therefore, it would seem from this summary that the daughter's right to maintenance is a right to be maintained by her father. When her father is a member of the joint-family, the cost of maintenance will be defrayed from the joint-income. If her father dies, the joint-family must assume the liability. If he lives and goes out of the joint-family, he takes with him his personal liability to maintain his daughter. If it is held on the contrary that the liability rested originally upon the joint-family, and continues to rest upon the joint-family as a common debt at the time of partition, then the observation that the right of the infant child to maintenance lies in personal relationship must be held to be wrong.

If the daughter's primordial right to a share in the joint-family property had survived to these days in the form of a claim for maintenance and marriage expenses, it would be such an interesting feature of Hindu Law, that modern students and commentators could hardly have overlooked it. Yet none of them mention it; and though the *argumentum ab silentio* should not be unduly stressed, their silence is certainly significant. Mayne, as I read his commentary, does not admit the existence of any such right. In her father's lifetime, the daughter is dependent upon the father (whether he be in or divided from the coparcenary). And the allotment she gets after his death, though it is called a fourth share, is only a sufficient amount to defray her nuptials. Sir Thomas Strange (Ed. 1830, p. 190) says

"Daughters take nothing as of right during their father's lifetime."

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Ghose and West and Buhler do not appear to discuss the question. Sarkar (Ed. V, p. 303) says that a daughter acquires an imperfect right in the father's property by virtue of which she is maintained out of it until marriage, and is also entitled to a quarter share, if partition takes place before her marriage, that is to say, when she continues as a member of the family. If "father's property" here means joint-family property, it undoubtedly supports the appellant's case; but may it not mean that the daughter has a claim to maintenance against her father's property, and by virtue of this right she can claim a share, when her father is dead and she is still a member of the coparcenary? The only way in which an unmarried daughter can cease to be a member of the family would seem to be by her father becoming a divided member and herself also being treated as divided in his branch. If that is so, even according to Sarkar's commentary, in the present case the daughter of the already divided father would have no right to a share.

That the right to maintenance after the death of the natural supporter is derived through him, and is not an independent right to a share of the family assets, is borne out by an *obiter dictum* of KUMARASWAMI SASTRI, J., in *Natarajan v. Muthiah Chetty*(1),

"persons, who by reason of certain circumstances are not entitled to a share in the estate, are entitled to maintenance by those to whom the estate has passed by survivorship. The liability to maintain is on the coparceners by virtue of the fact that they take the estate of their deceased relations."

And even if one goes back to the earliest texts, the right to maintenance seems to be a right against those who have survived and enjoy the family assets, rather than a right to enjoy a share of those assets along with

(1) (1926) M.W.N., 73.

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them. "Sisters also who are not already married must be disposed of in marriage by the brethren, contributing a fourth part of their own allotments" (Mitakshara, Chapter I, VII, 6). Not, be it noted, taking a fractional allotment in her own right, but looking to the brothers for a contribution from the property already divided amongst them. But here a difficulty supervened. If a brother had to contribute quarters of his share to several sisters, or several brothers to one sister, gross inequalities would result. Therefore, the commentators exercised their ingenuity and devised a fictional extra brother whose fourth share the sisters could enjoy. Hence it appears, says the Mitakshara, that daughters also participate after the death of their father. In fact, they have become participators through the difficulty of arranging their maintenance allotment; which is exactly the reverse of the appellant's theory that they are given a maintenance allotment, because they never lost their right to be participators.

And this clearly explains why it makes all the difference whether the father is alive or dead. When he is alive, the daughters are under his care and there is no question of participation. But when he is dead, and the brothers have to allot the maintenance, in working it out, the daughters become *quasi* participators.

This theory also explains what otherwise is difficult to understand, why, if the daughter has had a right to share continuously from the earliest times, it has degenerated (as the appellant concedes) into a right of maintenance. Along what path of thought or custom did it proceed until it degenerated into maintenance? I can understand its steadily dwindling, and being circumscribed in all manner of ways, but why, if it had nothing to do with maintenance, should it ever have fallen under that category? Is not the answer that the

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underlying idea has always been maintenance, and not participation? Maintenance when the father was alive; and then when his death had thrown his responsibilities upon the co-parcenary, maintenance at first worked out in terms of a share, and then again treated simply as maintenance.

In this view of the case, the assumption of the learned Subordinate Judge will be correct, and I am not prepared to disturb it. In respect to the other matters raised on appeal, I entirely agree with Mr. Justice RAMESAM, and have nothing to add. Only, if my view on the main question had prevailed, I should have allowed respondent his costs.

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REILLY, J.—I do not think it is necessary for me to discuss at length the main question in this appeal, which has been dealt with in the judgments already pronounced. It is admitted that, while a Hindu family remains undivided, the expense of marrying all the daughters of the family, whichever member of the family is their father, falls upon the family funds. It is contended for the plaintiff that the explanation of that is that the expense naturally and properly falls upon each girl's father, but, while he is undivided from the rest of the family, his personal obligation must be met from the family funds. That explanation appears to me to conflict with the conception of a joint-family. As soon as a joint-family widens beyond the descendants of one living head, it becomes clear that the right of each member born into the family arises by birth into the family, not by descent from one member of the family rather than another. This comes out clearly in the typical joint-family of Malabar Law, where no individual has a right to claim partition. Every member must be the child of a woman of the family, but the right to maintenance and the extent of that right have

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no relation to the fact that the member is the child of one woman rather than another. The special claim of a child on its parent to care and support is a matter of human instinct, which may have left its trace on every system of law; but it has essentially no place in the joint-family system. If we find that in an undivided Hindu family the girls have to be married at the expense of the family, I do not think we are justified in inventing for that natural and logical feature of the joint-family system any explanation other than that it is part of that system. To say that in such circumstances the obligation on the whole family to meet the marriage expenses of the girls is due to the fact that they are daughters of a member of the joint-family and not due to the fact that they are themselves members of the family appears to me to confound the explanation how they come to have a claim on the joint-family funds with the nature of the claim itself. In this case we are concerned with the question on whom the claim falls when a son with sisters demands partition while his father is alive. But it has been pointed out and admitted that, if after their father dies his sons make a partition, they must provide for the marriage expenses of their sisters as if it were an obligation of the joint-family. In explanation of that it is suggested for the plaintiff that, if in his life the obligation had been primarily that of the father, then, as his interest in the joint-family property lapsed to the sons on his death, the obligation came upon them with it. Apart from that explanation being in my opinion in conflict with the conception of a joint-family, it is almost impossible to reconcile the explanation with the fact that ancient Hindu Law specified a definite share, described as a fourth, as that of the sister in such a partition after her father's death. By whatever method such a fourth was

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to be calculated—and about that there were many differences of opinion—no method could bring it into any settled proportion to the interest of the father which had lapsed to the sons on his death. The fact that a fourth was ever specified for the sister's share in such circumstances indicates the idea that her right was her own by birth in consonance with the joint-family system and not merely a right as daughter of a deceased coparcener, whose death had benefited the surviving coparceners.

Then is there any binding authority which drives us to treat the daughter of a coparcener not as a member of the joint-family with a claim for her marriage expenses on the family funds, to be distributed as such on a partition in her father's life, but as having a claim only on her father and on his share in such a partition? What the plaintiff relies on is Chapter I, VII, 14, of the Mitakshara. But, if that passage refers to partition in the father's life at all, which appears to me open to some doubt, it may well mean no more than that at such a partition she must be content with the provision he thinks fit to make. As the passage says "there is no special precept respecting this case"—in contrast with the special precept that in a partition after her father's death she is to have a fourth. The statement in Mayne, S. 482, that, when a partition is made in the father's life, he is bound to maintain his daughter and pay her marriage expenses is based only on this passage in the Mitakshara, which is open to another interpretation. The statement quoted from Strange's Hindu Law—"Daughters take nothing as of right during their father's life"—appears to be the learned author's inference from the same passage. I agree with RAMESAM J. that there is nothing in Chapter I, VII, 14, of the Mitakshara which necessarily

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supports the view that the daughter's claim is only on her father and not directly on the joint-family.

If there is no compelling authority to support the plaintiff's view of this matter, then the obligation to maintain, and pay for the marriage of, a daughter should fall on the whole joint-family and be so provided for at partition even in her father's life, as would be the maintenance of a disqualified son. But there is one recognized feature of partitions which is at first sight incompatible with this view and has caused me some doubt. If a joint-family consists of a man and his children and his son's children, then the maintenance and the marriage expenses of his daughters and his son's daughters alike fall on the joint-family. But if there is a partition between him and his sons, it is admitted that the maintenance and marriage expenses of his sons' daughters thereafter fall upon the branch joint-families headed by his respective sons. Is that because the grand-daughters after all are primarily dependent on their fathers? If so, why are not the daughters primarily dependent on their father? With great respect I doubt whether any analogy drawn from the son's debts and the father's debts is of much assistance to us in this connexion. So long as the whole family is joint, the claims for maintenance and marriage expenses of both the grand-daughters and the daughters fall on the joint-family funds; but the liability of the joint-family funds for the debts of the sons and of their father is not the same. On consideration the explanation of the fact that after a partition between a father and his sons the claims of the sons' daughters for maintenance and marriage expenses are on the shares of the respective sons only appears to me to be that, while a girl is a member of a joint-family, her claim for such expenses can be only on the joint-family to which at the time she belongs: when

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a son who has a daughter is divided from his father, he becomes at once the head of a new branch joint-family, even if he has not yet begotten or adopted a son: it is on that joint-family and its property that his daughter's claim must fall. But, when sons divide from their father, their sisters do not remain members of a joint-family with their father, either a remnant of the old joint-family or a new joint-family which comes into being on the partition; the old joint-family, so far as the generation of the sons and their sisters is concerned, has gone, and, though the father may beget new children and so become the head of a new joint-family, his daughters living at the time of the partition are not members of that joint-family. If that is the correct view, then the fact that on a partition between a father and his sons the maintenance and marriage expenses of the sons' daughters fall on the respective sons' branches alone, as do the expenses of the sons' sons, and not on all who were coparceners in the old joint-family, is not inconsistent with similar claims of the sons' sisters falling on all who were coparceners of the old joint-family. If one of several sons alone divides from his father and brothers, then his sisters remain members of the joint-family of his father and his remaining brothers; but in that case the son who goes out by division would not escape liability for his share of his sisters' maintenance and marriage expenses.

I agree therefore with RAMESAM J. that on partition between a father and his sons the sons remain liable for the marriage expenses of their sisters in proportion to their shares of the property divided. As mentioned in *Vaikuntam Ammangar v. Kallapiran Ayyangar*(1), it has been a common practice in this Presidency to

(1) (1900) I.L.R., 23 Mad., 512.

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provide in partition decrees for the marriage expenses of daughters out of the family funds. Of that practice we all, I think, have knowledge, and in the District Munsif's Court the plaintiff himself did not object to it being followed in this case. It may not be appropriate to fix a definite sum for marriage expenses years before a marriage takes place; but the recognition in the practice that the claim for such expenditure is one which must be met from the funds of the joint-family and not by the father alone after partition is in my opinion in accordance with the law. I agree that this matter is not affected by the decision of their Lordships of the Privy Council in *Ramalinga Annavi v. Narayana Annavi*(1).

On the other points in the case also I agree with the judgment of RAMESAM J.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

THAYAMMAL AND TWO OTHERS (DEFENDANTS 1 TO 3),
APPELLANTS.

1929,
August 2.

v.

MUTUKUMARASWAMI CHETTIAR (PLAINTIFF),
RESPONDENT.*

Limitation Act (IX of 1908), ss. 20 and 21—Payment of interest by one of several mortgagors, effect of, on others—“Chargeable,” meaning of—Evidence Act, sec. 68 as amended by Act XXXI of 1926—Retrospective effect of.

According to section 21 of the Indian Limitation Act, payment of interest as such by one of several mortgagors, who is

(1) (1922) I.L.R., 45 Mad., 489.
* Appeal No. 132 of 1927.

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not the agent of the others, does not by itself serve to keep alive the debt as against the others, who have not authorized the payment. The word "chargeable" in section 21 is not confined to personal liability. It includes also liability to pay out of property.

Act XXXI of 1926, which amends section 68 of the Indian Evidence Act, relates only to processual law and not to substantive law. Hence it is retrospective in its operation. If the execution of a deed required to be attested by law is not denied by the executant, it need not be proved by any attesting witness, though it might have been executed before the Act.

APPEAL against the decree of the Court of the Subordinate Judge of Cuddalore in O.S. No. 68 of 1925.

The facts appear from the judgment.

K. Balasubramania Ayyar for appellant.

T. M. Krishnaswami Ayyar (with *R. Sriramachari*) for respondent.

JUDGMENT.

In this appeal, defendants 1 to 3 are the appellants before us. The plaintiff brought the suit on a mortgage bond, dated the 24th October 1907. The present suit was filed on the 17th October 1925. To save the bar of limitation, the plaintiff relied on a payment of Rs. 10 towards interest on the 17th October 1913, which purports to be endorsed on the mortgage bond and is exhibited as Exhibit A-1. The Subordinate Judge decreed the plaintiff's suit as framed with further interest. Hence this appeal.

Exhibit A-1, the endorsement, was signed by the first defendant and the second defendant for himself and as guardian of his younger brother the fourth defendant. It is said that the third defendant was then absent at Singapore and that the endorsement was signed on his behalf also, but there is no signature which purports to be on his behalf. So far as the first and second defendants are

concerned, the main point that was argued for the appellants was that, though the signatures on the endorsement are genuine, the endorsement was interpolated after the signatures were made, that there was in fact no payment on the 17th October 1913, and that what was represented to the defendants was that an endorsement will be made consisting of the earlier payments, which were really made. Beyond the bare suggestion, there is nothing to support this contention of the defendants. The first and second defendants have not gone into the box to support this contention. On the other hand, the plaintiff has gone into the box and has sworn to a payment of Rs. 10 on that date. This payment appears in the plaintiff's day-book, Exhibit D, at page 515. The actual entry was written by one Venkatachala Chetty, and his writing is proved by his son P.W. 2. This contention on behalf of the appellants 1 and 2 therefore fails.

Another contention raised on behalf of the appellants may also be disposed of. It is that Exhibit A has not been duly proved. It bears the signatures of five attesters and the writer. All these are dead except one namely C. Vadivelu Pillai. It is argued that Vadivelu Pillai has not been called as required by section 68 of the Evidence Act. This section of the Evidence Act has been recently amended by Act XXXI of 1926. None of the defendants has denied the genuineness of the suit mortgage bond. The first defendant only said that it had not been duly attested and that the plaintiff should prove strictly the genuineness but admitted her own execution. The second defendant never filed a written statement. The third defendant also did not plead that he did not execute the bond. We think the amendment is a provision relating to processual law and not to substantive law and therefore must be taken to be

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retrospective in its operation. That being so, it is not necessary to call the only living attestor. This contention therefore also fails. The result is, the appeal of defendants 1 and 2 should be dismissed with costs.

There remains the appeal of the third defendant. His learned Advocate argues that the suit is barred by limitation as against him. The endorsement, dated 17th October 1913, was not signed by him and there is nothing on record to show that those who signed the endorsement were specifically authorized for that purpose. The mere fact that the payment of the money enures for the benefit of all the defendants cannot constitute a specific authorization to sign the endorsement on their behalf within the meaning of section 20 of the Limitation Act. There are certain later payments towards Exhibit A but these were not relied on in the plaint as saving limitation and even if we are inclined to look at them for this purpose, all that we have got is that the payment in 1915 and one payment in 1918 were made by Vadivelu Pillai, the attestor abovenamed. Another payment in 1918 and another in 1919 do not appear to have been made by any specific person. Another payment in 1920 was made by one Munuswami Padayachi. These facts appear from Exhibit D, the plaintiff's later day-book. There is no evidence that Vadivelu Pillai or Munuswami Padayachi was specifically authorized to pay the amounts on behalf of the third defendant. It is true that there is evidence that Vadivelu Pillai had been managing the defendants' family affairs. He was permanently living and messing with the defendants in the same house and he was an inmate of the defendants' house even during his wife's lifetime and he was paying theerva on behalf of the defendants. But in our opinion all these do not constitute a specific authorization within the meaning of

section 20 of the Limitation Act—vide *Bapanna v. Bhaemalingam*(1). We therefore hold that there is no payment of interest as such by any person authorized by the third defendant to pay on his behalf.

In the plaint, there is an allegation that the third defendant ratified these payments. Paragraph 9 (a) of the plaint says that he "agreed thereto" and "acquiesced therein" and "admitted it" and "ratified it". In proof of this so-called ratification, Exhibit F was relied upon. The appellants object that this was filed at a very late stage but it is unnecessary to go into this question as Exhibit F does not purport to ratify any act done by others on behalf of the third defendant. It is merely a letter praying for more time. Assuming that it relates to the suit document, the letter being written on the 24th December 1921, more than 12 years after the date of the document, it cannot operate as an acknowledgment, nor can it amount to a fresh promise. Exhibit F therefore does not avail the plaintiff so far as the third defendant is concerned.

It is then contended for the respondent that under section 20 of the Limitation Act, it is enough if the interest on the debt is paid as such by any person liable to pay the debt. It is true that the words "the person liable to pay the debt" were construed to mean any person liable to pay the debt—vide *Asharam Sowkar v. Venkataswami Naidu*(2), relying on *Bolding v. Lane*(3) and *Chinnery v. Evans*(4). But that was a case to which section 21 of the Act would not apply and there could be no suggestion that the operation of section 20 was cut down by that of section 21, clause (2). In the case of

(1) (1916) 3 L.W., 231. (2) (1920) I.L.R., 44 Mad., 544.

(3) (1863) 1 De. G.J. & Sm., 122; 46 E.R., 47.

(4) (1864) H.L.C., 115; 11 E.R., 1274

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several joint contractors, partners, executors or mortgagees, the operation of section 20 seems to be cut down or limited by section 21 (2) of the Act. The decision in *Lewin v. Wilson*(1) does not help the respondent. That was an appeal from New Brunswick and though sections 29 and 30 of the New Brunswick Act are a reproduction of the corresponding sections in the English Statute, 7 William 4 and 1 Victoria c. 28, and they correspond to our sections 19 and 20, it does not appear that there is a section in the New Brunswick Act corresponding to our section 21, and if there is one, what its exact terms are. It is then argued by Mr. Krishnaswami Ayyar, the learned Advocate for the respondent, that in section 21, the word "chargeable" means "personally chargeable" and does not affect chargeability as to property; and therefore where the main liability included liability as to property and a personal liability, while the personal liability is cut down by section 21, the liability as to property remains on the construction of section 20; only where the main liability itself is a personal liability, the result of section 21 is to make the suit wholly barred. In support of this contention *Achola Sundari Debi v. Doman Sundari Debi*(2) and *Ibrahim v. Jagdish Prasad*(3) are the only Indian cases referred to; but in those cases the learned Judges have not adverted to section 21 of the Limitation Act at all. They were confined merely to the interpretation of section 20. Those decisions therefore do not help us. The learned Advocate then relied on *In re Macdonald, Dick v. Fraser*(4), a decision of STIRLING, J., as he then was. It was a decision under Lord Tenterden's Act (9 Geo., 4 c., 14), section 1. The question there

(1) (1886) 11 A.C., 639.
(3) (1927) A.I.R., All., 209.

(2) (1925) 90 I.C., 774.
(4) [1897] 2 Ch., 181.

was whether an acknowledgment made by one of several executors binds a testator's estate in the hands of the surviving executors, the original liability being that of the testator. In the first place, that section and our section 21 (2) are not identical. Section 21 refers to "partners" and also "mortgagees", but these are not mentioned in Lord Tenterden's Act. Whereas section 21 refers generally to executors, Lord Tenterden's Act refers to executors of any contractor. Again, section 21 refers to both cases of acknowledgment and payment, whereas Lord Tenterden's Act refers to acknowledgment or promise only and not to payment. It is unsafe to assume that the same result was intended in the two Acts even in the case of joint contractors or executors. The case did not go to the Court of Appeal, and the point has not since arisen. So far as executors are concerned, its effect has been incorporated in the text books—vide, for example, Lightwood on Limitation of Actions, 1909 Edn., page 353—but such statements are confined to executors only. In the course of STIRLING, J.'s judgment, he relied on CHITTY, J.'s judgment in *In re Hollingshead, Hollingshead v. Webster*(1), where reference to a similar section, namely, section 14 of the Mercantile Law Amendment Act, was made. In that case, the payment was made by a devisee for life and the question was whether it was a sufficient acknowledgment to bind the remainderman. CHITTY J. relied on the general observations of Lord CRANWORTH in *Roddam v. Morley*(2), and held that it was a sufficient acknowledgment. This view is in consonance with the view since adopted by the House of Lords in *Chinnery v. Evans*(3) and *Lewin v. Wilson*(4). In the course of the argument

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(1) (1888) 37 Ch. D., 651.
(2) (1857) 1 De. G. & J., 1; 44 E.R., 622
(3) (1864) 11 H.L.C., 115. (4) (1886) 11 A.C., 639.

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Mr. Swinfen Eady (as he then was) said that the admission of a debt by an executrix will not take it out of the statute so as to enable a creditor to obtain payment out of the testator's real estate. What use he actually made of section 14 of the Mercantile Law Amendment Act does not appear from the report, but CHITTY, J. in the course of the judgment says that Mr. Swinfen Eady's argument was that the estate was not liable and that the executor who made the acknowledgment was personally liable, and he said that this argument was founded on section 14 of the Mercantile Law Amendment Act. CHITTY, J. then observed that that was an extraordinary result and he proceeded to observe that some reasonable interpretation should be put on the words "so as to be chargeable." The interpretation that he suggested was that the co-executor who has not paid is not to be personally chargeable as for a *devastavit*. Thus it is seen that the interpretation of the word "chargeable" did not actually arise in the case. The discussion about it arose only because Mr. Swinfen Eady tried to support his argument by the analogy of the case of two executors and his further argument as to who would be liable in their case. We think it is unsafe to cut down the plain language of section 21 by reason of these two cases, *In re Macdonald, Dick v. Fraser*(1) and *In re Hollingshead, Hollingshead v. Webster*(2). The former related to the case of executors, and in the latter, the point did not actually arise. Whatever may be the law as to executors, it is impossible to say that of two joint contractors—which term has been held to include two mortgagors in this Court (vide *Muthu Chettiar v. Muhammad Hussain*(3)),—one contractor is bound by the payments of the other.

(1) [1897] 2 Ch., 181.

(2) (1888) 37 Ch.D., 651.
(3) (1920) 55 I.C., 763.

The word "chargeable" in section 21 must *prima facie* mean every kind of chargeability possible by reason of sections 19 and 20 of the Act, that is, every kind of chargeability under the original contract, and the term cannot be limited to personal liability only.

The result is, we think, that the suit is barred so far as the third defendant is concerned. We allow his appeal, and the suit is dismissed as against him with costs throughout. Half the pleader's fee only is allowed. But the appeal of defendants 1 and 2 is dismissed with costs. Time for payment is extended to four months from this date.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

BALASUNDARA NAIKER AND ANOTHER PLAINTIFFS
2 AND 3), APPELLANTS,

v.

RANGANATHA AIYAR AND OTHERS (DEFENDANTS 1 TO 17 AND
FIRST PLAINTIFF), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92, cl. (4)—Mortgage-bond—Discharge on payment of a portion of amount due, whether provable—Indian Contract Act (IX of 1872), sec. 63.—Registration Act (XVI of 1908), sec. 17.

Where a mortgagee agreed to take a payment by the debtor as a complete discharge, that is, not only promised previous to the payment to take it in complete discharge, but at the time of payment gave a discharge, such a discharge is not an agreement within section 92, clause (4) of the Evidence Act; consequently the discharge can be proved by oral evidence.

Mohin Chandra Dey v. Ram Dayal Dutta, (1925) 30 C.W.N., 371; and *Srimati Bhaba Sundari v. Ram Kamal Dutta*, (1926)

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44 Cal. L.J., 269, followed; *Jagannath v. Shankar*, (1919) I.L.R., 44 Bom., 55, dissented from.

Section 63 of the Indian Contract Act provides that no consideration is necessary, not for an agreement to remit, but for an actual remission.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Tanjore in O.S. No. 42 of 1924.

The plaintiffs sued to recover a sum of money alleged to be the balance due on a mortgage bond executed by some of the defendants. The latter pleaded that the bond was discharged by the payment of a smaller amount as agreed to by the mortgagees. The plaintiffs contended, *inter alia*, that the discharge could not be legally proved. The Sub-Judge, who tried the suit, upheld the plea of the defendants and dismissed the suit. The plaintiffs appealed.

K. V. Krishnaswami Ayyar for appellants.—An oral agreement for discharge by payment of a lesser amount due on a registered mortgage bond, is not provable in law under section 92, clause (4) of the Evidence Act. A registered document is necessary. The agreement, being anterior to payment, is certainly invalid even though an agreement immediately before actual payment may be valid. See *Jagannath v. Shankar*(1), *Malappa v. Matum Nagu Chetty*(2), *Yegnanarayana Aiyar v. Suppan Chetty*(3), *Namagiri Lakshmi Ammal v. Srinivasa Ayyangar*(4).

T. R. Venkatarama Sastri for respondent.—There are three Acts to be considered: (1) Registration Act, (2) Contract Act, (3) Evidence Act. The Registration Act only says than an agreement, if in writing, should be registered, otherwise it would be inadmissible; (2) section 63 of the Indian Contract Act does not require consideration for a discharge (3). If there is an oral agreement previously made, and, at the time of payment by the mortgagor, the parties continued to abide by the agreement, section 92, clause (4) of the Evidence Act or the Registration

(1) (1919) I.L.R., 44 Bom., 55.
(3) (1926) 52 M.L.J., 224.

(2) (1918) I.L.R., 42 Mad., 41.
(4) (1915) 27 I.C., 269.

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Act does not operate to prevent proof of the circumstances under which the payment was made. Oral evidence of an oral agreement as to full discharge by payment of an amount smaller than what was due, can be proved: See *Neelamani Patnaik Mussudi v. Sukaduvu Beharu*(1), *Gopalasami Aiyar v. Kalyanarangappa*(2).

The decision in *Jagannath v. Shanker*(3) is dissented from in *Mohin Chandra Dey v. Ram Dayal Dutta*(4) and in *Srimati Bhaba Sundari v. Ram Kamal Dutta*(5).

JUDGMENT.

The suit out of which this appeal arises was filed on the footing of a mortgage bond, Exhibit A, for Rs. 8,000, dated 11th January 1903, executed in favour of four persons, namely, (1) father of third plaintiff, (2) father of seventeenth defendant, (3) father of second plaintiff and (4) the first plaintiff, by defendants 1 to 3 and their undivided father. Fourth defendant is the son of the first defendant. Defendants 5 to 9 are sons of second defendant. Defendants 10 to 16 are subsequent vendees and mortgagees of defendants 1 to 9. The four obligees of the bond belong to one family. The first two belong to one branch of the family. The third and the fourth who are sons of brothers belong to another branch. The two branches were separated even before 1909. Under the terms of the mortgage bond, the interest was to be paid at 9 per cent per annum on the 11th January of each year, and if it was not so paid the interest should be compounded and bear further interest at 10½ per cent per annum with annual rests. The whole amount was to be paid on 11th January 1906. In default, it should carry further compound interest at 10½ per cent per annum with annual rests. Some amounts were paid on 2nd May, 31st August, 21st October, 12th November

(1) (1919) I.L.R., 43 Mad., 803.
(3) (1918) I.L.R., 44 Bom., 55.

(2) (1925) 48 M.L.J., 155.
(4) (1925) 30 C.W.N., 371.

(5) (1926) 44 C.L.J., 269.

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1905 and were all endorsed on the bond on the last of these dates. Again, some amount was paid on 15th April 1906 and 19th January 1907 and these payments were endorsed on the latter date. In the year 1909, there was some litigation between the third plaintiff and the seventeenth defendant. This was O.S. No. 3 of 1909. That was a suit filed by the seventeenth defendant against the third plaintiff for partition of the properties belonging to their branch. Pending the suit, two Receivers were appointed in October 1909 for the purpose of collecting the assets due to the family. The Receivers were vakils of the Sub-Court of Mayavaram at Kumbakonam where the suit was filed. In 1912, while the suit was pending, the Court was transferred to Mayavaram, but before the transfer, the Receivers had collected more than one lakh and fifty thousand rupees and they were discharged in April 1912. One of the debts which they collected as Receivers was the debt due on the suit mortgage bond. As the debt was due not only to the two parties in that suit but also to two others, namely, plaintiffs 1 and 2, the collection was made with the co-operation of the two persons. The third plaintiff is a natural son of the second plaintiff but was adopted into a different branch and the second plaintiff conducted O.S. No. 3 of 1909 on behalf of the defendant therein, namely, the present third plaintiff. In his evidence, he admits that he used to go to the Receivers whenever sent for, and that in respect of the realization of the common debts the Receiver used to consult him and the first plaintiff. There is no doubt, therefore, that the work of collection was made by the Receivers with the co-operation of plaintiffs 1 and 2. The defendants' case now is that the Receivers filed some suits and the debtors pleaded in those suits that the provisions regarding interest were penal and unenforceable. The

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Receivers compromised those suits agreeing to some reasonable rate of compensation and not insisting on the original rate of interest in the bond. This was done with the sanction of the Court. Similarly, in respect of the present suit bond, the Receivers and plaintiffs 1 and 2 agreed to take interest which would roughly work out compound interest at 9 per cent per annum and did not insist on the higher rate of $10\frac{1}{2}$ per cent per annum. They calculated the amount due on the bond on that footing and found that nearly a sum of Rs. 12,960 was due up to 29th March 1911. The amount was to be paid by the various obligors of the bond in proportion to their respective shares, they themselves being divided. Accordingly, the following sums were paid towards the suit mortgage bond, namely, (1) Rs. 4,300 on 29th March 1911 by the first defendant, (2) Rs. 4,300 on the same date by the third defendant, (3) Rs. 2,000 by second defendant on the same date and (4) Rs. 2,000 on 12th April 1911 by the second defendant. There still remained due a sum of Rs. 360 which was afterwards paid by the second defendant. These payments were accepted in full discharge of the debt due on the mortgage bond. Therefore the defendants pleaded that there was nothing due on the mortgage. The Subordinate Judge accepted the defendants' plea and dismissed the suit. The plaintiffs appeal.

On behalf of the appellants, it was contended that there was really no evidence to support the agreement and the subsequent discharge as pleaded by the defendants.

[Their Lordships then dealt with the evidence and then proceeded as follows:—]

Having regard to all the circumstances of the case, we are inclined to believe as a question of fact the plea raised by the defendants that the obligees of the bond

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took Rs. 12,960 in 1911 in complete discharge of the mortgage bond. It is immaterial on what basis the amount was really arrived at. But it adds a little more to the probabilities of the case that it works out practically to the sum due on the footing of 9 per cent compound interest.

It is next argued by the learned Advocate for the appellants that, assuming all the facts are in favour of the defendants, such a plea as that raised by the defendants is futile as the evidence adduced to support such a plea is inadmissible in evidence with reference to section 92, clause 4 of the Evidence Act. He relied on *Yegnanarayana Aiyar v. Suppan Chetty*(1), a decision of our brother, WALLER, J. We are informed that that decision is now under appeal under clause 15 of the Letters Patent. But we can consider the authorities relied on in that case. WALLER, J., has relied on the following cases:—*Namagiri Lakshmi Ammal v. Srinivasa Ayyangar*(2): In this case what was held by SESHAGIRI AYYAR, J., and KUMARASWAMI SASTRI, J., was that an endorsement on a mortgage bond reciting that the bond was cancelled and returned as the amount due was paid was inadmissible in evidence. In that case, the endorsement was made with a view to defeat creditors though the amount was not really received and it was found that the endorsement was not admissible with reference to the language of section 17 (n) of the Registration Act. *Lakshmana Setti v. Chenchuramayya*(3): Here also the defendants relied on an agreement in writing by the mortgagee to relinquish a sum of money more than Rs. 100 due under the mortgage bond and it was held that it was inadmissible for want of registration under section 17. *Malappa v. Matum Nagu Chetty*(4): This was

(1) (1928) 52 M.L.J., 224.

(3) (1918) 34 M.L.J., 79.

(2) (1915) 27 I.C., 269.

(4) (1918) I.L.R., 42 Mad., 41.

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a judgment of three Judges on a Letters Patent Appeal, and they unanimously held that a subsequent oral agreement to take less than what was due under the registered mortgage bond, being admitted in the pleadings, could be considered in the case and on this ground the appeal was dismissed and the mortgagee failed and the further remarks in the judgment with reference to section 92, clause 4, are strictly *obiter dicta*, but we agree that an oral agreement to take less than what was due under a registered mortgage bond would be inadmissible under section 92 (4); and *Jagannath v. Shankar*(1), which is a case like the present one supporting the appellant.

With reference to the first two cases, we observe that the question in them was whether a writing purporting to extinguish a mortgage bond was admissible under the Registration Act and it was held it was not admissible. In the case before us, there is no question

any writing being admissible or inadmissible with reference to the provisions of the Registration Act. If the writing itself does not purport to extinguish the mortgage bond, it would be admissible in evidence, and a plea of discharge based on the fact that the sum shown in the endorsement was taken in full discharge and the discharge was given to the obligors orally would stand on a different footing from the admission of a writing evidencing the payment. This is the view taken in *elamani Patnaik Mussadi v. Sukaduru Beharu*(2)

SPENCER and KRISHNAN, JJ. In *Gopalaswami Aiyar v. Kalyana Rangappa*(3), VENKATASUBBA RAO and SRINIVASA AYYANGAR, JJ., went further and held that an endorsement and a receipt purporting to completely

(1) (1919) I.L.R., 44 Bom., 55.

(2) (1919) I.L.R., 43 Mad., 803.

(3) (1925) 48 M.L.J., 155.

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discharge the debt were admissible in evidence. It is unnecessary for us to go so far though possibly their decision also may be supported.

As to the third decision relied on by WALLER, J., namely 42 Mad., 41, that decision really supports the respondent for it shows the possibility of the mortgage being extinguished by the payment of a smaller sum than that due on the bond.

As to the last case, 44 Bom., 55, we see that it has been dissented from in the Calcutta High Court (1) in *Mohin Chandra Dey v. Ram Dayal Dutta*(1) by GREAVES and GHOSE, JJ., where they held that oral evidence to prove a discharge was admissible, and again (2) in *Srimati Bhaba Sundari v. Ram Kamal Dutta*(2), by GREAVES and PANTON, JJ. The question that now arises before us is whether we should follow the two Calcutta cases or the Bombay case. For this purpose, we have to consider the three provisions of law, (1) section 63 of the Contract Act, (2) section 17 of the Registration Act and (3) section 92, clause 4, of the Evidence Act. The first of these shows that a creditor in India can remit the balance of a debt without any consideration. Where the debt is a mortgage debt, it may be that a document in writing purporting to extinguish the mortgage is inadmissible in evidence under the Registration Act, but the payment itself cannot be inadmissible, and if the creditor agreed to take the payment as a complete discharge, that is, not only promises, previously to the payment, to take it in complete discharge but at the time of the payment gives a discharge, the question arises whether such a discharge is an agreement within section 92, clause 4 of the Evidence Act. There is no doubt that any agreement which seeks to substitute

(1) (1925) 30 Calc. W.N., 371.

(2) (1926) 44 C. L.J., 269.

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terms different from those in the bond so as to enable the mortgagor to insist on the working out of the obligations on the lines of the substituted terms would be inadmissible. Strictly, therefore, an agreement promising the debtor that he would be discharged if he makes a certain payment less than that indicated on the mortgage bond is, standing alone, inadmissible to prove the discharge itself, both under section 92 (4) and also otherwise, for such an agreement is without consideration. What section 63 of the Contract Act permits is not an agreement to remit but an actual remission. That is, when a portion of the sum is paid, the creditor may say, "I do not want the rest. You need not pay any more." This last thing is therefore the essence of the transaction. A discharge extinguishing a debt, though on receipt of a smaller sum than that strictly due, is not an agreement substituting different terms for the original terms which will govern the further working out of the obligation but an extinction of the obligation itself. Though such a discharge extinguishing a debt is generally effected by creditors on the importunity or the request of the debtors, still it cannot be said to amount to a contract which binds two persons and puts them to further obligations. Where there is nothing more to be done, the whole thing is practically an act of grace on the part of the creditor. The request of the debtor is immaterial, and in law it is not a case of consensus of two minds ending in a contract, but merely a liberal act on the part of the creditor only. Looked at from this point of view, we think that section 92 (4) does not touch any act of a creditor which extinguishes a debt by taking a smaller sum of money. We agree with the view taken by GREAVES, PANTON and GHOSE, JJ., in the two Calcutta decisions abovementioned and dissent from the decision in

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Jagannatha v. Shanker(1). Where the act of the creditor does not extinguish the debt but gives only better terms than before, which have yet to be worked out, the principle does not help the debtor, and section 92 (4) prevents the admission of such an agreement. The observations of the Privy Council in *Firm Chhunna Mal Ram Nath v. Firm Mool Chand Ram Bhangat*(2), disapproving the decision in *Abaji Sitaram v. Trimbak Municipality*(3), show that a remission of debt under section 63 is not an agreement between two persons. It is really the act of one person discharging at his will and pleasure the obligation of another. There is also the view of our brothers MADHAVAN NAIR and CURGENVEN, JJ., in *Ramanathan Chettiar v. Sethuram Madige Rao Sahib*(4), where they observe that the discharge of a debt is different from the extinguishment of a mortgage, though one may be the result of the other. We think, therefore, the plea is admissible, and, once the plea is admissible, whether it is actually proved is merely a matter of evidence on the facts appearing in a particular case. We have already found, as a question of fact, that there is a complete discharge of the debt. The extinction of the mortgage followed the discharge of the debt. We therefore dismiss the appeal with costs.

K.R.

(1) (1919) I.L.R., 44 Bom., 55.
(3) (1908) I.L.R., 28 Bom., 67.

(2) (1928) 55 M.L.J., 1 at p. 6.
(4) (1927) 27 L.W., 47.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Wallace.

VENKANNA (FIRST DEFENDANT), APPELLANT,

v.

PARASURAM BYAS AND THREE OTHERS (PLAINTIFF
AND OTHERS), RESPONDENTS.*

1929,
February 1.

Civil Procedure Code (V of 1908), O. XIII, r. 4—Admission of document by the trial Court, time for—Sec. 2 (20)—“Signed” not including stamping of initials of the judge.

If a trial judge had not considered the admissibility of a document proved before him, the mere endorsement thereon under Order XIII, rule 4, Civil Procedure Code, does not preclude him from considering its admissibility at a later stage of the case.

Semble—Though “signed” includes, according to section 2 (20), Civil Procedure Code, “stamped,” “initials” of the judge cannot be “stamped.”

APPEAL against the Order of the Court of the Subordinate Judge of Rajahmundry in A.S. No. 98 of 1926 preferred against the decree of the Court of the Principal District Munsif of Rajahmundry in Original Suit No. 550 of 1924.

The necessary facts appear from the Judgment.

Ch. Raghava Rao for appellant.

P. Somasundram for respondents.

JUDGMENT.

PHILLIPS J.—In this case, the plaintiff (first respondent) sued on a hundi which was proved by the first defendant. Subsequently a clerk of the Court stamped the usual endorsement as to the production and admission in

* Civil Miscellaneous Appeal No. 241 of 1927.

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evidence of the document and the District Munsif's initials were affixed to this endorsement by a rubber stamp. Whether that was done by his own hand or by some one else does not appear. The District Munsif on a consideration of the document held that it was not duly stamped and therefore inadmissible in evidence and rejected it. The Subordinate Judge relying on *Sugappa v. Govindappa*(1), held that when the District Munsif had admitted the document and made the endorsement required by Order XIII, rule 4, of the Civil Procedure Code, it was not open to him to subsequently reject it, and remanded the suit for disposal. The first defendant now appeals against this Order.

Under Order XIII, rule 3,

"the Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection."

Prima facie, therefore, it would appear that the District Munsif was justified in rejecting this document, but it is contended for the respondents that when the endorsement mentioned in Order XIII, rule 4, has been made upon a document—an endorsement which purports to admit the document in evidence—it is not open to the Court to subsequently reject it. This argument would seem to involve that the mere mechanical act of endorsement is sufficient to constitute admission in evidence and that a judicial consideration of its admissibility cannot be had after such endorsement has been made, and this in effect amounts to a contention that the admission of a document in evidence may be done by a purely mechanical act.

In the first place, it is very doubtful whether, in the present case, the provisions of Order XIII, rule 4, have

(1) (1902) 12 M.L.J., 351.

been complied with, for the endorsement under that rule must be signed or initialled by the Judge. Under section 2 (20), Civil Procedure Code, "signed" includes "stamped" but there is no provision that initials may also be stamped. In the present case the Judge's initials were placed on the document by means of a rubber stamp and certainly the placing of such a stamp by a third person could not amount to initialling by the Judge, and it is not at all clear as to whether the stamp was affixed by the Judge himself or by a third person. I however think it is unnecessary to enquire as to who affixed the rubber stamp because it appears to me that the authorities are clear that a document is not deemed to have been admitted in evidence until the Judge has applied his mind to a consideration of its admissibility. The mere endorsement under Order XIII, rule 4, does not necessarily imply such consideration and in the present case it is clear from the District Munsif's judgment that he had not considered the admissibility until after the endorsement had been made. This view has been held in *Chunnilal v. Mula Bai*(1) and also by the Punjab Chief Court in *Sundar Das v. Peoples' Bank of India, Ltd.*(2) and the Nagpur Chief Commissioner's Court in *Sitaram v. Thakurdas*(3). The case in *Sugappa v. Govindappa*(4) is no authority to the contrary, for there it was held that although the Judge might have intended to reject the document yet in fact he had not rejected it but admitted it in evidence. *Dasi-hanar v. Ram Autar Singh*(5) would perhaps appear to support the respondents' case, for it is stated that the documents were admitted in evidence and exhibited and subsequently stamped; the District Munsif removed them from the

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(1) (1910) 12 Bom. L.R., 468.

(2) (1912) 16 I.C., 834.

(3) (1919) 50 I.C., 781.

(4) (1902) 12 M.L.J., 351.

(5) (1923) 71 I.C., 475.

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—
PHILLIPS, J. record of the evidence; but the facts, as is so often the case in these unauthorized reports, do not appear in the report and what exactly had been done by the District Munsif to admit these documents in evidence is not stated. As section 36 of the Stamp Act prohibits the rejection of a document once it has been admitted in evidence, even in a subsequent stage of the same suit, it is clear that, under that section, objection could not be taken when there had been such admission. What has to be determined in each case is whether there has been an "admission" or not. This case of the Patna High Court, *Dasichanar v. Ram Autar Singh* (1), does not discuss this point, but it appears to have been assumed that the documents had been properly admitted in evidence. That, I hold is not the case here, and therefore the District Munsif was justified in rejecting the document.

The appeal must therefore be allowed and the District Munsif's decree restored with costs both here and in the lower Appellate Court.

WALLACE, J. WALLACE, J.—I agree and have nothing to add.

N.R.

(1) (1923) 71 I.C., 475.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

VARADARAJA PERUMAL KOIL, BY ITS TRUSTEE
GANAPATHISUNDARAM PILLAI (DEFENDANT), APPELLANT, 1929,
July 25.

v.

MUNIAPPA PILLAI AND OTHERS (PLAINTIFFS),
RESPONDENTS.*

Lessor and lessee—Deposit of an amount made by lessee with lessor—Interest on the amount to be adjusted towards half the rent—Principal amount to be adjusted towards rent of last year of the lease period—Default in payment of rent—Subsequent suit by lessee for return of deposit from lessor—No forfeiture clause in lease—Amount of deposit, whether forfeited—Deposit, essentials of.

A lease provided that the lessee should deposit a certain amount with the lessor, that the interest on the amount deposited was to be taken in part-payment of the rent, and that the principal amount was to be taken in discharge of the last year's rent. Upon default in payment of the first year's rent, and re-entry upon the land by the lessor, the lessee sued to recover the full amount deposited by him with the lessor.

Held, that the amount left by the lessee with the lessor was not a deposit in the strict legal sense of the term, liable to be forfeited on default of payment of rent;

and that the lessee was entitled to recover the return of his deposit, less the rent that became payable in the first year.

What is strictly known as a deposit in the legal sense must possess a twofold character; it must first be a part-payment and next it must be of the nature of money "staked"; *Howe v. Smith*, (1884) 27 Ch.D., 89, referred to.

APPEAL against the order of the District Court of Tinnevely in Appeal No. 196 of 1925, preferred against

* Appeal Against Order No. 386 of 1926.

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the order of the Court of the Subordinate Judge of Tinnevely in O.S. No. 85 of 1924.

The material facts appear from the judgment.

K. V. Sesha Ayyangar for appellant.

T. S. Venkatesa Ayyar and *K. Balasubrahmaniam Ayyar* for respondents.

The JUDGMENT of the Court was delivered by

VENKATASUBBA RAO, J.—This appeal raises an important question of law, relating to the right of a party in default to the recovery of the deposit paid by him under a contract. The suit is filed by a lessee for the return of his deposit, and the trial Court rejected the claim, holding that the amount became forfeited to the lessor. The lower Appellate Court took a different view and remanded the case for re-trial and disposal. The question is, was the order of remand rightly made? The District Judge's decision remanding the suit is contained in the following passage of his judgment:—

"The landlord's loss in re-letting was alleged and put in issue but not tried. I think that the landlord is entitled to have the question decided, what damages he suffered by reason of plaintiff's default, and that he is entitled to deduct from the deposit whatever amount is found due to him as damages."

We have first to examine the terms of the lease deed. It bears date the 15th April 1920. The period of the lease was fixed as seven years and the lessee took possession. The lease was of agricultural land. The annual rent was agreed to be Rs. 3,210 to be paid in two instalments, a moiety before the 30th December and the remaining half before the 30th June of each year. Some further rent was to be paid in kind with which we are not concerned. The deed contains a provision for re-entry, it being stipulated that in default of payment of rent, the landlord is to be at liberty to re-enter and take possession not only of the land but

also of any crops standing upon it. The lessee paid a deposit of Rs. 2,676 and the clauses that follow are very material. He is entitled to interest on that sum at 6 per cent per annum and may adjust that interest against the rent payable on the 30th June of each year. Then as regards the principal of the deposit amount, it was to be adjusted against the rent payable for the last, that is, the seventh, year of the lease.

The lessee made default in the payment of rent that fell due on the 30th June 1921. The lessor made a demand for the rent which was not complied with. He immediately exercised his right of re-entry and took possession of the land with the standing crops thereon. The lessee made some ineffectual protest not in regard to the re-entry but in respect of certain subsidiary matters. With that protest, we are not concerned in this appeal.

The question to be decided is, is the lessee entitled to the return of his deposit, less the rent, that became payable on the 30th June 1921? We may observe that the claim is confined to this amount. Mr. Sesha Ayyangar, the learned Advocate for the appellant (the lessor), has drawn our attention to several English and Indian decisions on the point. The first question that arises is, is the amount claimed in this suit a deposit in the legal sense? What is strictly known as a deposit must possess a twofold character. It must first be a part-payment and next it must be of the nature of money "staked". That a "deposit" must possess these two distinctive marks is emphasized in the leading case on this subject, *Howe v. Smith*(1). This case has been referred to and followed in numerous Indian decisions, including *Natesa Aiyar v. Appavu Padayachi*(2).

(1) (1884) 27 Ch.D., 89.

(2) (1913) I.L.R., 38 Mad., 178 (F.B.).

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The very word "staked" is used in the judgment of BOWEN, L.J., who observes

"In the present case, we have, in the first place, turning to the language of the instrument, a description of the manner in which the money is *staked* or deposited. It is a deposit, and it is to be *both a deposit and in the nature of part-payment*."

The force of the word "staked" is brought out in the judgment of FRY, L.J., wherein it is stated

"It is not merely a part-payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract."

A deposit then serves not merely as a part-payment but there is a further characteristic which it possesses, namely, it is paid as a "guarantee that the contract shall be performed," in other words, as "a security for the completion of the purchase." (See the judgments of COTTON, L.J., and BOWEN, L.J.) This dual nature of what is known as deposit is most tersely referred to by COTTON, L.J., thus:—

"If the sale goes on, . . . it goes in part-payment of the purchase-money for which it is deposited; but if, on the default of the purchaser, the contract goes off, that is to say, if he repudiates the contract, . . . he can have no right to recover the deposit."

The same idea is conveyed by the judgment of FRY, L.J. After stating that a deposit corresponds to "the earnest or *arrha* of our earlier writers," the learned Lord Justice goes on to say

"The expression used in the present contract that the money is paid "as a deposit and in part-payment of the purchase money," relates to the two alternatives, and declares that in the event of the purchaser making default the money is to be forfeited, and that in the event of the purchase being completed, the sum is to be taken in part-payment."

This definition of the word "deposit" receives further support from the judgment of Lord DUNEDIN in

Sprague v. Booth(1). After referring with approval to *Howe v. Smith*(2), the learned Lord observes:—

"If payment is made of the purchase money, it is to be credited to such payment; if default is made in the payment of the money, then the deposit is forfeited."

We have now clearly shown that a sum paid under a contract cannot be called a deposit unless it fulfils these two requirements. These being then the nature and incidents of a deposit, can it be said that the money paid under the contract in question answers that description? In our opinion, the answer must be in the negative. In the first place, there is a broad distinction between an executory contract of sale and an *executed* contract of lease. In the former case, a deposit amount is paid in order to create "by the fear of its forfeiture a motive in the payer to perform the rest of the contract." In the case of a lease partially performed, the matter stands on a different footing. This very contract illustrates what we mean. The parties did not contemplate either by express terms or by implication that the money was to be forfeited. The lease deed contains express stipulations on the point. It says that the interest on the deposit was to be adjusted against the moiety of the rent due on each 30th of June and the principal itself was to be deducted from the rent for the last year of the lease. There was not the remotest idea that the amount was ever to be forfeited. The sum was therefore paid in part-payment of the rent, but not in addition as security or guarantee for the performance of the contract. The second requisite is therefore wanting and we are not prepared to hold that the sum in question can be treated as a deposit in law.

The cases quoted by Mr. Sesha Aiyangar do not apply, for in each of them the lease contains an express

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(1) [1809] A.C., 576.

(2) (1884) 27 Ch.D., 89.

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forfeiture clause, *Orr v. Chinna Yegappa Chetty*(1), *Venkatachari v. Ramalinga Thevan*(2), *The President, Vellore Taluk Board v. Gopalaswami Naidu*(3).

Mr. Sessa Aiyangar contends that, even in the absence of a forfeiture clause, the deposit amount becomes liable to be forfeited. He relies upon *Howe v. Smith*(4), the case already cited, *Hall v. Burnell*(5), and *Ex parte Barrel, In re Parnell*(6). The law on the point may be thus shortly stated. In each case, we have to look to the document to see what was the bargain that was made. The parties may agree just as they please as to what is to be done with the money deposited. In the absence of an express clause, the term most naturally to be implied, having regard to the nature and incidents of a deposit, is that on repudiation of the contract by the payer, the amount shall be forfeited to the payee. (See *Howe v. Smith*(4), the judgment of FRY, L.J., at page 101.)

In the present case, we have held that the amount paid under the contract is not a deposit and the principle above stated does not therefore apply.

There was some discussion whether, on the facts, the lessee's conduct amounts merely to a breach or constitutes a repudiation of the contract. In the view we have taken, it is unnecessary to deal with this question.

To avoid any misunderstanding, it remains to observe that the respondent's learned Advocate confines his claim to the amount, the subject-matter of the appeal in the lower Appellate Court.

The appeal fails and is dismissed with costs.

K.R.

(1) (1916) 17 M.L.T., 229.

(3) (1913) I.L.R., 38 Mad., 801.

(5) [1911] 2 Ch., 551.

(2) (1918) 7 L.W., 404.

(4) (1884) 27 Ch.D., 89.

(6) (1875) L.R., 10 Ch. App., 512.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

S. NATARAJAN AND OTHERS (RESPONDENTS 2 TO 4),
APPELLANTS,

v.

1929.
August 23.

V. NARASIMHA AYYANGAR, OFFICIAL LIQUIDATOR OF THE
CITY HYGIENIC MILK SUPPLY CO., LTD., MADRAS (PETI-
TIONER), RESPONDENT.*

Indian Companies Act (VII of 1913), ss. 3, 187, 199, 200 and 201—Order made by High Court on a contributory to pay a call—Application to a District Court to enforce the order—Jurisdiction of the District Court to enforce the order—Procedure.

The District Court of a place where a contributory has property has no jurisdiction to entertain an application for enforcement of an order of the High Court directing him to pay a call, as such an order could be enforced under section 200 of the Companies Act, 1913, only by the Court which would have had jurisdiction over the company if its registered office was situate at such place; and that Court under section 3 (1) of the Act was the High Court.

Section 3 (3) of the Act, cannot validate the proceedings of the District Court in such a case, if the objection to its jurisdiction was taken therein at the very commencement and at the proper time. *Kayastha Trading and Banking Corporation v. Jai Karan Lal*, (1926) I.L.R., 6 Pat., 132, followed.

APPEAL against the order of the District Court of West Tanjore in E.P. No. 166 of 1928 in O.P. No. 62 of 1922.

This appeal arises out of an application for execution, made to the District Court of West Tanjore, of an order made by the High Court of Madras calling upon a contributory to pay a call. The applicant was the Official Liquidator of the respondent company; he produced the order of the High Court, before the District

* Civil Miscellaneous Appeal No. 237 of 1929.

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Court, as the contributory had property within the jurisdiction of the latter Court, against which the liquidator could proceed. The appellants contended in the lower Court that the Court had no jurisdiction to entertain the application. The Court overruled the contention and ordered execution. The respondents in the lower Court preferred this appeal to the High Court.

N. Suryanarayana for the appellants.—This is an appeal in execution proceedings for the enforcement of an order passed by the High Court of Madras, directing a contributory to pay a call under section 187 of the Indian Companies Act, 1920. The relevant sections are sections 3, 199 to 201 of the Act. Under section 3 (1) the Court which has jurisdiction to entertain the application is the High Court. Section 200 refers back to section 3 (1) in effect; under the latter section, it is the High Court which has jurisdiction. There was no transfer of the decree from the High Court to the District Court in this case. The liquidator simply produced the order of the High Court along with his application for execution. Section 201 only points out the procedure, if the Court had jurisdiction. Only the High Court can execute the decree or order. See *Kayastha Trading and Banking Corporation v. Jai Karan Lal*(1), as to the scope of sections 200 and 201 of the Act.

C. S. Venkatachari for the respondent.—The District Court had jurisdiction under section 200 of the Act. Section 201 shows that production of the order of the High Court before the District Court is enough to empower the latter Court to order execution of the order of the High Court. Otherwise no effect could be given to section 200 of the Act.

In any event, under section 3 (3) of the Act, the proceedings taken before the lower Court, are rendered valid, though taken in a wrong Court. Section 3 (3) of the Act is similar in its effect to section 11 of the Suits Valuation Act.

The JUDGMENT of the Court was delivered by
VENKATASURBA RAO, J.—The short question is; what is the effect of sections 199, 200 and 201 of the Indian Companies Act read with section 3?

VENKATA-
SUBBA RAO, J.

(1) (1926) I.L.R., 6 Pat., 132.

An order was made by the High Court under section 187 ordering the payment by a contributory in respect of a call. He has property in the district of Tanjore against which the liquidator can proceed. The latter accordingly produced the order before the District Judge and applied for its execution. The Judge overruling the objection of the contributory held that he had jurisdiction to enforce the order.

We have to decide whether the order of the District Judge is right. It is stated by both sides that the only relevant provisions of the Act bearing on the question are the four sections to which we have referred. To them, therefore, we propose to confine our attention. The decision really turns on the meaning of section 200 read in the light of section 3. The relevant portion of the former sections runs thus :—

“Any order made by a Court for or in the course of the winding up of a company shall be enforced in any place in British India other than that in which such Court is situate, by the Court that would have had jurisdiction in respect of such company if the registered office of the company had been situate at such other place.”

Let us apply the section to the facts of this case. The order was made by the High Court in the course of the winding up. It is sought to be enforced in Tanjore. Under the section, which is the Court that can enforce it? The answer is “the Court that would have had jurisdiction in respect of such company, if its registered office had been situate at Tanjore.” What then is that Court? The answer to this question is furnished by section 3, which reads thus :—

“The Court having jurisdiction under this Act shall be the High Court having jurisdiction in the place at which the registered office of the company is situate.”

In other words, if the registered office of this company is situate at Tanjore, the Court having jurisdiction

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under the Act would be the High Court. From the foregoing statement, it follows that the only Court that can enforce the order in question against property at Tanjore is the High Court of Madras. We do not propose to decide the question, in what manner, in the event of an application being made to the High Court, the order is to be enforced, by direct action or by its being transmitted to the Tanjore Court? That is a point which does not arise at present. We fail to see how sections 199 and 201, relied upon by Mr. Venkatachari, support his contention. The section that confers jurisdiction is section 200 and the other two sections referred to by the learned Advocate merely deal with the mode of enforcing the orders. This, in our opinion, is the proper construction of these previous sections.

The view we have taken receives support from *Kayastha Trading and Banking Corporation v. Jai Karan Lal*(1). Mr. Venkatachari asks what purpose then does section 200 serve? The answer is simple. It obviously can apply to a case where an order made by the High Court of one province is to be enforced in another province; and, as the Patna High Court in the decision we have cited has pointed out, in such a case, it can only be enforced by the High Court of that other province.

Lastly, Mr. Venkatachari seeks to support the order of the lower Court by relying upon section 3, clause 3, which says,

“Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court.”

It is very doubtful whether this clause applies to a case of this kind. In any case, it can have no application, as the Patna case has decided, when the

(1) (1926) I.L.R., 6 Pat., 132.

objection was taken at the very commencement and at the proper time.

This appeal is allowed with costs.

The act of the Official Liquidator in applying to the lower Court is *bona fide* and we, therefore, allow him to take his costs out of the estate.

K.R.

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APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetty.

SRISALADI NAGABUSHANAM (PLAINTIFF), APPELLANT,

v.

VARDHINIDI VENKANNA (DEFENDANT), RESPONDENT.*

1929,
September
13.

Madras Elementary Education Act (VIII of 1920), ss. 34 and 36 and rules under section 36—Education-cess, levied and collected from the landholder—Right of landholder to recover any portion of the cess from his tenants.

A landholder, from whom an education-cess under the Madras Elementary Education Act (VIII of 1920) was collected by the Government, is not entitled to recover from his tenants any portion of the cess so collected.

Although the education-cess is recoverable as an addition to land-cess under the rules framed under section 36 of the Act, yet the former cess does not become land-cess for all purposes, and there is no statutory right given to the landholder to recover any portion of the education-cess from the tenant, as in the case of land-cess.

SECOND APPEAL against the decree of the District Court of West Gōdāvari in Appeal Suit No. 41 of 1927 preferred against the decree of the Court of the Sub-Collector of Narasapur in Summary Suit No. 98 of 1926.

* Second Appeal No. 1671 of 1927.

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BUSHANAM
v.
VENKANNA.

The material facts appear from the judgment.
B. Satyanarayana for appellant.
V. Govindarajachari for respondent.

JUDGMENT.

The plaintiff is the appellant in both these appeals. The two suits filed by him are for the recovery of rent and cess from the ryots (defendants). The only question in dispute in these second appeals is whether the plaintiff is entitled to recover one-half of the education-cess which the Government has levied and recovered from him. It would appear from the judgment of the lower Appellate Court, it was conceded on behalf of the plaintiff that he is not entitled to recover land-cess from the defendants. The defendants have set up a contract or agreement by which the plaintiff's predecessor-in-title agreed not to collect land-cess from them. That agreement was no doubt prior to the passing of Act VIII of 1920 which is the Madras Elementary Education Act. Under section 34 of this Act, the education tax *can be levied* in the area which is not within a municipality, not exceeding 25 per cent of the taxation leviable in that area, under all or any of the following heads, namely, land-cess, tax on companies, professional tax, and house tax. This section does not specify from whom such a tax can be levied. In section 36, it is stated that the assessment and realization of taxes leviable under section 34 shall be in accordance with the procedure prescribed. That procedure appears to have been prescribed under a rule which was framed under section 36. The rule is to this effect, namely,

"the tax levied by a local authority under section 34 of the Act under any head of taxation specified therein, shall be treated as an addition to the tax levied under the heads by the local authority under the law for the time being in force governing it, and shall be assessed and recovered along with the said tax as an integral part of it".

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The question at issue has to be decided upon a proper interpretation of this rule. It must be borne in mind that this rule is one framed under section 36, which only relates to the procedure prescribed for assessment and realization of the tax. The scope of this rule, therefore, is confined to the procedure to be adopted for the levy and recovery of this tax and cannot be extended further. It says that the education tax can be recovered along with the taxes already in force, for instance, land-cess. This education tax should be treated as an addition to the land-cess and is recoverable along with the said land-cess as an integral part of it. That being so, it seems to me that this rule does not declare that the education tax is *ipso facto* land-cess or shall be deemed to be land-cess for all purposes. If an amount is due to the Government under the Land Improvement Loans Act, that amount is recoverable as an arrear of revenue. It is only the procedure prescribed for the recovery of arrears of revenue that should also be adopted for the recovery of those dues. It has been held that, by reason of the identical procedure for their recovery, such dues do not become arrears of revenue for all purposes. Similarly, by reason of the aforesaid rule framed under section 36 of the Act, it cannot be urged that the education tax has been declared by Statute to be land-cess itself. In this view, it has to be seen whether the plaintiff has got any right to recover from the tenants a portion of the education tax levied from him. In the case of land-cess, there is the express provision in section 88 of the Madras Local Boards Act, XIV of 1920, second proviso, which enables a landholder to recover from his tenant one-half of the land-cess payable by him in respect of the land occupied by the tenant. But for this proviso, the landholder will have no right to recover any portion of it from the tenant, unless under a special contract entered

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into with him. With respect to land-cess, there is a statutory right given to the landholder to recover one-half of it from the tenant, but as to educational tax leviable under Act VIII of 1920, there is no statutory provision to enable the landholder to collect any portion of it from the tenant. The plaintiff's claim to recover one-half of the education tax from the defendants should be based either upon a contract or upon a statutory liability. Neither of them exists in this case. It is therefore clear, that the plaintiff's claim with respect to education-cess is unsustainable.

Even if it should be held that, by reason of the rule framed under section 36 of the Act referred to above, the education tax must be deemed to be land-cess itself or a portion of it, the plaintiff would still be prevented from recovering any portion thereof from the defendants by reason of the agreement which disentitles him to recover the land-cess from the defendants. The contract seems to be that no land-cess should be recovered from the defendants. If it be so, I must hold that there was no reservation to the effect that that contract should be confined only to the amount which was then levied as land-cess. Unless such a reservation is satisfactorily established, it must be presumed that whatever amount was levied under the head of land-cess was waived under that contract. In the view I have taken above, it is not quite necessary to deal with the contract on the basis that education-cess is land-cess itself. I have, however, dealt with this aspect, as it was also the subject of arguments before me. In any view, the plaintiff would not be entitled to recover any portion of the education tax from the defendants.

In the result, the second appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven.

RANGA RAJU AND ANOTHER (DEFENDANTS), PETITIONERS,

v.

ETHIRAJAMMAL (PLAINTIFF), RESPONDENT.*

1929,
September
13.

Suit for sale on a mortgage—Preliminary decree—Application for passing final decree—Notice—Contest—Order directing that a final decree should be passed—Appeal against the order—Court fee, payable—Whether as on a miscellaneous appeal or on an appeal against the final decree.

An appeal against an order directing, after contest, that a final decree shall be passed in a mortgage suit should be treated as a miscellaneous appeal and is liable to be stamped with a Court fee accordingly; it is not an appeal against the final decree, liable as such to be stamped with an *ad valorem* Court fee.

PETITION under section 115, Civil Procedure Code to revise the order of the District Court of Chingleput in A.S. No. 191 of 1928 (M.P. No. 279 of 1927 in O.S. No. 73 of 1926 on the file of the Court of the Subordinate Judge of Chingleput).

The material facts appear from the Judgment.

K. P. Ramakrishna Ayyar with N. Ramachendra Ayyar for petitioners.

T. G. Aravamuthan, for respondent.

JUDGMENT.

This Civil Revision Petition was presented in the following circumstances. The plaintiff, now respondent, obtained a preliminary mortgage decree against the petitioner and applied in M.P. No. 279 of 1927 to have a final decree passed. The defendants were given

* Civil Revision Petition No. 107 of 1929.

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AMMAL.

notice and alleged that the decree debt had been adjusted. This issue was tried by the Subordinate Judge of Chingleput and found against, so that he directed that a final decree should be drawn up. The petitioners took this order on appeal to the District Court, stamping it as though for a miscellaneous appeal. The learned District Judge took up the matter of the sufficiency of the Court fee and passed an order in which he says that the appeal was clearly against the final decree in the mortgage suit and accordingly that an *ad valorem* Court fee should be paid. The petitioners now object to the terms of this order.

The question thus is whether an appeal against an order directing after contest that a final decree shall be passed in a mortgage suit should be treated as an appeal against the final decree in that suit. Not much guidance can be obtained from reported cases. The learned District Judge has referred to *Bajrangi Lal v. Mahabir Kunwar*(1), but all that that lays down is that an appeal from a final decree in a mortgage suit passed under Order XXXIV, rule 5, Code of Civil Procedure, requires an *ad valorem* Court fee, a proposition which need not be disputed. In *Subbalakshmi Ammal v. Ramanujam Chetty*(2), SPENCER and KRISHNAN, JJ., had to deal with an order dismissing an application for a final decree in a suit for sale on a mortgage from the point of view of its appealability, and there indeed they did hold that the effect of the order was to dismiss the suit, thereby being technically a decree and appealable. I do not, however, find that case of much assistance here, because although the effect of the order here no doubt would be that a final decree must be passed, it can hardly be said that this appeal is tantamount to an appeal from that decree.

(1) (1913) I.L.R., 35 All., 476.

(2) (1918) I.L.R., 42 Mad., 52.

We have only to consider what the permissible grounds in each case would be. In this appeal against the order, the grounds must necessarily be limited to adducing cause why the final decree should not be passed; whereas once the decree is passed and an appeal is preferred against it, grounds such as those would not avail the appellant, but he must attack the merits of the decree. I think it is quite clear, therefore, that the scope of an appeal against the order would be different from that against the decree and further that the judgment-debtor has a right of appeal against both. To charge him *ad valorem* fees in this appeal would mean, if he appealed against the decree, he would have to pay them twice over, which I do not think can be correct. I must accordingly allow the petition and decide that the appeal preferred to the District Judge was properly stamped and direct him to restore it to file and dispose of it according to law.

Petitioners will get their costs in this petition.

K.R.

RANGA RAJU
v.
ETHIRAJ-
AMMAL.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Madhavan Nair.

KONDALU AIYAR (PETITIONER), APPELLANT.*

1929.
October 29.

Letters Patent of the High Court, cl. 15—Amendment of—Application in the High Court in a second appeal for stay of execution of decree—Dismissal by a single Judge of the High Court—Appeal against order under Letters Patent, cl. 15, after amendment—Leave to appeal, not applied for—Maintainability of Letters Patent appeal, without leave—Jurisdiction in dismissing petition, whether appellate.

Where, in a second appeal pending in the High Court, an application for the stay of execution of the decree of the lower Court was dismissed by a single Judge of the High Court, and an appeal was preferred against the order under the Letters Patent, but no leave to appeal against the order had been applied for under the amended letters patent,

Held, that the order refusing stay of execution was passed in the exercise of the appellate jurisdiction of the High Court, and an appeal against the order, without obtaining leave to appeal, would not lie.

Sadaka Mahammad v. Hayath Batcha Sahib, (1928) 54 M.L.J., 323; and S.R., 12731 of 1928, followed.

APPEAL, under clause 15 of the Letters Patent, against the order of JACKSON, J., in C.M.P. No. 4152 of 1929 for stay of execution of the decree in A.S. No. 133 of 1929 in the District Court of Tinnevely, pending S.A. No. 928 of 1929.

The facts appear from the judgment.

K. V. Venkatasubrahmanya Ayyar with P. N. Appu-swami Ayyar for appellant.

JUDGMENT.

This is a Letters Patent Appeal from the judgment of Mr. Justice JACKSON and the question is, does the

* Letters Patent Appeal No. 103 of 1929.

appeal lie? There was a second appeal filed and in that, an application was made for stay of execution of the decree of the lower Appellate Court. The application was dismissed by Mr. Justice JACKSON and this is an appeal from his order.

It is on account of the recent amendment of the Letters Patent that the present question arises. There was no certificate granted by the learned Judge declaring that the case is a fit one for appeal. Mr. Venkatasubrahmanya Ayyar's contention is this. The order in question is not a judgment passed by the High Court in the exercise of its appellate jurisdiction. The very expression "Appellate Jurisdiction", he contends, involves a scrutiny of a proceeding of an inferior Court. The order of the High Court refusing stay is not related to any order of the lower Court and has an independent existence. Moreover, power to grant or refuse stay is conferred on the High Court by an express provision in the Civil Procedure Code. On these grounds, he maintains that the order in question was not made by a Judge of the High Court in the exercise of his appellate jurisdiction. This contention involves a fallacy. A similar argument was advanced in *Sadaka Muhammad v. Hayath Batcha Sahib*(1) with reference to an interlocutory order in a Civil Revision Petition. KUMARASWAMI SASTRI and WALLACE, JJ., made the following observation:

"It is difficult to see how there can be any application apart from the Civil Revision Petition filed in the High Court, as a party could not, without filing a Civil Revision Petition in the High Court, ask for stay of execution of the decree in the lower Court."

These remarks apply to the present case. The application to the learned Judge could not have been made independent of, and apart from, the second appeal that was pending. We must therefore hold that it was

(1) (1928) 54 M.L.J., 322.

KONDALU
AIYAR, *In re.* the appellate jurisdiction of the High Court that was invoked and that the order was made in exercise of that jurisdiction. *Sri Sri Sri Chandra Chudamani Rajah Harichandran Jagadev v. Lokkeno Patnaik*(1), (decided by RAMESAM and TIRUVENKATA ACHARYA, JJ.), is a direct case on the point and supports our view. The appeal is dismissed.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Cornish.

1929,
August 21.

KESAVA PILLAI *alias* KORALAN AND ANOTHER,
PRISONERS (ACCUSED NOS. 2 AND 4)

and

KESAVA PILLAI *alias* THILLAI KANNU PILLAI.
(ACCUSED No. 1), APPELLANT.*

Retracted confession—If can be acted upon without material corroboration—Reasons given by accused for making confession, subsequently retracted, on the face of them, false—If corroboration necessary.

There is no absolute rule that a retracted confession cannot be acted upon, unless there is material corroboration. If the reasons given by an accused person for having made a confession which he subsequently withdraws are, on the face of them, false, that confession may be acted upon as it stands and without any further corroboration.

TRIAL referred by the Court of Session of the South Arcot Division for the confirmation of the sentences of death passed upon accused Nos. 2 and 4 in Case No. 14 of the Calendar for 1929, and case taken up by the

(1) S.R. 12731 of 1928 (unreported).
* Referred Trial No. 82 of 1929 and Criminal Appeal No. 334 of 1929 (taken up No. 22 of 1929).

High Court for enhancement of the sentence passed on ^{KESAVA}
the first accused in the same case. PILLAI, *In re.*

N. S. Mani for accused No. 2.

D. R. Venkatesa Ayyar for accused No. 4.

S. Venkatachala Sastri for accused No. 1.

Public Prosecutor (L. H. Bewes) for the Crown.

The JUDGMENT of the Court was delivered by

WALLER, J.—The three appellants have been convicted of the murder of one Tillaikannu Pillai. The first appellant is the murdered man's son. The second and third appellants are respectively the first appellant's brother-in-law and father-in-law. Another brother-in-law was charged with them but acquitted. There was, we consider, no ground for differentiating between him and his brother. If the Sessions Judge accepted, as he did, the confessions of the first and third appellants and the evidence of P.Ws. 10 and 11, he should have convicted the third accused as well. The fact that his name did not appear in Exhibit E was, comparatively speaking, of very little significance.

That there was ample motive for the murder is clear. In the first place, Thillaikannu was keeping a woman called Nagu and spending money on her, to which his son and no doubt his wife's family objected. In the next, Thillaikannu's relations with his son's wife (P.W. 2) had given rise to constant quarrels. He had been intimate with her before she was married, and the intimacy continued after her marriage. About ten days before the murder, the first appellant had caught her going to his father's room at night and thrashed her, threatening to kill himself or her, unless his father was murdered. Lastly, the father had been talking of settling some of his property on his daughter (P.W. 1) on account of the quarrels between himself and his son. All this has been conclusively established.

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On the night of 11th January last, Thillaikannu went out to his field with the first appellant, after which he disappeared. Eighteen days later his body was dug up, in consequence of information given by the first appellant to P.W. 1. She heard of her father's disappearance and came back to her native village to make enquiries. When she came, the first appellant began by telling her that their father had gone to Cuddalore. The next day, he confessed to her that he and his father-in-law and brothers-in-law had murdered Thillaikannu and buried the body between two rocks in his field, after which he attempted to commit suicide, but was saved by P.W. 8. The village munsif was informed, and the first appellant took him and pointed out the place where his father's body had been buried, and it was dug up.

The main evidence in the case consists of confessions by the first and third appellants. There can be no doubt but that the first appellant confessed to his sister that he and the other three had murdered his father, though she made a desperate attempt to save him by alleging that he did not, in his confession, implicate himself. In the end, when confronted with Exhibit F—a statement made by her to the village munsif—she had to admit that he confessed to her that he also had helped in the murder. Strong objection has been taken by the defence to the Sessions Judge's procedure in having recalled her, after her deposition had been concluded, in order to put Exhibit F to her. There is no force in the objection. Section 540, Criminal Procedure Code, gives a Judge the fullest discretion to recall a witness at any stage of a trial and makes it imperative for him to do so, if he considers further evidence essential to the just decision of the case. Here an essential document had been overlooked by the prosecution, and it was the Judge's duty to have it admitted in evidence. To argue that he should not have carried out that duty, as the result was fatal to the

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ALLER, J.

accused, is to suggest that the words "just decision" mean a decision in favour of the defence.

We are satisfied that P.W. 1 has given a perfectly correct account of what her brother confessed to her. The circumstances all indicate that he must have taken part in the murder himself. He had the strongest of motives for doing so. He was certainly present. He knew where the body had been buried. He first of all lied to his sister about their father's whereabouts and, after confessing, tried to commit suicide. Before the committing Magistrate, no doubt, he, while admitting his presence, attributed the murder to the other three accused. In the Sessions Court, he resiled even from that admission. The fact that he has retracted altogether makes little or no difference, as—apart from his retracted confession—there is ample circumstantial evidence from which his guilt can be inferred.

The third appellant made a complete confession to the committing Magistrate, implicating himself, the first appellant, and his sons, in the murder. This he withdrew in the Sessions Court, alleging that he had been tortured by the Police into making it. That was, of course, absurd. He had not been in the custody of the Police. He had never complained of torture before, and, when he made his confession, he was standing in the presence of a Magistrate. What happened seems obvious. He must have been angered at the first appellant attempting to save his neck at the expense of his fellow-culprits, and was unable to contain himself and blurted out the truth. We are told that the confession, having been retracted, cannot be acted upon without material corroboration. There is, of course, no such absolute rule. If the reasons given by an accused person for having made a confession, which he subsequently withdraws, are, on the face of them, false, it is not apparent why that confession should not be acted on as it stands and without

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any further corroboration. Not that corroboration is lacking in this instance. It is not likely that the murder was the work of one hand. Thillaikannu's treatment of his daughter-in-law and her husband, his wasting of his substance on P.W. 5, his threat to settle his property on P.W. 1, must all have roused fierce resentment in the daughter-in-law's family. It is conclusively established that the appellant was away from his house on the night of the murder, and, before the committing Magistrate, his wife admitted that he had told her that he had taken part in the murder. In the Sessions Court, she asserted that this admission was due to torture by the Police, of which she had never complained before. We are of opinion that the Sessions Judge was entirely justified—in view of her obvious desire to save her husband and sons—in admitting her deposition before the committing Magistrate as evidence at the trial under section 288, Criminal Procedure Code.

In the result, we must find that the first and third appellants have been rightly convicted. It is urged that P.Ws. 1 and 8 should not be believed, as they would benefit by the conviction of the first appellant. The answer is that P.W. 8 saved him from committing suicide and that both he and P.W. 1 have made every effort to save him from conviction.

The sentence passed on the third appellant is confirmed. The first appellant has been called on to show cause why his sentence should not be enhanced. We do not entirely accept the reasons given by the Sessions Judge for not hanging him, but his father had treated him very badly, and it is possible that his father-in-law may have been the leader in the crime. We propose therefore not to interfere, but to confirm his sentence.

B.C.S.

APPELLATE CRIMINAL.

1929,
September 6.

Before Mr. Justice Waller and Mr. Justice Cornish.

T. M. A. NATHAN (ACCUSED), PETITIONER. *

*Code of Criminal Procedure (V of 1898), ss. 265 and 537 —
Judgment to be signed by all members of Bench present—
Failure to comply—Not an illegality and cured under
section 537.*

In a trial before a Bench of Magistrates, by whomsoever the judgment and record may have been written, they should, under section 265 of the Code of Criminal Procedure, be signed by all the members of the Bench present; but failure to comply with this provision is not necessarily an illegality, and may, where no failure of justice had been occasioned, be cured by section 537 of the Code. *Rama Kotiah v. Subbiah* (1929) I.L.R., 52 Mad., 237 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 Bench of Magistrates, Ootacamund, dated 18th October 1928, in Summary Trial No. 610 of 1928.

V. L. Ethiraj for petitioner.

Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

The petitioner has been convicted by a Bench of Magistrates. He comes up in revision on the ground that the judgment convicting him is illegal, as it has been signed only by the Chairman of the Bench. We think that that is a perfectly good ground of objection. Section 265 of the Code of Criminal Procedure is divided into three sub-sections. The first provides that records and judgments shall be *written* by the presiding officer in English or in the language of the Court or in his mother-tongue. The second prescribes that, if authorized by the Local Government, a Bench may employ a

* Criminal Revision Case No. 181 of 1929.

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clerk to prepare the record or judgment, which shall be signed by each member of the Bench present and taking part in the proceedings. The third directs that, if no such authority has been given, the record—which, presumably, includes the judgment—shall be prepared by a member of the Bench and signed “as aforesaid” and shall then be “the proper record”. The first subsection says nothing about signing the record or judgment, but deals merely with the language in which they shall be written. The intention, we think, is that, by whomsoever the judgment and record may have been written, they shall be signed by all the members present. We have been referred to a decision *contra* by DEVADOSS, J., in *Rama Kottiah v. Subba Rao*(1), which is based on the wording of section 367 of the Code of Criminal Procedure. With great respect, we do not consider that that section affords any assistance in the construction of section 265. The words “presiding officer of the Court” are no more than a compendious description of all classes of judicial officers, Magistrates and Judges, who have to pronounce judgment.

The Public Prosecutor invites our attention to section 537 of the Code of Criminal Procedure and argues that the omission should be treated as an irregularity, which has occasioned no miscarriage of justice. It has been held that the failure to comply with a mandatory provision of the Code is not necessarily an illegality. In this case, all the members of the Bench signed the register in which the sentence was embodied. They obviously agreed in the judgment, and we do not think that their omission to comply with the technical requirement of the law as to the signing of it was anything more than an irregularity, which occasioned no failure of justice.

(1) (1929) I.L.R., 52 Mad., 237.

NATHAN,
In re.

There is, however, a further and fatal objection. It is founded on that disastrous provision of law, subsection (8) of section 526 of the Code of Criminal Procedure, which is absolutely imperative in its terms. The petitioner, in the course of the trial, applied for an adjournment for the purpose of moving the High Court for a transfer, but the Bench rejected the application on the ground that it had been made after the trial had begun. That was, of course, no ground at all. Such an application can be made in the course of a trial, and must, unfortunately, be granted. To refuse it, contrary to the terms of the section, is to deny the applicant an absolute right conferred on him by the statute and vitiates the whole proceedings.

We set aside the conviction, but, as the case arises out of a family dispute, do not order a retrial.

B.C.S.

PRIVY COUNCIL.*

GUDIVADA MANGANNA (PETITIONER),
APPELLANT,

v.

MADDI MAHALAKSHMAMMA (RESPONDENT),
RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Code of Civil Procedure (Act V of 1908), sec. 110—Right of appeal to Privy Council—Value of subject-matter of suit.

In section 110 of the Code of Civil Procedure, 1908, dealing with appeals to the King in Council from a decree or final order of a High Court, the words “the amount or value of the subject-matter of the suit in the Court of first instance” mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of first instance; and that meaning is

* *Present*:—Viscount DUNEDIN, Sir GEORGE LOWNDEN and Sir BINOD MITTAL.

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not affected by the alternative condition which follows in the section. *Subramanya Ayyar v. Sellammal*, (1915) I.L.R., 39 Mad., 843, approved.

PETITION for special leave to appeal from a decree of the High Court at Madras (November 1, 1928), reversing a decree of a Subordinate Judge. The petitioner was plaintiff in a suit against the respondent, his sister, for a declaration of his title, and for possession of certain property which had belonged to their deceased mother. The property included certain promissory notes payable by persons not parties to the suit. For purposes of Court-fees the suit was valued at Rs. 7,200.

The Subordinate Judge decreed the suit, but upon appeal to the High Court it was dismissed.

An application by the petitioner to the High Court for a certificate enabling an appeal to the Privy Council was dismissed on the ground that the value of the subject-matter of the suit in the Court of first instance was not Rs. 10,000 or upwards so as to satisfy the requirements of section 110 of the Code of Civil Procedure applicable to the case. For the purposes of their decision the learned Judges accepted the petitioner's contention of fact that if interest upon the promissory notes to the date of the decree of the Subordinate Judge were included the value exceeded Rs. 10,000.

Section 110 of the Code is set out in the judgment of the Judicial Committee.

Under the established practice of the Board, the petitioner was entitled to contend upon a petition for special leave to appeal, and without appealing from the refusal of a certificate, that he had an appeal by right under the provisions of the Code.

Narasimham for the petitioner.—The value of the subject-matter of a suit for the purposes of section 110 of the Code is what would accrue to the plaintiff if he obtains a decree. That, in the present case, would include interest upon the promissory

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notes. The judgment of the Board in *Moti Chand v. Ganga Prashad Singh*(1) did not reject the view that the value at the date of the decree was the test. It is well established that the valuation for Court-fees is not conclusive for the present purpose.

W. Wallach for the respondent.—For the purposes of section 110 the value of the subject-matter of a suit is the value at the date of the plaint: *Subramanya Ayyar v. Sellammal*(2). Although other High Courts have held otherwise, it is submitted that the view of the Madras High Court is correct. That case dealt with mesne profits and the same principle applies here. *Moti Chand v. Ganga Prashad Singh*(1) does not affect the present question. But in any case the petitioner has not shown that the value was Rs. 10,000 even at the date of the decree. The value of the promissory notes to the holder is purely problematic. The petitioner by his plaint claimed only possession.

Narasimham in reply.—*Subramanya Ayyar v. Sellammal*(2) is distinguishable as in that case mesne profits were not recoverable from the defendant but from others.

The JUDGMENT of their Lordships was delivered by

Viscount DUNEDIN.—The case turned upon whether the widow, whose heir the respondent is, took an absolute interest in certain properties of the husband or only a life estate. If the latter, the respondent had no right. The Subordinate Judge held that the widow had only a life estate. The High Court reversed. The losing parties then applied for leave to appeal to the King in Council, which was refused upon the ground that the amount or value of the subject-matter of the suit was less than Rs. 10,000.

The appellant now asks for special leave to appeal on the ground that the decision of the High Court was wrong in the respect that the amount or value of the subject-matter of the suit was more than Rs. 10,000. The point arises in this way. Part of the property in

VISCOUNT
DUNEDIN.

(1) (1901) I.L.R., 24 All., 174; L.R., 29 I.A., 40.
(2) (1915) I.L.R., 39 Mad., 843.

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question consisted of promissory notes. The promissory notes in the plaint were described as of their face value, and so valued together with the other subjects in dispute, the amount of Rs. 10,000 cannot be reached, but if to the face value of the promissory notes is added the interest up to the date of the decree of the first Court, then the sum of Rs. 10,000 is exceeded.

The section of the Civil Procedure Code which rules the matter is section 110, which is as follows:—

“In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

“or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

“and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.”

Case (a) of section 109 is an appeal from a decree passed on appeal by a High Court, and therefore the present case is within case (a). Now, it is a matter of history that the present section of the Code was an amended form of the enactment which prior to the Code controlled the matter. Up to 1874, appeals to the Privy Council were governed by the Order in Council of the 10th April, 1838. The words then were “amount or value of the subject-matter in dispute in appeals to Her Majesty in Council.” Upon that there were decisions of the Privy Council that interest on money claims and mesne profits of immovable property subsequent to the date of the suit, but awarded by the decree, might be reckoned, but none subsequent to that date.

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Then came the Privy Council Appeals Act (VI of 1874), and subsequently the Code of Civil Procedure, which imposed the additional condition as to the value in the Court of first instance, which is not included in the Order above quoted.

In 1901, in the case of *Moti Chand v. Ganga Prashad Singh*(1), their Lordships held that the word “and” meant “and” and not “or,” so that each of the two conditions had to be separately fulfilled. In that case the amount recoverable even under the decree in the first Court did not amount to Rs. 10,000, so that the present position did not arise.

The question did, however, arise in India, and the Calcutta [see *Dalgleish v. Damodar Narain Chowdhry* (2)] and Madras Courts gave contrary decisions. Their Lordships consider that the Madras Court was right. The case is *Subramanya Ayyar v. Sellammal*(3). In that case the question was as to mesne profits. If mesne profits from the date of the institution of the suit to the date of the decree were added, the sum of Rs. 10,000 was exceeded, *secus* if not. The Courts held that they could not be added, and their Lordships agree with their reasoning, which, indeed, treated the question under the first part of the section as completely clear, but considered whether the second part, “or the decree or final order must involve,” etc., made any difference, and held that it did not, for reasons which commend themselves to their Lordships.

Learned counsel for the petitioner sought to distinguish that case by saying that it applied to mesne profits and not to interest, and also that there the pecuniary claim was directly made and not, as here, a

(1) (1901) I.L.R., 24 All., 174; L.R., 29 I.A., 40.

(2) (1906) I.L.R., 33 Cal., 1286

(3) (1915) I.L.R., 39 Mad., 843.

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claim for a promissory note itself, leaving the pecuniary claim to be worked out by action against the maker of the promissory note. But, in truth, mesne profits are much more akin to the interest sought to be added by computation in this case than the case of interest directly sued for, for they are something attaching to the subject claimed and not what is the subject of a direct claim. Further, the point that there is here no direct action for the money, but only for the thing that will bring in the money, so far from helping the appellant, is all against him. Who can tell whether there will be any interest due under the promissory note? The maker of the promissory note may have many defences. The truth is that it is somewhat of a concession to allow the promissory notes to be ranked as at their face value. That concession is allowed, and that is the utmost that can be said to be the value as at the institution of the suit. To add what may eventually turn out to be accrued monies after that date and up to the decree is to go far beyond what has been conceded and is in the teeth of what their Lordships hold to be the true meaning of the Code.

Their Lordships will therefore humbly advise His Majesty that the application should be dismissed with costs.

Solicitors for petitioner: *Chapman-Walker & Shephard.*

Solicitor for respondent: *T. L. Wilson & Co.*

A.M.T.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice Curgenvven and Mr. Justice Pakenham Walsh.

1928,
October 28.

KARUTHASWAMI SERVAL, IN RE (ACCUSED), PETITIONER.*

Ss. 110, 117, 118 and 256, 257, *Criminal Procedure Code* (V of 1898)—*Right of a person called to give security for good behaviour, to avail section 256—Applicability to him of section 257.*

Section 256 of the Criminal Procedure Code, which gives to an accused person an absolute right of recalling the prosecution witnesses for cross-examination, is not applicable to a person called upon to give security for good behaviour; but he has the qualified right given by section 257 of the Code. *Chintamon Singh v. Emperor*, (1907) I.L.R., 35 Cal., 243, followed; the observation in *Venkatachinnayya v. King-Emperor*, (1920) I.L.R., 43 Mad., 511, held *obiter* and dissented from.

PETITION under section 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Rāmnād Division at Madura in Criminal Appeal No. 19 of 1928 preferred against the Order of the Court of the District Magistrate of Rāmnād at Madura in M.C. No. 45 of 1927.

This case coming on for hearing, the Court (WALLER and ANANTAKRISHNA AYYAR, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

WALLER, J.—Mr. Grant on behalf of the petitioner raises two points of law. The first is that the notice served on his client did not conform to the requirements of section 112, Criminal Procedure Code. Assuming that it did not, the defect seems to me to have been cured by the fact that he was

* Criminal Revision Case No. 941 of 1928.

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supplied with a copy of the charge-sheet. He next raises a more difficult question. The petitioner, during the enquiry, asked the Magistrate to re-summon some of the witnesses against him for further cross-examination, but his request was refused. Mr. Grant argues that, by virtue of sub-section (2) of section 117, Criminal Procedure Code, the whole of the procedure applicable to a warrant case is applicable to a case of this nature. I have been referred to no authority of this Court that bears directly on the point. Indeed, in the course of a long experience as a Magistrate, I have never come across a case in which it was even suggested to me that the accused in a security enquiry had the right now claimed. There are two decisions by other High Courts which directly negative it. One is *Chintamon Singh v. Emperor*(1). The other is *Bija v. Crown*(2). I should be prepared to follow these decisions but for certain observations that occur in *Venkatachinnayya v. King-Emperor*(3). The question that had to be decided was whether the accused in a security case was entitled under section 350 (a), Criminal Procedure Code, to demand that the witnesses against them should be re-summoned and re-heard, when there was a change of magistracy. The decision was that though the sub-section very clearly refers to a trial and not an enquiry, they were so entitled. With great respect, it seems to me somewhat difficult to reconcile this view with the views expressed in other decisions of this Court as to the distinction between a trial and an enquiry. That, however, is a question that does not arise here. What is material is that two of the Judges, AYLING and COURTS TROTTER, JJ., expressed the opinion that the whole of the procedure governing warrant cases was attracted by section 117 (2), Criminal Procedure Code, to enquiries in security cases of the kind I am now considering. The matter is of considerable importance and, in view of the *obiter dicta* in the 43 Madras case, I think that the following question should be referred to a Full Bench:—

“Is an accused person, who has been called upon to give security for good behaviour, entitled to the benefit of section 256, Criminal Procedure Code?”

I may add that—as pointed out in the 35 Calcutta case—the object of section 256 is to give the accused an opportunity

(1) (1907) I.L.R., 35 Cal., 243.

(2) (1928) I.L.R., 8 Lah., 265.

(3) (1920) I.L.R., 48 Mad., 511.

of further cross-examination directed expressly to the case embodied in the charge, which seems to be superfluous where, as in security cases, the precise charges against him are known to him before the enquiry begins.

ANANTAKRISHNA AYYAR, J.—I agree that the question stated by my learned brother should be referred for the decision of a Full Bench.

ON THIS REFERENCE—

Nugent Grant and *R. Kesava Ayyangar* for petitioner.—Section 117 prescribes that the procedure in these cases is to be as in warrant cases; hence section 256 is applicable; right to cross-examine is a substantive right; *Venkatachinnayya v. King-Emperor*(1). The provision in section 117 (2) that no charge need be framed in cases under section 112 does not preclude a Magistrate from framing a charge if he chooses to frame one. The right given by section 257 of the Code is not absolute but can be exercised only at the discretion of the Magistrate. I rely also on *Emperor v. Tirlok*(2), *Nawab Ali v. Emperor*(3), *Sanatan Bhattacharya v. Emperor*(4) and *Emperor v. Lansha*(5). The decisions in *Chintamon Singh v. Emperor*(6) and *Bija v. Crown*(7) are wrong. There will be serious hardship if this right is denied.

N. S. Mani for Public Prosecutor (*L. H. Bewes*) for the Crown.—Section 256 is not available to the petitioner. The procedure in Chapter XXI relating to trials in warrant cases is applicable only in cases where a person is accused of having actually committed an offence and is charged therewith and not to others like the petitioner against whom there is only an enquiry with a view to prevent the commission of offences. Sections 221 to 223 cannot apply to him and no charge can be framed against him. The notice issued to the petitioner under section 112 has been held to be equal to a charge and the right now claimed under section 256 has been negatived in the last two of the cases quoted above and also in *Ahmad Bakhsh v. Emperor*(8). Section 257 applies to the petitioner and there can be no hardship; see also *Chulan Tewari v. Sukdad Khan*(9).

(1) (1920) I.L.R., 43 Mad., 511.

(2) (1927) I.L.R., 50 All., 71.

(3) (1924) I.L.R., 52 Cal., 470.

(4) (1925) I.L.R., 52 Cal., 632.

(5) (1910) 9 I.C., 468.

(6) 1907 I.L.R., 35 Cal., 243.

(7) (1928) I.L.R., 8 Lah., 265.

(8) (1915) 32 I.C., 676.

(9) (1874) 23 W.R. (Crl.), 9.

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KUMARASWAMI SASTRI, J.—The question referred to us for decision is “Is an accused person, who has been called upon to give security for good behaviour, entitled to the benefit of section 256, Criminal Procedure Code?”

The sections dealing with security for good behaviour are contained in Chapter VIII of the Criminal Procedure Code.

Section 110 empowers the Magistrates enumerated therein to require a person habitually addicted to the commission of offences in clauses (a) to (e) to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding three years as the Magistrate thinks fit. Section 112 provides that, where a Magistrate deems it necessary to require any person to show cause, he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties required. Section 113 says that if the person in respect of whom an order has been made is present in Court, it shall be read over to him or explained to him if he so desires. Section 114 says that if the person is not present in Court, a summons should be issued calling on him to appear. Section 115 requires the summons or warrant to be accompanied by a copy of the order made under section 112 and to be delivered to the person.

Then comes section 117, the section which prescribes the mode of enquiry. It says that when the person appears in Court, the Magistrate shall proceed to enquire into the truth of the information upon which action has been taken and take further evidence as may appear necessary.

Clause (2) runs as follows:—

“Such enquiry shall be made, as nearly as may be practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases, and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed.”

The form prescribed in Schedule V for the summons to be issued under section 114 runs as follows:—

“Whereas it has been made to appear to me by credible information that (then the substance of the information is set out) . . . you are hereby required to attend in person (or by a duly authorized agent) (on a date specified in the form) to show cause why you should not be required to enter into a bond, etc.”

So that Chapter VIII provides for the procedure to be adopted till the enquiry opens and section 117 says that where the order requires security for good behaviour the enquiry shall be made as nearly as practicable in the manner prescribed for conducting trials in warrant cases. Turning to the mode prescribed for the trial of warrant cases which is provided for in Chapter XXI, section 252 provides for the discharge of the accused if no case is made out by the prosecution witnesses.

Section 254 enacts that if the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence, a charge should be framed.

Section 255 requires that the charge should be read and explained to the accused and that he should be asked whether he pleads guilty or has any defence to make and empowers the Magistrate to convict the accused if he pleads guilty.

Under section 256, if the accused refuses to plead, or does not plead or claims to be tried, then he has to state within the period mentioned in the section whether

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he wishes to cross-examine any and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled and after cross-examination and re-examination, if any, they shall be discharged and the evidence of the remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination, if any, they also shall be discharged, and the accused shall then be called upon to enter upon his defence and produce his evidence.

Section 257 runs as follows :—

“(1) If the accused after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

Provided that when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.”

Under section 258, the Magistrate has to record the order of acquittal if he finds the accused not guilty, and if he is guilty to pass sentence according to law.

Section 259 refers to the procedure to be adopted if the complainant is absent and the case is compoundable.

Now it is obvious that under Chapter XXI the Magistrate can frame a charge at any stage of the prosecution case. He is not bound to wait until all the prosecution witnesses have been examined. The

sections following section 254 presume that a charge has been framed and are only applicable on that basis. They also refer to offence and to acquittal.

It is obvious from the provisions of Chapter VIII that no charge is framed, but the procedure till we come to trial is that the Magistrate proceeds *ex parte* until it comes to the stage of sending notice or summons to the person against whom security is required. Then under section 112, the Magistrate gives the substance of the information received and the particulars as to the bond, and then the trial begins.

Reading the provisions of Chapters VIII and XXI, it is clear that so far as the person required to give security is concerned, the trial really commences from the point where notice has been given to him to show cause, which contains the substance of the information and which must be treated as equivalent to a charge, though not the charge itself. In this view effect can be given to all the provisions, and under section 256 the cross-examination of the witnesses should take place as if witnesses examined for the prosecution are witnesses examined after a charge has been framed. Section 257 would apply where for any reason he wants to recall and cross-examine the prosecution witnesses, the Magistrate having a discretion to refuse an application if he is of opinion that the application is made for the purpose of vexation or delay.

It has been argued by Mr. Grant that all that section 117, clause (2), says is that no charge need be framed and that consequently if a Magistrate chooses to frame a charge, then there will be really two charges, one contained in the notice and the other in the charge framed. I find it difficult to see how any Magistrate can, having regard to the provisions of Chapter VIII, frame any charge such as is contemplated by sections 221

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to 223 in Chapter XIX. The words "no charge need be framed" really mean that the charge shall be dispensed with because in the very nature of things it is not possible to frame a charge with the particulars enjoined by sections 221 to 223.

It is also argued that a party cannot know exactly for what he is tried until all the witnesses have been examined and it may be necessary for him to cross-examine the witnesses and that it would be a great hardship if the opportunity given to him by section 256 is not given. Treating it as a mere question of hardship, I think section 257 provides for all reasonable requirements. The Magistrate is bound, if he refuses the application, to state in writing that in his opinion the application is made for the purpose of vexation or delay or for defeating the ends of justice. Except for that reason, the Magistrate is bound to issue process and there is no reason why if the right is going to be abused the Magistrate is still bound to issue summons. I agree with the observations of SHADI LAL, J., in *Ahmad Bakhsh v. Emperor*(1) that if there is no hardship to the other party, under section 257 it is desirable that proceedings under Chapter XXI should not be unduly delayed.

The view I take is amply supported by authority.

In *Chintamon Singh v. Emperor*(2), RAMPINI and SHARFUDIN, JJ., observed:

"No doubt under section 117 of the Criminal Procedure Code the enquiry into bad livelihood cases should be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in warrant cases. But we do not think that the provisions of section 256 of the Criminal Procedure Code indicate that the person called upon to show cause under section 110 of the Criminal Procedure Code has a right to further cross-examine the prosecution witnesses under

(1) (1915) 32 I.C., 676.

(2) (1907) I L.R., 35 Cal., 243.

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section 256 of the Criminal Procedure Code inasmuch as the provisions of this section relate to cases where a formal charge as required by section 254 has been drawn up and the accused has been called upon to meet that charge. In cases under section 110 of the Criminal Procedure Code, the order of the Magistrate under section 112 of the Criminal Procedure Code is equivalent to a charge. The object in giving the substance of the information in an order under section 112 of the Criminal Procedure Code is that the person called upon to show cause may clearly understand the matter that he has to meet in his defence and a Magistrate has no power to go beyond the requirements of his order under section 112 of the Criminal Procedure Code."

In *Bija v. Crown*(1), it was held that a person against whom proceedings have been taken under section 110 of the Criminal Procedure Code has no right to further cross-examine the prosecution witnesses under section 256 of the Code. Sir SHADI LAL, C.J., refers with approval to *Chintamon Singh v. Emperor*(2).

In *Ahmad Bakhsh v. Emperor*(3) SHADI LAL, J., observed:

"In security cases the order passed by the Magistrate under section 112 is equivalent to a charge in a warrant case and the person against whom the order is made is fully aware of what is alleged against him. The evidence is thereafter recorded in his presence and he has every reasonable opportunity of cross-examining the witnesses. There is consequently no conceivable reason why he should be allowed the right of a second cross-examination and why he should thereby protract the proceedings unnecessarily. The reason which underlies the rule as to double cross-examination in warrant cases is entirely absent here, and the principle of *Cessante ratione legis, cessat ipsa lex*, is fully applicable."

The learned Judge follows the view taken in *Chintamon Singh v. Emperor*(2), and dissents from the view taken in *Emperor v. Lansha*(4).

(1) (1926) I.L.E., 8 Lah., 265.

(3) (1915) 32 I.C., 676.

(2) (1907) I L.R., 35 Cal., 243.

(4) (1910) 9 I.C., 468.

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Mr. Grant has referred us to *Venkatachinnayya v. King-Emperor*(1). The question there for determination was whether section 350 (1), proviso (a) of the Criminal Procedure Code, which refers to change of magistracy during the pendency of a trial and the right to have a *de novo* trial applies to security proceedings, and the Full Bench held it did. In dealing with the question however there are observations of AYLING and COUTTS TROTTER, JJ., to the effect that the accused had a right under section 256 to recall the prosecution witnesses. These observations are in my opinion *obiter dicta* as the learned Judges were not there dealing with the right now claimed.

Reference has also been made to *Emperor v. Lansha*(2), which is a case decided by the Chief Court of Burma, where it was held that section 256 of the Criminal Procedure Code is applicable to proceedings under section 110 by virtue of the provisions of section 117, clause (2) of the Code. There is no reference to any authorities, and this case is dissented from in *Bija v. Crown*(3).

In *Emperor v. Tirlok*(4), BOYS, J., after referring to the provisions of section 117 and the provision that no charge need be framed, observed:

"The reason for the exception is obvious. What is equivalent to a charge has already been framed in the order served upon the accused in accordance with section 112."

The learned Judge then goes on to deal with sections 254 and 255 and observes that at any stage of the proceedings the Magistrate, if he is *prima facie* satisfied that there is a case against the accused, may interrupt proceedings for the purpose of asking the accused whether he pleads guilty or whether he has any defence to

(1) (1920) I.L.R., 43 Mad., 511.
(3) (1926) I.L.R., 8 Lah., 265.

(2) (1910) 9 I.C., 468.
(4) (1927) I.L.R. 50 All., 71.

make and that if he does so and the accused wishes to defend, then the accused can recall for cross-examination witnesses examined up to that stage, and if the Magistrate does not do so but waits till all the prosecution witnesses are called, the accused can, when he is asked if he wishes to defend, ask for the recall of prosecution witnesses. It seems to me that if the notice under section 112 is equivalent to the charge and if when that notice is read to accused he has the option of either executing the bond or denying his liability to do so, there is no necessity for the Magistrate interrupting proceedings. He cannot again issue a notice under section 112 and there is no analogy to a Magistrate in warrant cases framing a charge when only some of the prosecution witnesses are examined and then going on with the rest of the prosecution evidence.

I prefer to follow the view taken in *Chintamon Singh v. Emperor*(1), *Ahmed Bakhsh v. Emperor* (2), and *Bija v. Crown*(3), and would answer the reference by stating that in security proceedings where the other side wants to recall any prosecution witness he has no absolute right to do so under section 256 of the Criminal Procedure Code but has a right under section 257 of the Code.

In this case it appears that the Magistrate rejected the application to re-summon on the ground that section 256 does not give the accused that right. He has not applied his mind to the question whether it is necessary in the interests of the accused that the witnesses should be re-summoned nor does he state that he considered the application was one made for the purpose of delay. Whether this would be a ground for interference is a matter entirely for the Bench to decide.

(1) (1907) I.L.R., 35 Cal., 243. (2) (1915) 32 I.C., 676.
(3) (1926) I.L.R., 8 Lah., 265.

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CURGENVEN, J.—In deciding whether the right to recall prosecution witnesses for cross-examination, given by section 256 of the Criminal Procedure Code, can be claimed under section 117 in security proceedings, it is of assistance to consider why the right is given in the trial of a warrant case. Two answers are possible:—

(1) The charge shows the accused, perhaps for the first time, precisely what he has to meet. The first cross-examination may therefore have been conducted in some measure under a mistaken impression.

(2) Answers elicited from later prosecution witnesses necessitate the further questioning of earlier ones.

If the right had been given on ground No. (2), exercise of it would not have been restricted to the stage immediately after charge, since a charge may be framed before the examination of the prosecution witnesses is completed. It would have been fixed at the close of the prosecution evidence. The fact that the stage in the case at which the right must be exercised is the stage at which the charge is framed supports the view that charge and right are related as cause and effect, and therefore no charge, no right. There is no such right in proceedings where no charge is framed, e.g., summons cases, sessions trials, civil suits.

If the right is allowed in proceedings under section 117, it must be on a less qualified basis than in a warrant case. We must hold that it is exercisable in all instances after all the witnesses for the prosecution have been examined. In so holding, instead of merely applying warrant procedure "as nearly as may be practicable," we should be going beyond it and conceding a right which it does not confer. We should be creating an inflexible rule in security cases where no such inflexible rule exists in warrant cases.

I agree with my learned brother KUMARASWAMI SASTRI, J., that the words "No charge need be framed" can only mean that no occasion can arise for framing a charge; because under section 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of a charge is taken by the "order in writing setting forth the substance of the information received" prescribed by section 112. This order has to be read over to the person in respect of whom it is made, and although the Code does not provide that he should plead to it, it resembles a charge in that it must contain a statement in abstract of the prosecution case.

In 43 Mad., 511, the question for decision, so far as we are now concerned, was whether in security proceedings for good behaviour the effect of sub-section (2) of section 117, Cr.P.C., was to render applicable the provisions of Chapter XXI of the Code, dealing with warrant cases, and those of Chapter XXV, in so far as they deal with the mode of taking or recording evidence in such cases, or whether the sub-section attracted the provisions of all sections of the Code which are applicable to warrant cases. The Full Bench had not to decide which of the provisions of Chapter XXI should be deemed to be inapplicable, so that any observations made upon that question were clearly *obiter*. I do not myself think that AYLING, J., in selecting section 256 as what seems to have been a random illustration, meant that in his view its provisions had necessarily to be enforced. All that he says is that section 350 is as much a matter of procedure as the right to have prosecution witnesses recalled and cross-examined conferred by section 256. Accordingly there was no ground for disputing the applicability of section 350 merely because it occurred elsewhere in the Code. The line of reasoning

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is not vitiated by the circumstance that the provisions of section 256, although a matter of procedure and therefore *prima facie* applicable, may on special grounds be found incompatible with the method of conducting a security inquiry. The observation of COUTTS TROTTER, J. (as he then was) that the whole of the procedure in a warrant case must be adopted, was clearly no more than a generalization.

I agree with the answer to the reference proposed by my learned brother.

PAKENHAM
WALSH, J.

PAKENHAM WALSH, J.—I agree that the order calling on a person to show cause why he should not execute a bond to be of good behaviour is “equivalent to a charge” and there is ample authority for this position. It is impossible to frame a regular charge for several reasons. In the first place it is doubtful whether a person called on to show cause in such a case is an “accused.”

In *Jhoja Singh v. Queen-Empress*(1), it was held that he was, but in *Hopcroft v. Emperor*(2), more cautious language is used that “he stands in the position of an accused person,” and finally in *Binode Behari Nath v. Emperor*(3), it was held that he was not an accused person, so that 23 Cal., 493, must be held to have been over-ruled. *Queen-Empress v. Mona Puna*(4) does not deal with a case of security for good behaviour. No doubt, *Queen-Empress v. Mutasaddi Lal*(5) remains and COUTTS TROTTER, J., in 43 Mad., 511, seems to incline to the same view.

Secondly, it is doubtful if there is any “offence.” In (1920) I.L.R., 43 Mad., 511, AYLING, J., remarked on page 523 that no “offence” is involved in an enquiry

(1) (1896) I.L.R., 23 Cal., 493.

(3) (1923) I.L.R., 50 Cal., 985.

(2) (1908) I.L.R., 36 Cal., 163.

(4) (1892) I.L.R., 16 Bom., 661.

(5) (1898) I.L.R., 21 All., 107.

under Chapter VIII of the Code, and COUTTS TROTTER, J., (as he then was) says :

“If he cannot be said to be “charged” with an offence, it is at least sought to be proved against him that he is a person with criminal or undesirable propensities.”

I agree with my learned brothers in interpreting the words “No charge need be framed” as meaning that no occasion can arise for framing a charge. If the order under section 112, Criminal Procedure Code, which is equivalent to a charge is not a charge, there is no stage at which or process by which it can become anything more. Neither evidence in support of it nor the Court’s opinion that it is *prima facie* proved by the evidence tendered can enable anything else to be framed than an order under the terms of section 112 and the Code does not contemplate two identical charges in the same case.

I agree with my learned brother CURGENVEN, J., in his classification of the two reasons why a right to recall and cross-examine prosecution witnesses is given in a warrant case, and I would say that sections 256 and 257 seem to me to deal respectively with those two rights. The right to cross-examine when the person first knows exactly what the charge against him is, is absolute and is dealt with under section 256. It extends not to all the prosecution witnesses but only to those examined before the charge is framed and the Court may frame a charge at any stage. It does not mean, as we should have to hold that it means, if we accepted Mr. Grant’s argument, a right to recall and cross-examine all the prosecution witnesses.

The right to recall and cross-examine earlier witnesses owing to what may be said by later ones is qualified and is dealt with by section 257. As the “equivalent to a charge” is framed under Chapter VIII

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before any of the prosecution witnesses are examined, the absolute right of recall cannot arise for the first purpose, but the qualified right for the second purpose does exist. It may be noted that Chapter VIII seems to be somewhat defective as it does not expressly provide for an examination of witnesses called for the defence, and the only form of summons given in the appendix, schedule V, is with regard to giving security for keeping the peace.

The balance of authority is certainly against a right of recall and cross-examination of the prosecution witnesses under section 256 (1). The remarks relied on in 43 Mad., 511, are *obiter*. Although the reference to us does not mention section 257, I agree that we should answer the question in the manner proposed by my learned brothers.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

1929
August, 2.

LAKSHMI ACHI AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

NARAYANASAMI NAIKER AND FIFTEEN OTHERS
(DEPENDENTS), RESPONDENTS.*

Mortgage, priority of—Purchaser undertaking to pay two mortgages—Failure of purchaser to pay—Purchaser from purchaser paying only one—Effect of—A selling his share of joint family properties to his brother for discharging his debts—Effect of sale on their joint status—Third party's right to sue on contract.

If in consideration of a sale of certain lands the purchaser agrees to pay certain specific mortgages thereon, he cannot by

* Appeal No. 89 of 1924.

paying only one of them claim priority in respect of that mortgage over others later in date; for the expressed intention was to pay and extinguish all of them; *Govindasami Tevan v. Dorasami Pillai*, (1910) I.L.R., 34 Mad., 119, followed. The same will be the result if, instead of the purchaser paying, an alienee from him paid.

If of A and B, members of a joint Hindu family, A sells his share in some of the family properties, not to a stranger, but to B, A thereafter becomes divided from B in respect of the said properties, without any right of survivorship thereto. *Balakrishna Trimbak Jendulkar v. Savitribai*, (1878) I.L.R., 3 Bom., 54, followed.

If by a sale by A of certain properties to B, B undertakes to pay A's debts thereon, not only out of those properties, but also personally, A's creditors not being parties to this contract, cannot compel B to pay A's debts personally.

APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in O.S. No. 16 of 1922.

The first defendant in this suit executed on 5th March 1914 the mortgage in suit in favour of one Subrahmanyam Chettiyar, the deceased son of the first plaintiff and the husband of the second plaintiff. At that time the first defendant (Narayanaswami Naiker) had a brother, by name, Natarajulu and both formed an undivided Hindu family owning immovable properties. Each of the brothers had before the suit mortgage, incurred simple and mortgage debts, some jointly and others individually. One such joint debt was a mortgage executed in 1909 (Exhibit V) while other mortgages, Exhibits XVI, XVI (a) and XIV, were executed by Narayanaswami alone. Soon after the suit mortgage, Narayanaswami agreed in 1914 to sell his share in all the family properties to his brother Natarajulu, the consideration for the sale being the undertaking by Natarajulu to discharge all the debts binding upon Narayanaswami (16 in number), including debts under Exhibits V, XVI, XVI (a), XIV and the suit mortgage

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(Exhibit A). Natarajulu brought a suit to enforce this agreement to sell and obtained in 1916 a sale-deed through Court in accordance with a compromise decree, comprising the vendor's share in all the family properties except two which were settled on Narayanaswami's wife for her life, the consideration for the sale being the undertaking by Natarajulu to discharge all the debts of Narayanaswami not only out of the properties sold to him but also out of his own properties. Natarajulu himself did not pay the debts but sold some of the properties mortgaged to the plaintiffs (suit items 1, 2 and 16) to the fourth defendant who undertook to discharge the mortgage debt under Exhibit V. Similarly he sold item 15 in this suit to one Guruvappa who undertook to discharge the mortgage debts under Exhibits XVI and XVI (a). Guruvappa, in his turn, sold item 15 to defendants 5 and 6. After Natarajulu died unmarried about the year 1920, his mother, the 2nd defendant, claiming that he was divided from Narayanaswami and that she was Natarajulu's heir got possession of his properties and sold in 1921, suit items 8 and 14 to the 15th defendant to discharge a mortgage decree thereon obtained on Exhibit XIV. In the present suit for Rs. 13,000 brought by the plaintiffs to enforce their mortgage, which was not paid by Natarajulu, defendants 4, 5, 6 and 15 having discharged the mortgages under Exhibits V, XVI, XVI (a) and XIV claimed priority over the suit mortgage. Plaintiff also claimed that all the properties of Natarajulu were liable to discharge the suit mortgage on account of his undertaking, which claim was resisted by the mother and other defendants on the ground that the plaintiffs were strangers to that undertaking. Though the Subordinate Judge found that Natarajulu died undivided and that therefore Narayanaswami was entitled to all the family

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properties by survivorship, he held that the sale by the second defendant (the mother) to the fifteenth defendant was good as there was no objection to it by Narayanaswami. The Subordinate Judge allowed the claims to priority made by defendants 4, 5, 6 and 15 and in other respects allowed the suit, decreeing interest at the contract rate, only up to the date of decree and not up to the date fixed for payment. Plaintiffs preferred this appeal.

S. Varadachariyar and C. A. Seshagiri Sastri for appellants.— Though one of two members of a joint Hindu family sells his share in most of the family properties to the other member, he does not thereby become separate from the other; and the right of survivorship as between the two is not thereby lost; *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1), and *Maharaja of Bobbili v. Venkataramanjulu Naidu*(2). Even if they became divided by that sale, the purchaser by undertaking to pay the vendor's debts as consideration for the sale, becomes liable to pay the debts not only out of the properties sold to him but also out of his own properties; for he is in the position of a universal donee. If the vendor had to pay certain mortgage debts which the purchaser undertook to pay out of the consideration, then the purchaser by paying those mortgages, cannot claim priority by subrogation as against later mortgagees; *a fortiori* if he pays only some of them, as in this case; *Narayanasami Naidu v. Narayana Rau*(3), *Srinivasa Chari v. Gnana-prakasa Mudaliar*(4), *Govindasami Tevan v. Doraisami Pillai*(5), and *Muhammad Sadiq v. Ghaus Muhammad*(6). If the purchaser is not entitled in such a case to any priority, an alienee from him who is directed by the purchaser to pay the mortgages will be in no better position, by paying only the earlier mortgages; *Bisseswar Prosad v. Lala Sarnam Singh*(7). Interest at the contract rate should be awarded not only up to the date of decree but also up to the date fixed for payment.

L. A. Govindaraghava Ayyar and P. N. Appuswami Ayyar for the mother (second defendant).—The sale by one member

(1) (1902) I.L.R., 25 Mad., 690 at 717.

(2) (1914) I.L.R., 39 Mad., 265.

(3) (1893) I.L.R., 17 Mad., 62.

(4) (1906) I.L.R., 30 Mad., 67.

(5) (1910) I.L.R., 34 Mad., 119.

(6) (1910) I.L.R., 33 All., 101.

(7) (1907) 6 C.L.J., 134.

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to the other effects a division in status; *Sivagnana Thevar v. Periasami*(1), *Naraganti Achammagaru v. Venkatachalapati Nayanivaru*(2), *Balakrishna Trimbak Jendulkar v. Savitribai*(3) and *Peddayya v. Ramalingam*(4). A purchaser of the equity of redemption is not personally liable to pay the balance due on a mortgage; *Nanku Prasad Singh v. Kamta Prasad Singh*(5) and *Jumna Dass v. Ram Autar Pande*(6). He explained and distinguished the cases quoted by the appellant.

K. Rajah Ayyar and V. Ramaswami Ayyar for fourth respondent (alienee from the purchaser).—A third party to an undertaking cannot take advantage of it. Payment of the earlier mortgage gives a right of subrogation and therefore a right to priority as against later mortgages; *Thorne v. Cann*(7). It is a question of intention of the person paying a prior mortgage, whether he means to keep alive that mortgage; the presumption being that he does so intend as it is for his benefit, though the payment is out of the consideration for the sale; *Dinobundhu Shaw Chowdhry v. Jagmaya Dasi*(8); *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*(9), and *Satnarain Jewari v. Chowdhuri Sheobaran Singh*(10). As there is no covenant running with the land, an assignee from the person covenanting, but not fulfilling his obligation in full is in a better position than the person who covenanted; *Thorne v. Cann*(7). The reason is that the covenant is only personal; *Ayyareddi v. Gopalakrishnayya*(11), *Kasim Moideen Rowther v. Annamalai Thevan*(12). Intention at the time of the covenant may be different from the one at the time of payment and the latter was given effect to in *Har Shyam Chowdhuri v. Shyam Lal Sahu*(13).

JUDGMENT.

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RAMESAM, J.—The suit out of which this appeal arises was filed on the basis of a mortgage bond, dated the 5th March 1914, executed by the first defendant in favour of one Subrahmanyam Chettiyar, who was the son of the

- (1) (1878) I.L.R., 1 Mad., 312 at 325.
 (2) (1881) I.L.R., 4 Mad., 250. (3) (1878) I.L.R., 3 Bom., 54.
 (4) (1888) I.L.R., 11 Mad., 408. (5) (1923) A.I.R., 54 (P.C.).
 (6) (1911) I.L.R., 34 All., 63 (P.C.). (7) [1895] A.C., 11.
 (8) (1901) I.L.R., 29 Calc., 154 (P.C.).
 (9) (1911) I.L.R., 39 Calc., 527 (P.C.). (10) (1911) 14 C.L.J., 500.
 (11) (1923) I.L.R., 47 Mad., 190 (P.C.).
 (12) (1909) 3 I.C., 936. (13) (1915) I.L.R., 43 Calc., 69.

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first plaintiff and the husband of the second plaintiff. At the time of the mortgage, the first defendant had a brother Natarajulu and they were undivided. The plaintiffs claim that the first defendant Narayanaswami was the manager of the family and the mortgage deed was executed for purposes binding on the family. The defendants denied these allegations and contended that the debt is not binding on Natarajulu's share. This point was found by the Subordinate Judge against the plaintiffs, and the plaintiffs who are the appellants before us do not attack this finding so far as the state of things existing at the date of the mortgage is concerned. A few months after the execution of Exhibit A (the suit mortgage), a suit was filed by Natarajulu for specific performance of an agreement to sell Narayanaswami's share of the family properties with certain other reliefs which it is unnecessary to mention. Exhibit C (1), dated the 2nd November 1914, is the plaint, and Exhibit C is the compromise decree passed in that suit, dated the 23rd November 1915. According to the said compromise decree, two of the items included in that suit were settled upon the first defendant's wife for life and all the other properties were to be sold to Natarajulu. In execution of this decree, a sale deed was obtained by Natarajulu through the Court. This is Exhibit C (2), dated the 30th November 1916. The consideration for the sale deed was Rs. 35,000 and the consideration was to be paid by the vendee undertaking to discharge various debts of the vendor. Sixteen debts were enumerated in the sale deed. It is necessary to make particular mention of some of these items. The first item is Narayanaswami's half share of the debt due on a mortgage bond, dated the 11th August 1909, executed by both the brothers (Exhibit V). The fourth item is a sum of Rs. 356-4-0 due wholly by Narayanaswami on a

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mortgage bond, dated the 10th March 1913 (Exhibit XVI). The fifth item is a sum of Rs. 821-4-0 due wholly by Narayanaswami on a mortgage bond executed by him on the 18th November 1913 (Exhibit XVI-a). The sixth item is a sum of Rs. 1,100 due wholly by Narayanaswami on a mortgage bond executed by him on 1st November 1913 (Exhibit XIV). The tenth item is a sum of Rs. 2,675 due wholly by Narayanaswami in respect of Exhibit A. It is unnecessary to refer to the other items. The plaintiffs now claim that Natarajulu's share of the properties also is liable to their debt, first, on the ground that after the death of Natarajulu in 1919, these properties survived to Narayanaswami and the mortgage, Exhibit A, is at least now binding on the whole of the properties and secondly on the ground that Natarajulu having undertaken to pay off Narayanaswami's debts by the sale deed, Exhibit C (2), it has become a personal obligation and he is liable to pay off the debt due to the plaintiffs out of the properties of the family and not merely Narayanaswami's properties. This is the first point argued in appeal, the point having been decided by the Subordinate Judge against the plaintiffs. The second point argued by the appellants is that certain alienees from Natarajulu or his mother, the second defendant, are not entitled to priority over the plaintiffs' mortgage on account of their having paid off certain mortgages of the first defendant earlier in date than the plaintiffs' mortgage. The last point argued in appeal relates to the rate of interest. The second defendant, the mother of the two brothers, claims to be interested in Natarajulu's half share of the properties not sold to the alienees.

Taking up the first point, one subordinate question that arises is whether after the sale deed, Exhibit C (2), the two brothers should be considered as divided or

still undivided. Mr. Varadachariyar, the learned Advocate for the appellants, relied on certain observations of BHASHYAM AYYANGAR, J., in *Aiyyagari Venkataramayya v. Aiyyagari Ramayya*(1). The alienation in that case was by a member of a joint family in favour of a stranger and the point referred to the Full Bench was what fraction of the family property passed to the alienee by the sale deed. The observation relied on is at page 717. I do not think this observation helps the appellants. If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at page 717 amounts to. It almost implies that so far as the properties in which the whole or part of the members' share is sold are concerned, he must be regarded as divided from the other members. But where the sale is not to a stranger but to the remaining members of the family the matter becomes much stronger. The observations at page 268 of *Maharaja of Bobbili v. Venkataramanjulu Naidu*(2) do not go beyond what I have stated above and even if there are any observations in those two cases in favour of the appellants, their value must be discounted on the ground that these observations were made long before the decision of the Privy Council in *Girja Bai v. Sadas Shiv Dhundiraj*(3). In the present case, a careful examination of the terms of the compromise and the provision therein that certain items should go to the heirs of Narayanaswami, and the terms of the sale deed,

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(1) (1902) I.L.R., 25 Mad., 690.

(2) (1914) I.L.R., 39 Mad., 265.

(3) (1916) I.L.R., 43 Calc., 1031.

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Exhibit C-2, showing that some debts were taken as binding on both the brothers and others on Narayanaswami alone—all show the unmistakable intention that the brothers should thereafter be separate. So early as *Balakrishna Trimbak Jendulkar v. Savitribai*(1), such a conclusion was reached. We are of opinion that the finding of the Subordinate Judge on the second issue is unsustainable. On the facts of this case, the presumption of jointness is overwhelmingly rebutted. Therefore, there is no survivorship of the properties of Natarajulu to the first defendant.

It is next suggested that the effect of Exhibit C-2 is to make Natarajulu liable to pay the plaintiffs' debt out of the whole of the properties. In the first place, the sale deed is only of Narayanaswami's share of the properties. They are transferred to Natarajulu in consideration of his paying off Narayanaswami's debts. The only effect of the covenants in the sale deed is that Natarajulu is liable *as between himself and the vendor* to pay off all the debts of the vendor out of all the properties which were the subject of the sale, that is, Narayanaswami's share of the properties, and personally out of other properties of his own; but such a covenant cannot be taken advantage of by the creditors who are no parties to the sale deed and so far as creditors like the plaintiffs are concerned, their remedies are confined to the rights under their documents. The plaintiffs' rights are to sell the mortgaged properties under Exhibit A. It may be that if, by non-payment of plaintiffs' debt by Natarajulu, Narayanaswami was put to trouble of some kind, he can sue Natarajulu for damages by reason of the breach of the covenant; but apart from this, we cannot see how creditors like the plaintiffs can take

(1) (1878) I.L.R., 3 Bom., 54.

advantage of the covenant. Nor can we read anything in the terms of the sale deed to show an undertaking by Natarajulu that he will pay off all the vendor's debts out of the whole of the family properties. On the other hand, portions of the sale deed imply that some of the debts are not binding on Natarajulu at all and he is in no way liable for them and, in the case of other debts, he is liable only to the extent of his half share. It is impossible to spell out of these terms an undertaking of Natarajulu in respect of his own share of the properties for Narayanaswami's share of the debts enuring to the benefit of creditors. The analogy of universal donee is invoked by the learned Advocate for the appellants, but we are not able to say that this analogy helps him. We are, therefore, of opinion that the plaintiffs can recover their debts only out of the half share of Narayanaswami in the mortgaged properties.

The next question that arises is whether certain of the alienees are entitled to priority over the plaintiffs' mortgage. The following table shows the parties claiming such priority over the plaintiffs, the items in the plaintiffs' mortgage in respect of which the priority is claimed, the debts by reason of the payment of which such priority is claimed and the last column shows the amount to the extent to which the priority is claimed:—

Persons claiming priority.	Items in respect of which priority is claimed.	Prior debts paid.	Amount to the extent to which priority is claimed.
(1)	(2)	(3)	(4)
			Rs. A. P.
Fourth defendant ..	Numbers 1 and 2.	Exhibit V ...	4,500 0 0
Fifth and sixth defendants.	Number 15 ..	Exhibits XVI and XVI (a).	3,900 0 0
Fifteenth defendant ...	Numbers 8 and 14.	Exhibit XIV ...	5,500 0 0

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Mr. Varadachariyar, the learned Advocate for the appellant, argued first that as Exhibit C-2 provides for the payment of Narayanaswami's debts by Natarajulu, he can himself claim no priority if he pays some of these debts and does not pay others, and that being so, persons claiming through him can claim no such priority; and secondly, that in the sale deeds of Natarajulu in favour of the various alienees, they were asked to pay the prior mortgages and therefore they cannot claim any priority. Now it is clear that where a mortgagor sells his property to a vendee requiring the vendee to pay off two or three prior debts of the mortgagor and if the vendee pays off only one of them, he cannot claim priority in respect of it over the others, though he may claim such priority in respect of some other debts the payment of which by him was not contemplated. This proposition was decided in *Govindasami Tevan v. Doraisami Pillai*(1) and both branches of the above statement are illustrated by the decision in *Har Shyam Chowdhuri v. Shyam Lal Sahu*(2). In the latter case, it was held that the vendee could claim priority in respect of the debt X and not in respect of the debts Y or Z. This proposition is conceded by the respondents. The question, however, arises how far this disability of the vendee applies to transferees from him. In *Bissessar Prosad v. Lala Sarnam Singh*(3), it was held that the transferee also cannot claim such priority—vide the observations at page 139 of 6 C.L.J., 134, beginning with

“In our opinion, they do not, because they had constructive, if not, actual notice of the debt due to Muniram and of the circumstance that Prayag Lal had assumed payment of it . . . They are, consequently, not entitled to be subrogated to the

(1) (1910) I.L.R., 34 Mad., 119.

(2) (1915) I.L.R., 43 Cal., 69.

(3) (1907) 6 C.L.J., 134.

rights of the mortgagee of the 28th May 1889, whose debt they satisfied.”

In the present case, a perusal of Exhibit C (2) shows the position undertaken by Natarajulu, and all his vendees must be taken to have actual or constructive notice of Exhibit C (2); that is the title deed of their vendor and they cannot pretend ignorance of its contents. No case has been cited to support the contention of the respondents that the transferees stand in a better position than the transferor. There is no analogy between the relative positions of such transferor and transferee and the relative position of the mortgagor and his first transferee who would be transferor as against a second transferee. The relative rights between the two sets of parties are entirely different. The effect of the sale deed, Exhibit C (2), is to calculate all the debts of Narayanaswami up to a particular date and to make them stand on the same footing as on that date. The description of the various items of consideration show that all the debts were calculated up to the 5th October 1914 and the total amount of consideration, Rs. 35,000, was made up as on that date, and neither in the hands of Natarajulu nor in the hands of transferees from him can there be any priority between these various debts, whatever their original dates might have been. It is unnecessary to deal with the larger contention of Mr. Varadachari that wherever there is a covenant by the vendee to pay off a prior debt of the mortgagor, there can be no priority in respect of it. The authorities relied on by Mr. Rajah Ayyar, for example, *Satnarain Jewari v. Chowdhuri Sheobaran Singh*(1) and *Chidambaram Nadan v. Muni Nagendrayyan*(2), show that no such broad proposition can be insisted on and it is safer to rest the decision in each particular case on the

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(1) (1911) 14 C.L.J., 500.

(2) (1920) 12 L.W., 393.

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particular intention in that case derived from the facts and not upon any general formula of that kind. But so far as transferees from the first transferee are concerned, there can be no question of their intention, for they stand in no better position than their transferor and it is unnecessary to examine their intention. After all, the rights conferred upon transferees who pay off prior mortgages for using such prior mortgages as a shield are the result of an equitable doctrine in spite of the fact that the mortgages are extinguished, and where a transferor by reason of his covenants and the transferee by reason of a notice of the transferor's covenants show a different intention, there is no scope for the application of such an equitable doctrine. The decisions in *Kasim Moideen Rowther v. Annamalai Thevan*(1), and in *Thorne v. Cann*(2), do not help the respondents. I therefore hold that the respondents mentioned in the above table cannot claim priority over the plaintiffs' debt in respect of the half share of Narayanaswami's debt under Exhibit V and the other debts of Narayanaswami and the other bonds mentioned in the table.

The other point which arises in the case is the question of interest. There is no dispute about this. The plaintiffs are entitled to the contract rate up to the date mentioned in the decree for payment, namely, the 10th April 1924. The Subordinate Judge allowed it up to the date of the decree and thereafter at 3 per cent per annum. The appellants will be allowed interest at the contract rate up to 10th April 1924, and on the consolidated amount from that date at 6 per cent up to date of payment.

The decree will be modified according to the second and third of the above findings.

(1) (1909) 3 I.C., 986.

(2) [1895] A.C., 11.

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The appellants will pay the costs of the second defendant, Govindammal. The appellants will be entitled to proportionate costs on the amounts in respect of which there is a dispute as to priority from the fifth and sixth (in whose place the fourth defendant has stepped in pending appeal) and from the fifteenth defendant respectively but as to 4th defendant and Exhibit V, the appellants will be entitled to half the costs.

JACKSON, J.—I agree.

The question of the alienees' priority appears to me to be simply one of fact.

They knew that their vendor had undertaken to pay off the mortgages, and they knew that their own sales were effected in pursuance of that undertaking. There is no ground for presuming that with that knowledge they ever intended to keep alive the mortgages which they paid up; and I should find, as a matter of fact, that the idea never crossed their minds. No doubt, as observed in *Gokaldas Gopaldas v. Puran Mal Prem Sukhdas* (1), it may ordinarily be presumed that a man having a right to act in either of two ways has acted according to his interest. But that presumption of fact is rebuttable as shown in *Govindasami Tevan v. Doraisami Pillai*(2). If the party who pays off the mortgage suffers by the presumption not being in his favour, he has only himself to thank for not committing his intention to paper. Although the intention to keep a mortgage alive need not be formally expressed in India, nevertheless such formal expression by way of deed would save parties considerable confusion, litigation and expense.

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(1) (1884) I.L.R., 10 Cal., 1035.

(2) (1910) I.L.R., 34 Mad., 119.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.

1929,
September, 4.

SRI RAJAH BOMMADEVARA NAGANNA NAIDU
BAHADUR AND ANOTHER (DEFENDANTS 1 AND 2),
APPELLANTS,

v.

SRI RAJAH BOMMADEVARA SATYANARAYANA
VARAPRASADA RAO AND FOUR OTHERS (PLAINTIFF AND
THIRD DEFENDANT AND NEW RESPONDENTS), RESPONDENTS.*

*Alluvion and diluvion—Slow and gradual accretions to one shore
of a non-navigable river—Ownership of, when bed belongs
not to the owner of the shore but to another.*

Slow and gradual accretions to one shore of a non-navigable river belong to the owner of that shore, even when the bed of the river belongs to another, in the absence of any fixed boundary marking off the shore from the river-bed.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Bezwada in Original Suit No. 50 of 1923 (Original Suit No. 9 of 1921 in the Sub-Court of Bezwada).

The deceased father of the plaintiff sued in O.S. No. 15 of 1896 his brother, the deceased father of defendants 1 and 2, for partition of the Vallur Zamindari, their family property, and got a decree for partition in 1902, under which the southern half of the Zamindari was later on allotted to plaintiff's father while the northern half was allotted to the defendants' father. The whole Zamindari abutted one side of the river Kistna. Plaintiff brought this suit in 1921 for the recovery of 90 acres of

* Appeal No. 327 of 1924.

land alleging that in the partition effected under the above decree the bed of the river also was divided between the brothers, that his father got the river-bed lying east of the North Vallur, but that the defendants later on encroached upon 90 acres of land which were slow and gradual accretions lying between such river-bed and the defendants' bank. The defendants while admitting the division of the mainland denied any division of the river-bed in virtue of the decree and pleaded that each party was allowed to enjoy the river-bed in accordance with his legal rights, viz., that each was to enjoy the river-bed just opposite to his mainland *ad medium filum aquæ*. The Subordinate Judge held that there was a division of the river-bed as pleaded by the plaintiff and that as owner of such river-bed the plaintiff was in law entitled to the 90 acres, viz., the silted portion, though it lay near the defendants' bank. Plaintiff's claim for mesne profits against defendants 1 and 2 was allowed only for 3 years before suit while the claim for mesne profits against the Government, the third defendant, was disallowed. The defendants 1 and 2 preferred this appeal against the decree and the plaintiff preferred a memorandum of objections claiming mesne profits for more years from the defendants 1 and 2 or in the alternative from the Government. The other contentions raised by both sides appear from the judgment.

V. Ramadas for appellant.—There was no division of the river-bed between the parties in pursuance of the decree. Even if there was a division of it, the portion now claimed by the plaintiff was not allotted to him. The decree is silent about it. Even if the river-bed was allotted to him, the 90 acres which are slow and gradual accretions to the shore belong only to the owner of the shore and not to the owner of the river-bed; *Secretary of State for India v. Rajah of Vizianagaram*(1),

(1) (1921) I.L.R., 45 Mad., 207 (P.C.).

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RAO. *Attorney-General of Southern Nigeria v. John Holt & Co., Liverpool, Ltd.*(1), *Hindson v. Ashby*(2), *Foster v. Wright*(3). He referred to *Micklethwait v. Newlay Bridge Co.* (4), *In re Hull and Selby Railway*(5), *Secretary of State for India v. Rajah of Vizianagaram*(6), *Venkatalakshminarasamma v. Secretary of State*(7), *Secretary of State for India v. Venkatanarasimha Naidu*(8).

K. Kuttikrishna Menon for the first respondent (with *V. Surya Narayana*).—The river-bed also was divided under the decree and the bed east of defendants' mainland was allotted to plaintiff's father. They were regarded as belonging to him; see *Secretary of State for India v. Venkatanarasimha Naidu*(8). The case of *Venkatalakshminarasamma v. Secretary of State*(7), lays down only a presumption as to ownership of accretions; but where the boundaries are well marked or can be clearly proved, as in this case, there is no room for the presumption and the accretions belong to the owner of the river-bed; *Dass on Riparian Rights*, pages 208, 213, *Halsbury*, Vol. 28, page 362; *Hunt on Boundaries*, 5th Edn., page 26; *Coulson and Forbes on Waters*, 4th Edn., pages 37, 38, *Micklethwait v. Newlay Bridge Co.*(4), *Attorney-General v. Chambers*(9), *Attorney-General of Southern Nigeria v. John Holt & Co.*(1). I am entitled to mesne profits for the previous years also, against all the respondents.

V. Govindarajachari for fourth respondent.—The boundary between the shore and the river is well marked by survey stones in this case. In such a case the accretions belong only to the owner of the river-bed; *Attorney-General v. Reeve*(10) and *Ford v. Lacey*(11).

V. Ramadas in reply.—There is no fixed boundary. 45 E.R., 28 is disapproved of in *Hindson v. Ashby*(2).

P. Venkataramana Rao (Government Pleader).—No mesne profits can be claimed against the Government, *Secretary of State v. Varaprasada*(12).

(1) [1915] A.C., 599, 612, 614.

(3) (1878) 4 C.P.D., 438, 446.

(5) (1839) 5 M. & W., 328; 151 E.R., 139.

(6) (1916) I.L.R., 40 Mad., 1083.

(2) [1896] 2 Ch., 1.

(4) (1886) 33 Ch.D., 133 at 152.

(7) (1918) I.L.R., 41 Mad., 840.

(8) (1919) 11 L.W., 256.

(9) (1859) 4 De. G. and J., 55; 45 E.R., 22.

(10) (1885) 1 T.L.R., 675.

(11) (1861) 7 H. & N., 151; 158 E.R., 429.

(12) (1929) A.J.R. (Mad.), 520.

PAKENHAM WALSH, J.—This appeal arises in the following circumstances. The plaintiff's father and the father of defendants 1 and 2 were brothers and owned the Zamindari of Vallur. The plaintiff's father who was the junior brother brought a suit for partition in 1896 and obtained a decree against the father of defendants 1 and 2 (Exhibit QQ) in O.S. No. 15 of 1896, dated 31st March 1902. In the division made at this partition South Vallur fell to the share of the plaintiff's father and North Vallur to that of the father of defendants 1 and 2. The river Kistna had been corroding its banks and the Government started conservancy operations in 1893. The conservancy operations resulted in a gradual accretion to the mainland on the Vallur side of about 704 acres. The father of defendants 1 and 2 claimed the accretions as his own as being the owner of the foreshore. He brought a suit in 1912. The Government opposed his claim on the ground that the river was navigable. The plaintiff's claim in that suit was allowed; vide *Secretary of State v. Venkatanarasimha Naidu*(1). The present plaintiff whose father had died was a minor at the date of this litigation and his estate was under the Court of Wards. There was no representation made by the Court of Wards during this litigation that he had any claim to any part of the accretions. The Government was ordered in that suit to pay about three lakhs mesne profits to the plaintiffs. On attaining his majority the present plaintiff has filed the present suit saying that 90 acres out of the 704 acres of accretion belonging to him were wrongly taken possession of by the father of the defendants. He bases his claim on an assertion that at the time of the division the eastern portion of the river-bed

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(1) (1919) 11 L.W., 256.

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which adjoins North Vallur was assigned to his father and that as these 90 acres formed part of the river-bed he is entitled to them. Two questions therefore arose in the suit, one of fact and one of law. The question of fact was whether the river-bed was divided at the partition so as to award its eastern half to the plaintiff's father. The question of law is whether, assuming that the river-bed belonged to his father, the accretion to the mainland would belong to the plaintiff or defendants. It is not denied that it is a gradual accretion and has been caused by the planting of nannul grass during the river conservancy operations. The lower Court has found that the river-bed was divided in the manner alleged by the plaintiff and, on the question of law, that he is entitled to the accretion which then formed part of the river-bed. It has therefore given a decree for recovery of possession of the suit land against defendants 1 and 2, subject to the provisions of the Rivers Conservancy Act. It has allowed the plaintiff mesne profits to be recovered from defendants 1 and 2 for faslis 1330, 1331 and 1332; but it has disallowed his claim for mesne profits as against the third defendant, the Secretary of State for India. Against this decree, defendants 1 and 2 have preferred this appeal.

The initial difficulty which the plaintiff has to meet is that the decree on which his whole claim rests—for it is admittedly not based on his possession—is entirely silent as to the alleged division of the river-bed contended for by him. We specially sent for the decree, plans and records connected with it from the District Court, and there is no such division, as the plaintiff alleges, dividing the river-bed, to be found on the record. The contention of the defendants is that the river-bed continued to be enjoyed after the partition in the legal manner, i.e., the party owning land on the mainland

enjoyed the river-bed up to a half of its width and the other half was enjoyed by the party who owned the lanka opposite and as regards the bed between any two lankas each party enjoyed a half if one of the lankas belonged to each of them and the whole if one of them owned both the lankas. That being the normal and legal mode of possession, it rests very heavily upon the plaintiff to show that the method of division by which he got the entire river-bed east of a certain line drawn by the Special Deputy Collector, Mr. Nageswara Rao, P.W. 2, is a fact.

[After discussing the evidence on this point, his Lordship concluded as follows:]

Differing therefore from the view of the lower Court, we hold that the plaintiff has failed to prove that the eastern portion of the river-bed adjoining the North Vallur Estate was granted to his father at the time of the partition; and, if he fails to prove this, it must be held that the partition was made as contended for by the defendants that each riparian or lanka owner enjoyed up to the middle portion of the stream adjoining his share or lanka. In view of this finding, it is unnecessary to discuss at length the second question, whether, assuming that the plaintiff has proved that the river-bed is his, he is entitled to the accretions claimed. But we would hold against him on this point also differing from the view of the law taken by the lower Court.

The principle that the riparian owner owns a half of the river-bed *ad medium filum aquæ* is of course not disputed. In *Venkatalakshminarasamma v. Secretary of State for India*(1), which followed *Micklethwait v. Newlay Bridge Co.*(2), it was laid down that as regards a grant of land in India described as bounded

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(1) (1918) I.L.R., 41 Mad., 840 (F.B.).

(2) (1886) 33 Ch., 138.

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by a non-navigable river, the onus of showing that the grant did not cover the bed *ad medium filum aquæ* was on the grantor. That even where the owner of the river-bed is different from the riparian owner, a gradual accretion to the shore will belong to the riparian owner and not to the owner of the river-bed is laid down by the Privy Council in *Secretary of State for India v. Rajah of Vizianagaram*(1). There the accretion was in the Gōdāvari river at a point where it was tidal and navigable and the bed was the property of the Government; it was nevertheless held that the accretion belonged to the riparian owner. That case is really sufficient to settle the whole matter before us. But as the learned Subordinate Judge has taken a different view of the law and there has been some discussion on it before us, the matter may be pursued a little further. In *Foster v. Wright*(2), it was held that the person who possessed fishery rights in a river was entitled to fish in that part of the river which had covered the riparian owner's lands by gradual encroachment. So also, in *In re Hull and Selby Railway*(3), it was held that, where there was a gradual encroachment by the sea upon land, the land covered by the water belonged to the Crown. In *Hindson v. Ashby*(4), the view of ROMER, J., that a strip of land formed by gradual accretion in a river belonged to the landowner and not to the person possessing fishery rights in the river was upheld. But on the facts it was found not to be a case where the accretion was gradual. *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Ltd.*(5) is a case where the principles of gradual accretion do not apply; but there are some remarks which bear on the present

(1) (1921) I.L.R., 45 Mad., 207.

(2) (1878) 4 C.P. D., 488.

(3) (1889) 5 M. & W., 323; 151 E.R., 139.

(4) [1896] 2 Ch., 1.

(5) [1915] A.C., 599.

case and they will be quoted later. The learned Subordinate Judge has referred in paragraph 38 to the Bengal Regulation, XI of 1825; but that has been held to be not applicable in Madras; vide *Surya Row Bahadur v. Secretary of State for India*(1). The present also is not a case of a small, shallow river silting up gradually. Doss's Tagore Law Lectures on the Law of Riparian Rights, page 209, relied on by the learned Subordinate Judge in the same paragraph is not applicable to the present case. The principles applicable to the present case will be found at page 261 of the same book where the learned author states:

“Right to accretions by alluvion.—This right arises *ex jure naturæ* wherever land abuts on a river, whether the bed of the river be the property of the riparian owners as in the case of private rivers, or the property of the Crown as in the case of public rivers.”

Vide also his remarks at pages 151 to 156. The learned Subordinate Judge admits that it was argued before him that the Bengal Regulation was not applicable to the Madras Presidency. But he draws an inference from the decision in *Venkatalakshminarasamma v. The Secretary of State for India*(2), referred to above, that it logically follows from that decision that in the special cases where the ownership of the bank and the ownership of the river-bed adjoining it are in different persons, all accretions formed in the river-bed must go to the owner of the river-bed. That this does not follow has been decided by the Privy Council in *Secretary of State for India v. Raja of Vizianagaram*(3). There is really only one difficulty about the law on the point and that no doubt is a somewhat serious one, namely whether, when there has been

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(1) (1911) I.L.R., 36 Mad., 57 at 61.

(2) (1918) I.L.R., 41 Mad., 840 (F.B.)

(3) (1921) I.L.R., 45 Mad., 207.

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a demarcation of the river-bed, the results of the accretions formed go to the riparian owner or the owner of the river-bed. The learned Advocate for the respondents relies on 28 Halsbury, page 362 and *Attorney-General v. Chambers*(1). This latter case was mentioned in *Hindson v. Ashby*(2), by LINDLEY, L.J., who had also decided *Foster v. Wright*(3), as being apparently opposed to the decisions in *Leigh v. Jack*(4), *Rex v. Lord Yarborough*(5), *Gifford v. Lord Yarborough*(6), and *In re Hull and Selby Railway Co.*(7). What he says is:

"Whether, apart from the Statute of Limitation, the accretions, or the land left by the water, can become the property of the plaintiffs or cease to be the property of the defendant, is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hale de Jure Maris, c.i. and vi., and the Year-book, 22 Ass, fo. 106, pl. 93, to show that the doctrine of accretion does not apply where boundaries are well-defined and known. This may be if the boundary on the waterside is a wall, or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself."

Then he quotes the cases which were opposed to the view and says,

"But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

A full discussion of the law on the point is found in Coulson and Forbes' Law of Waters, fourth edition, pages 82 to 91, and Hunt's Boundaries and Fences, sixth edition, pages 35 to 48.

(1) (1859) 4 De. G. & J., 55, 71; 54 E.R., 22.
(2) [1896] 2 Ch., 1.

(4) (1879) 5 Ex., 264.

(3) (1878) 4 C.P.D., 438.

(5) (1824) 3 B. & C., 91; 107 E.R., 688.

(6) (1828) 5 Bing., 163 H.L.; 6 E.R., 491.

(7) (1859) 5 M. & W., 328; 151 E.R., 139.

There is no evidence at all in the present case that the boundary of the river was demarcated at any time. The learned Advocate for the respondents sought to establish such a state of things from the following statement of D.W. 2:—

"There are survey stones between the metta lands and the plaint lands. There are only the big stones planted at a distance of one furlong each by the River Conservancy Department."

The witness admits that he never inspected the plaint lands subsequent to the suit to see whether there were any survey stones. But in any case there is no evidence at all that the Conservancy Department planted any stones to demarcate the boundary of the river. Then it is attempted to be argued that because the defendants' riparian lands were surveyed, the western boundary of these lands must be taken to be the limits of the estate and also to be the eastern boundary of the river. Apart from the fact that it is not shown that defendants had any notice of such survey, this argument is clearly illusory, because as remarked before, if land on the bank of a river which is gradually silting up is surveyed at any particular time, though this will of course show the then limits of the riparian owner's property, it does not mean that it is the demarcated and fixed limit of the river-bed, and in the present case it is not even clear from the evidence that survey stones were planted along this western boundary of the defendants' land. In *Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool), Ltd.*(1), it is observed:

"It need no longer be matter of doubt that the operation of the rule of adding to the ownership of riparian lands the property of the soil *ad medium filum* is not interfered with on

(1) [1915] A.C., 599 at 612.

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account of a specific or scheduled measurement of the land, a delineation or colouring on a plan, which measurement, delineation or colouring does not in fact include any part of the bed of the river or of the street."

Hunt's Law of Boundaries and Fences, 6th edition, page 48, deals with this question of a marked boundary, where the author says :

"Finally, it is submitted that the true solution of this troublesome question of accretion is to be found in the question—Yea or nay, was the boundary according to the intendment of the parties interested in its delimitation fixed by reference to a physical feature, subject to the incident of alteration through natural causes which is necessarily inherent in such a feature ; or was it fixed by reference to the position of that physical feature as it then subsisted."

Now, taking the plaintiff's case as he puts it, there cannot, we think, be the smallest doubt that the proposal of the Special Deputy Collector, which the plaintiff says was carried into effect, was to give the river-bed to the plaintiff's father irrespective of any fixed boundary of such river-bed. There is not the smallest mention in any of his proposals of any fixed boundaries he proposed to give as those of the river-bed. Even in the plaint, this is clearly the attitude taken up. In paragraph 5, the plaintiff states that at the time of the partition the Special Deputy Collector drew a line bisecting the Kistna paya between certain lankas in such a manner that the river portion on the eastern side thereof and the lankas therein might fall to the share of South Vallur (i.e., the plaintiff's estate). In paragraph 6 he says that in accordance with the aforesaid partition the plaintiff's estate alone was entitled to the river portion on the eastern side and the lankas, and he further states in that paragraph that all the accretions newly formed such as lankas, etc., springing up in this plot passed only to the plaintiff's estate. It is not asserted in the plaint

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that the western limit of the defendants' metta lands was to be considered as the eastern boundary of the river. On the point of law, therefore, even assuming that the plaintiff's father was assigned the river-bed east of the line drawn by the Special Deputy Collector, the accretions will still belong to the defendants who are riparian owners and the suit must fail and the appeal must be allowed.

The memorandum of cross-objections put in by the respondent must therefore also be dismissed. They relate to mesne profits paid by the Government to the defendants 1 and 2 as a result of the decree in the previous litigation. It becomes unnecessary to consider the question whether such money can be pursued by the plaintiff and recovered from the hands of defendants 1 and 2. But we may say as regards the alternative claim for its recovery from the Government that it is clearly untenable for the reasons stated by the learned Subordinate Judge in paragraph 47 of his judgment. Vide also *Secretary of State v. Varaprasada*(1).

The appeal will therefore be allowed throughout with costs in both the Courts and the plaintiff's suit dismissed. The memorandum of cross-objections is also dismissed with costs.

KUMARASWAMI SASTRI, J.—I agree and have nothing to add, as my learned brother has dealt fully with all the points raised.

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(1) (1929) A.I.R. (Mad.), 520.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

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NARAYANAN THIRUMUMPU AND ANOTHER (FIRST DEFENDANT AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

MOOTHA PODUVAL AND 23 OTHERS (PLAINTIFFS 1 TO 3, 5 TO 12, DEFENDANTS 2 TO 13 AND LEGAL REPRESENTATIVE OF 2ND DEFENDANT), RESPONDENTS.*

Trust—Suit by one trustee of a public trust against another merely for accounts, whether maintainable.

A suit by a trustee against his co-trustee demanding merely an account of the defendants' management, without an allegation of any specific breach of trust or threatened breach of trust by the defendant, is not maintainable. This rule applies not only to private trusts but to public trusts also; *Jamnadas Gordhana Das v. Damodaradas Chunilal*, (1926) 103 I.C., 225, followed.

APPEAL against the decree of the Court of Subordinate Judge of Tellicherry in Original Suit No. 18 of 1925.

The facts appear from the judgment.

K. P. M. Menon and *K. Kuttikrishna Menon* for the appellant urged the arguments mentioned at the end of paragraph 2 of the judgment below and quoted *Jamnadas Gordhana Das v. Damodaradas Chunilal*(1) as holding that one trustee cannot sue his co-trustee merely for accounts in the absence of a breach of trust already committed or about to be committed.

Advocate-General (A. Krishnaswami Ayyar) and *P. Govinda Menon* for respondent—Such a suit lies. *Appanna Poricha v. Narasinga Poricha*(2), *Meenakshi Achi v. Somasundaram Pillai*(3), Appeals 323 and 368 of 1919 (unreported).

JUDGMENT.

This appeal arises out of Original Suit No. 18 of 1925 on the file of the Sub-Court of Tellicherry which was a

* Appeal No. 127 of 1926.
(1) (1926) 103 I.C., 225.

(2) (1921) I.L.R., 45 Mad., 113 (F.B.).

(3) (1920) I.L.R., 44 Mad., 205.

suit for an account of the management of the Payyanur devaswam by defendants 1 to 6 in their capacity as uralers from 1909, for the recovery of the sum that might be found due as a result of the accounts from the defendants personally and from their family property and for an injunction restraining them from interfering with the management of the devaswam by the eleventh plaintiff who was appointed samudayi by plaintiffs 1 to 10. The claim in respect of the eleventh plaintiff was dismissed by the Subordinate Judge, but the relief in respect of the account was decreed. The first defendant filed the appeal. During the pendency of the appeal he died and his successor, the present karnavan of Thazhēkkatmana, has been added as his legal representative, the second appellant.

The suit devaswam is known as "Grama Kshetram," i.e., village temple, and is a famous temple of North Malabar. It was originally managed by the village council consisting of the karnavans of 16 Nambudri manas and 15 poduval Karalars, ten of them being mootha poduvals and five elaya poduvals. Ten poduval families of the village are each entitled to send one mootha poduval to the temple council, the nominees being the karnavans thereof. Five of the said families have the further privilege of sending their representatives, the senior anandravans, to the same council who would be styled as "Elaya Poduvals." The first seven plaintiffs in this suit are mootha poduvals and plaintiffs 8 to 10 are elaya poduvals. The eleventh plaintiff also claimed to be an elaya poduval. After the suit was filed, the fourth plaintiff died and it was claimed for the plaintiffs that the eleventh plaintiff became a mootha poduval after having performed the Moopu Thazhal ceremony and his place as elaya poduval devolved upon the twelfth plaintiff. Defendants 1 to 6 are karnavans of six of the Nambudri

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manas and they are admitted to be Uralers. Defendants 7 to 13 are, some of them, mootha poduvals and some elaya poduvals who have not performed the Moopu Thozhal and Elama Thozhal ceremonies. The plaintiffs claimed that defendants 1 to 6 should render them an account in respect of the management of the devaswam from 1909. The defendants pleaded that the first defendant acquired the hereditary right of samudayam by prescription. They also pleaded that there were seven manas who have co-uraima right in the temple and the suit is bad on account of their non-joinder. They denied the right of the eleventh plaintiff to manage the temple and the liability of the first defendant to render an account. As already mentioned, the Subordinate Judge found that the appointment of the eleventh plaintiff could not be upheld and dismissed that portion of the suit. In appeal the appellant urged several objections: (1) that the karnavans of the Thazhekkat mana are perpetual and hereditary samudayis, (2) that the suit is bad for non-joinder on account of not having impleaded at least two Nambudris, namely, the karnavans of Thavath and Thattiyeri manas, (3) that a suit for accounts by a Uraler against a Co-Uraler without an allegation of breach of trust or a threatened breach of trust is not maintainable, (4) that the tarwad of the first defendant is not liable for the misfeasance of the first defendant or unless it is shown that the tarwad was directly benefited by getting possession of the funds belonging to the trust, and (5) that, in any event, as the first defendant became karnavan only in December 1922 the relief for an account should not extend beyond the period from December 1922 to October 1924 when the first defendant died.

There has been continuous litigation between the poduval Karalars on the one hand and the Nambudri

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Tirumumpus (Uralers) on the other for a number of years in respect of this devaswam. For a long time the karnavans of Thezekkat mana were claiming to be the perpetual samudayees of the devaswam under a document which has been found not to be genuine and latterly the first defendant has been asserting the right by reason of adverse possession. Though some of the Nambudri manas became extinct, attempts to revive some of the extinct manas by adoptions into those manas seem to have been made. One such attempt in respect of the Rayara Mangalath mana seems not to have been questioned and to have been recognized even by the poduvals. The karnavan of that mana is the second defendant in the present case. In respect of two other manas, the Thavath and Thattiyeri manas, similar adoptions were set up and the persons so affiliated into these manas having married female members of the Thazekkat family were allowed to take part in the management of the trust. They were joined as parties in Exhibits I, II and III which were kanom deeds and in Exhibit XI, a kuzhikanom deed, and in fact, wherever the document did not stand in the name of the first defendant alone but in the name of several Uralers, they seem to have been allowed to come in. But the poduvals never admitted their rights. On one occasion while not admitting their rights, the poduvals impleaded these two individuals as defendants. That was a suit for defining the ceremonies which a karnavan has to undergo for becoming a mootha poduval and for an injunction against the Uralers. The judgments in connexion with that litigation are Exhibits HH, JJ and KK (AAA being the decree). It came up on second appeal to the High Court. In another litigation the suit was by some of the Uralers impleading the karnavans of the Thavath and Thattiyeri manas as defendants. The other defendants

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pleaded that these two had no uraima right and the District Munsif found against the right (Exhibit VII). On appeal by them the Subordinate Judge of North Malabar found that there was a usage according to which their adoption into the Nambudri families of Thavath and Thattiyeri manas should be recognized as valid and allowed the appeal (Exhibit VIII). We are now invited to consider the question of the validity of the adoption of these two individuals into their respective manas and if we find them valid, to dismiss the suit on the ground of non-joinder. It is even suggested that we should first implead them as parties so as to avoid the inconvenience of deciding the question behind their back. We may at once say that we do not see any reason to follow the latter course and as we think that the case can be disposed of on other grounds, we do not feel it necessary to decide on the status of these two individuals. They have given evidence as D.Ws. 4 and 9 showing that they were recognized. Exhibit DD is another judgment in a suit in which they joined as plaintiffs, but nothing was decided. In our opinion, this question of non-joinder among other questions in the case need not be disposed of in this suit, as we think that the suit can be decided on simpler grounds.

It is contended for the appellant that a mere suit for accounts against a trustee by a co-trustee without an allegation or breach of trust or threatened breach of trust is not maintainable. Paragraph 5 of the plaint alleges that the Uralers

"have neither increased funds nor acquired property to the devaswom On demand being made of the defendants 1 to 6 to render accounts and to hand over to the devaswom the money on hand for the period the Uralers exclusively conducted the management without the junction of the Karalars, they have not done so. They have not even sent a reply for the registered notice sent to them."

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Defendants 2 to 6 say that for a long time, i.e., from the time when the temple was restored after its destruction during the invasion of Tippu Sultan, the first defendant's mana was practically looking after the management and conducting the affairs of the temple, and therefore they are not liable. The Subordinate Judge has found that defendants 2 to 6 have never taken part in the management of the devaswam though they are nominally Uralers. There is a general allegation in paragraph 5 of the plaint that

"As the defendants 1 to 6 and their predecessors appropriated the devaswom funds to their tarwads, the said defendants 1 to 6 are liable to the devaswam even in the capacity of karnavans of their manas."

This is a very general allegation for the purpose of making not only defendants 1 to 6 personally liable but also liable in the capacity of karnavans. It is not an allegation made for the purpose of making out a breach of trust or a threatened breach of trust justifying a suit for an account. The allegation is too general and vague and does not relate to any particular period or particular amount and it is not clear whether any one of the defendants is charged or their predecessors are charged with the appropriation of funds. It is true that it has been held by this Court that a suit by a trustee against a co-trustee does not require the sanction of the Advocate-General or the Collector under section 92 of the Civil Procedure Code (vide *Appanna Poricha v. Narasinga Poricha*(1), approving *Meenakshi Achi v. Somasundaram Pillai*(2)). But it was not decided in those cases that any suit by a trustee against a co-trustee on any cause of action whatever is maintainable. In the present case, the cause of action is said to be the appointment as Samudayee of the eleventh

(1) (1921) I.L.R., 45 Mad., 113 (F.B.). (2) (1920) I.L.R., 44 Mad., 205.

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plaintiff on the 14th of June 1924 by a yogam consisting of the plaintiffs and defendants 7, 8 and 9 and other Karalars and the obstruction of the eleventh plaintiff. The appointment of the eleventh plaintiff was not upheld by the Subordinate Judge. The question arises whether there is any other ground for maintaining a suit by the other plaintiffs against the defendants. In the Full Bench decision in *Appanna Poricha v. Narasinga Poricha*(1), the right of the plaintiff as co-trustee was denied. The plaintiff was in possession of the mutt only; but the defendants got possession of the lands and the plaintiff had to incur expenses in connexion with the management of the mutt out of his own pocket. He had therefore to sue for a declaration that he was a co-trustee entitled to joint possession of the lands belonging to the mutt, for re-imbursement of the moneys spent by him, for a scheme for the future management and incidentally for an account. In *Meenakshi Achi v. Somasundaram Pillai*(2) also, the suit was for a declaration of the plaintiff's right to share in the management and for joint possession of the trust properties, the plaintiff's right being denied by the defendants. In fact there was an alternative claim in that suit that the plaintiff was solely entitled to the management. The respondent also relied on the unreported judgments of WALLIS, C.J. and OLDFIELD, J. in Appeals Nos. 323 and 368 of 1919. In Appeal No. 323, the parties were entitled to possession of the trust by turns and the plaintiff sued to recover possession of the properties because his turn fell in. In Appeal No. 368 also, the facts were similar. I do not see how these cases can help the respondents. In the present cases there is no allegation of any specific breach of trust or threatened breach of trust on the

(1) (1921) I.L.R., 45 Mad., 118 (F.B.). (2) (1920) I.L.R., 44 Mad., 205.

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part of the Uralers so as to justify an apprehension on the part of the plaintiffs that they would also be held liable for the breach on the ground that they did not take proper action against their co-trustees which would be a real ground of liability of a co-trustee who was himself not guilty of the breach, and it therefore justifies an action by one co-trustee against another to prevent such a breach—vide Lewin on Trusts, 13th edition, page 249, and Underhill, 7th edition, page 387. These authorities relate to private trusts. But apparently the same principles would apply to public trusts also. In the case of public trusts one mode of investigation provided in England into the conduct of one trustee at the instance of a co-trustee is by applying to the public trustee for an investigation and audit of the condition and accounts of the trust—vide article 441, Vol. 28, Halsbury, 217. Even in the case of a public trust it is said that any single trustee, when aware that his co-trustees are about to commit a breach of trust, may apply to the Court to prevent it—vide, Tudor on Charities and Mortmain, 4th edition, page 249. Where a breach has been committed, no doubt he can also sue. Where his own position as co-trustee is denied, he can also sue. But a mere suit asking the defendants to render an account of their management without any allegation of breach of trust which has been committed or is about to be committed does not seem to be maintainable and to hold that such a suit is maintainable will be to allow any trustee wantonly to sue his co-trustees for accounts. The moment the litigation in respect of one period is finished, another litigation in respect of another period will commence and so on *ad infinitum*. I do not think the policy of the law is to allow such a state of things. In *Jamnadas Gordhana Das v. Damodaradas Chunilal*(1),

(1) (1926) 108 I.C., 225.

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it was held by the Bombay High Court that a trustee cannot be regarded as accountable to a co-trustee and all that a co-trustee can require is that he should have inspection of all the papers, documents and accounts relating to the trust estate in the hands of his co-trustee. We agree with this decision. We think that a suit for a bare account—which is the character of the present suit after the right of the eleventh plaintiff was negatived—without any further allegation is not maintainable. On this ground we allow the appeal and dismiss the plaintiff's suit with costs throughout.

Memorandum of objections.—The respondent filed a memorandum of objections questioning the finding of the Subordinate Judge about the validity of the appointment of the eleventh plaintiff. When the appeal was argued, it was argued on the footing that the finding of the Subordinate Judge about eleventh plaintiff should stand. No indication was given by the respondents that they proposed to question that finding. Nor was argument addressed on the Memorandum of objections.

Apart from this, we think the finding is right. The second defendant having succeeded to the karnavanship of his mana, *ipso facto* becomes a Uraler, no ceremonies being necessary for the Nambudris. It is for the poduvals to give notice to the Uralers and to find out who the Uralers are, at their risk. The notice to the predecessors of the second defendant ceases to operate with his death.

The Memorandum of objections is dismissed with costs.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.*

PITCHAYYA AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

VENKATAKRISHNAMACHARLU AND ELEVEN OTHERS
(DEFENDANTS 1, 2, 4 TO 11 AND LEGAL REPRESENTATIVE OF
THIRD DEFENDANT), RESPONDENTS.*

1929,
September,
13.

*Civil Procedure Code (Act V of 1908), s. 92—Sanction for a
“scheme suit” obtained by three—Suit filed by two only,
including other reliefs—Maintainability of.*

A suit under section 92, Civil Procedure Code, must be instituted by *all* those who obtained the sanction; if not, it is invalid and the defect cannot be cured by impleading such of those who have not joined as plaintiffs, as defendants to the cause; *Maddala Bagavannarayana v. Vadapalli Perumallacharyulu*, (1915) 29 M.L.J., 231 and *Venkatesha Malia v. Ramayya Hegade*, (1914) I.L.R., 38 Mad., 1192, followed. Considerations before granting sanction pointed out.

Where a sanction was given under section 92, Civil Procedure Code, to file “a scheme suit in respect of the affairs” of a temple, no relief can be given in respect of any other matter, e.g., removal of the trustee or the appointment of new trustees or receiver. *Srininasa v. Venkata*, (1887) I.L.R., 11 Mad., 148, followed.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Bapatla in Original Suit No. 8 of 1924 (Original Suit No. 55 of 1923 in the Court of Subordinate Judge of Bapatla).

The facts appear from the judgment.

Advocate-General (A. Krishnaswami Ayyar) with P. V. Vallabhacharyulu and K. Viswanatha Sastri for appellants.—The evidence points to a dedication of property only for the God in the temple and not for the benefit of the archakas. A

* Appeal No. 418 of 1924.

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scheme suit is not like a private suit. Death of parties does not abate it; nor the neglect of plaintiffs to conduct the suit. So long as the minimum number of two file the suit, there is no defect of parties. The fact that one of the three persons who got the sanction did not join as a plaintiff but was made a defendant does not vitiate the suit, but cures the defect, if any. He did not repudiate the suit in the lower Court; nor does he do so now; there is now a petition here to transpose him as plaintiff. A suit for a scheme is a substitute for a representative suit; the words in Romilly's Act are "any two or more"; *Kumaraswami Asari v. Lakshmana Goundan*(1), *Alagappa v. Muthiah*(2), *Sayyed Gulam Gouse Sha Sahib Kadiri v. Dost Muhammad Khan Sahib*(3), *Jekkam Reddi v. Sir S. Subramania Ayyar*(4), *Raja Anand Rao v. Ramdas Daduram*(5), *Arumuga Thambiran v. Namasivaya Pandara Sannadhi*(6), *Kunhan v. Moorthi*(7), *Maddala Bagavannarayana v. Vadapalli Perumallacharyulu*(8) is wrong.

S. Varadachari with V. Govindarajachari and K. Kameswara Rao for respondents.—The suit is not a *bona fide* one; that is why the third petitioner did not join in filing the suit. The sanction is only for filing a suit for a scheme; but the prayers are also for removal of the defendants from trusteeship, appointment of new trustees and for a receiver. The suit brought being different from the one sanctioned, it was rightly dismissed, *Srinivasa v. Venkata*(9). The policy of requiring sanction under section 92 is to prevent frivolous and vexatious suits by paupers against honest trustees; *Venkatasesha Malia v. Ramayya Hegade*(10). This case and *Maddala Bagavannarayana v. Vadapalli Perumallacharyulu*(8) hold that, unless all those who got the sanction join as plaintiffs, the suit should be dismissed. The endowment is for the support of the archakas.

Advocate-General in reply.—Section 92 does not give a personal right. It does not contain the word "sanction" but only "consent." Consent to three is consent to two. Sanction to file a scheme suit enables the inclusion of other reliefs, e.g., removal of trustees, *Venkatacharyulu v. Suryanarayana*(11).

(1) (1927) 54 M.L.J., 629.

(3) (1924) 47 M.L.J., 745.

(5) (1920) I.L.R., 48 Calc., 493 (P.C.).

(7) (1910) I.L.R., 34 Mad., 406.

(9) (1887) I.L.R., 11 Mad., 148.

(2) (1917) I.L.R., 41 Mad., 287.

(4) (1920) I.L.R., 43 Mad., 720.

(6) (1925) I.L.R., 48 Mad., 888.

(8) (1915) 29 M.L.J., 231.

(10) (1914) I.L.R., 38 Mad., 1192

(11) (1928) 27 L.W., 42.

JUDGMENT.

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This appeal arises out of a suit filed under section 92 of the Civil Procedure Code by two plaintiffs who obtained the sanction of the Collector. The Collector's sanction which is filed as Exhibit A in the case runs as follows:—

"Permission under section 92, Civil Procedure Code, is granted to the three persons named below to bring a scheme suit in respect of the affairs of the temple of Sri Varadarajaswami Varu of Pedapullivaru Village, Repalle Taluk, which are reported to be mismanaged by the present trustee:—

(1) Kavata Venkata Subrahmanyam,

(2) Davuluri Pichayya,

(3) Kosaraju Reddayya.

Time six months.

2. The Tahsildar, Repalle, will please report the result at the end of the period."

This sanction was obtained without notice to the defendants but this makes no difference as regards the validity of the sanction. Having got the sanction, two out of the three persons namely, Pichayya and Reddayya, filed the suit. Though the sanction was only given to bring a scheme suit, the prayers in the plaint were—

(1) for a scheme to be framed for the general management of the temple,

(2) for the removal of defendants 1 to 10,

(3) for the appointment of new trustees,

(4) for an order vesting the temple properties in the trustees appointed by the Court,

(5) for the appointment of a receiver and other reliefs.

Obviously, except the first prayer, all the other prayers are outside the scope of the sanction. No relief could have been granted with reference to them. See *Srinivasa v. Venkata*(1).

(1) (1887) I.L.R., 11 Mad., 148.

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Venkatasubramaniam who was the first of the three persons to whom sanction was given did not join as a plaintiff and he was impleaded as the eleventh defendant. It is alleged in paragraph 12 of the plaint that the eleventh defendant was added as a *pro forma* defendant as he was not then available to join as plaintiff. An application is filed before us to transfer him as an appellant. In the affidavit filed by Venkatasubramaniam all that is stated is that after the sanction was obtained he was obliged to leave Pedapulivaru on private business and could not co-operate with the other two persons in filing the suit and that as he was not available even on the last day of limitation the suit had to be filed by the other two persons. He says that he allowed the suit to go *ex parte* as he was willing that it should be prosecuted. The counter-affidavit filed denies the fact that Venkatasubramaniam was not in Pedapulivaru on the date the suit was filed and states that the real reason was that the present appellants and Venkatasubramaniam applied for sanction to file scheme suits both in regard to the temple in question and a Siva temple in Pedapulivaru, that Venkatasubramaniam was interested in the Siva temple, that after obtaining the sanction the appellants refused to file a scheme suit in regard to the Siva temple, for, the archakas of the temple were their friends and belonged to their faction, and that as the present appellants refused to join him in filing the suit with regard to Siva temple, Venkatasubramaniam declined to join the appellants in filing the present suit.

Although the defendants took the objection in the lower Court that the suit was bad because only two of the three persons to whom sanction was given filed the suit and although issues were raised covering that contention, no application was made either by Venkatasubramaniam or by the other two plaintiffs to

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transpose Venkatasubramaniam as a plaintiff in the lower Court.

The Subordinate Judge dismissed the suit. He found on the facts that no misconduct was proved against the defendants (archakas) and he held that the suit as laid was bad as two alone out of the three persons to whom sanction was given could not file the suit. In paragraph 10 of his judgment, the learned Subordinate Judge says :

"The plaintiff's witnesses themselves have admitted that the defendants have been doing the nitya naivedya, deeparathana, tirunakshatralu, and Pakshotsava or Ekadasi utsavams. They won't admit that the Masotsva and Sukravarlu sevas have been done. But these witnesses of the plaintiffs are either partisans of the plaintiffs or are relations of the plaintiffs and most of them have come forward without summons. There is ample evidence on the side of the defendants, which I believe to be true, that the sukravara sevalu and the Masotsvam or the seva on Sravana Nakshatra day in each month also have been done regularly by the defendants 1 to 10 in addition to other sevas not referred to in Exhibit 1 (original trust deed). I therefore find that the defendants 1 to 10 have been doing regularly all the services and sevas referred to in Exhibit 1."

He finds that the defendants are not liable to be removed even assuming that Exhibit 1 creates a trust in favour of the deity.

So far as the first plaintiff is concerned, it is clear from his evidence that he has instituted this suit because of his enmity with the defendants and although in paragraph 8 of the plaint various charges of misconduct have been made, his evidence shows that some at least of the main charges are false. He admits that he and all the defendants have not been on speaking terms for the last 16 years, that during this period he never asked the archakas why they were not properly doing the necessary things for the temple, that for the last 16 years the archakas have not been inviting the karnam

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and the other village officials for the festivals, that the first defendant complained against him for making excess collections as the assistant karnam of the village and that he lost his branch postmastership on account of complaints made by the defendants. The second plaintiff did not venture to give evidence although he alleged several acts of misconduct in the plaint.

We are not satisfied that the non-joinder of Venkata-subramaniam as a plaintiff was due to his absence from the village. If his affidavit is true, he left the village, after the sanction was obtained, on private business and could not co-operate with the other two persons in filing the suit in the lower Court. He says that he was absent even on the last day when the suit had to be filed because the sanction endured only for six months. If his affidavit is true, beyond obtaining the sanction, he took no part in the preparation or the filing of the plaint. This fact would be material in dealing with the other question as to whether the suit is properly framed. The probabilities point to the reason given by the archakas in the counter-affidavit being a true one. We do not think that sufficient reasons have been made out for transposing the eleventh defendant as a plaintiff even assuming that such a transposition would cure the original defect in the institution of the suit. We can find little bona fides in the matter. Although the sanction was only for filing a scheme suit, various charges of misconduct were made in the plaint with a view to support the prayer for the removal of the archakas for which no sanction was given, and these charges have been found to be false. Even on the first plaintiff's own evidence some of the charges could not be sustained. Enmity with the defendants and not a bona fide desire to safeguard the interests of the temple seems to be the main motive for the suit. However, if the plaintiffs can

have a good cause of action, motive would be immaterial, but we refer to this only as a ground for not exercising our discretion in the matter.

As regards the maintainability of the suit, we think that the suit by some only of the persons to whom sanction was given under section 92 would not lie. The object of requiring sanction or permission before such suits are instituted under section 92 is to safeguard not only the rights of the public but also the rights of the institution and the trustees. The suit being a representative suit, it is necessary to see that the persons who come forward are persons who have an interest in the temple and persons who can be safely entrusted with the conduct of the suit. Even though the whole public are technically parties, still the plaintiffs who file the suit have the conduct of the suit and very large powers in the shaping and the conduct of the suit. As a matter of general experience, the public leave it to the plaintiffs to conduct all the proceedings and to take the various steps necessary for its successful prosecution. It is also for the benefit of the institution and of the trustees, because it affords a safeguard against impecunious improper persons coming as plaintiffs and involving the trust in litigation and expense, and it is also a safeguard that the persons are substantial persons from whom if the suit fails the costs can be recovered and not merely men of straw. If two out of three or more persons to whom sanction was given can file a suit, it may be that the substantial persons having got the order take no further part leaving the trustees and the institution remediless as regards the recovery of costs. The authority giving the sanction must consider the various aspects before giving the sanction and one important consideration should be as regards the status and position of those who come forward to represent the community.

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We may in this connexion state that it would be more desirable, before giving the sanction, that notice should be given to the institution or the trustees, although it is not obligatory.

In *Sayad Hussein Miyan v. Collector of Kaira*(1), JARDINE and RANADE, JJ., observed :

"Turning to India it is obvious that the requirement of sanction protects trust funds and the trustees also from vexatious suits, as so great an officer as the Advocate-General will not sanction suits without enquiry about the motives, the merits, the expense, and such bars as limitation."

In *Venkatesha Malia v. Ramayya Hegade*(2), SANKARAN NAIR and SPENCER, JJ., observed :

"Such sanctions for instituting suits against trustees have to be construed strictly without enlarging their scope, the object of requiring sanction being to protect managers from vexatious suits . . . Cases may occur in which it might be inadvisable to grant sanction to a particular individual either on account of his character, personal motives, or his solvency, and yet if he joined with some one whose very name would be a guarantee against the suit being improperly conducted, a Court would be justified in granting a joint sanction where it would have refused leave to the single applicant."

Having regard to these considerations we think that where permission or sanction is given by name to more than two persons, that power should be exercised by them all.

So far as the authorities go, they support this view. The question directly arose for consideration in *Maddala Bhagavannarayana v. Vadapalli Perumallacharyulu*(3), where SIR JOHN WALLIS, C.J. and SESHAGIRI AYYAR, J., held that where sanction is given under section 92 of the Civil Procedure Code to more than two persons, two of them alone cannot sue. It appears from the facts of that case that four individuals obtained the sanction of

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the Collector under section 92 of the Civil Procedure Code and that two of them alone brought the suit alleging that the other two had been gained over by the defendants and they refused to join in the suit. The contention was that, sanction having been given by the Collector to four persons, two of them alone cannot sue without obtaining fresh sanction. The learned Judges, after referring to the terms of section 92, observed :

"We think the language used shows that the persons authorized to sue are all the persons to whom the consent has been given and not any two of them. On the opposite contention, there might be competition between the various persons authorized as to who should sue. Besides, the provision for giving consent to two or more persons shows that the legislature considered that in some cases it might not be desirable for only two to sue. In this connection it is worth mentioning that Romilly's Act, upon which this section was founded, enabled any two persons interested to apply, and that here the legislature has empowered any two or more persons with the consent of the Advocate-General."

A similar question arose as regards the Religious Endowments Act where also sanction was necessary. In *Venkatesha Malia v. Ramayya Hegade*(1), it was held that where sanction to sue is given to two persons under section 18 of the Religious Endowments Act, one of them cannot sue alone and that the sanction granted under section 18 was a condition precedent to the exercise of the right of suit. Section 14 of the Act empowers any person or persons interested in the institution to sue in case of breaches of trust, etc. Section 18 requires previous leave to be obtained from Court. It appears from the report of the case that when the suit came on for trial before the judge who gave the sanction, though no issue was raised, a preliminary objection was taken that the suit was bad

(1) (1897) I.L.R., 21 Bom., 257.

(2) (1914) I.L.R., 38 Mad., 1192.

(3) (1915) 29 M.L.J., 231.

(1) (1914) I.L.R., 38 Mad., 1192.

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for the non-joinder of the other sanction-holder and the Judge upheld the contention.

Reference has been made by the learned Advocate-General to cases of suits by trustees; but those cases have no application as in such cases it is the trust which has the right of action and is the plaintiff and it is sufficient if all the trustees are present before the Court as plaintiffs or defendants. We may mention that even in the case of trusts, where the act which gives rise to the cause of action is an act which has to be done by all the trustees together or in consultation with each other, e.g., putting an end to a lease, it has been held that one or more trustees cannot by simply joining the other trustees give rise to a valid cause of action where the other trustees have not been consulted before the suit was filed. Similarly, cases where it has been held that there is no abatement where one of two plaintiffs who obtains sanction dies or cases where it has been held that you can transpose parties after the suit is filed or allow new persons to come on as additional plaintiffs, would have no application to cases like the present where the question is whether the suit has been rightly instituted. It is only after a suit has been rightly instituted, the public become constructive parties to the suit. If the suit is not properly instituted, there is no question of the Court treating the suit as one which is properly instituted and then remedy any defects by the addition of parties.

We are of opinion that the suit was not properly instituted and should be dismissed on that ground.

In the view we take of the law on this question it is not necessary for us to consider the other question as to whether there is a trust in favour of the temple, the Archakas being only trustees or whether there is a gift to the Archakas subject only to their performing the

services mentioned in Exhibit 1 and any surplus income can be appropriated by them for their own use.

The appeal fails and is dismissed with costs of defendants 1 to 10. On the Memorandum of Objections, we allow Rupees 250 as vakil's fees in the lower Court.
N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

J. A. SANKARA RAJU (APPELLANT IN BOTH APPEALS),

v.

KUPPAMMAL AND THREE OTHERS (RESPONDENTS IN O.S.A. No. 75 OF 1929), AND

THE OFFICIAL ASSIGNEE, MADRAS, AND SIX OTHERS
(RESPONDENTS IN O.S.A. No. 79 OF 1929).*

Presidency Towns Insolvency Act (III of 1909) Second Schedule, art. 18—Validity of sales—Power of Court to consider.

The power of the Court to inquire under article 18 of the Second Schedule to the Presidency Towns Insolvency Act involves also the power to consider the validity of sales, and, if a proper case is made out, not to confirm sales. If there is no reason to set aside, the Court merely confirms the sale.

ON APPEAL from the orders of WALLER, J., dated respectively 9th September and 5th August 1929 and passed in Applications Nos. 1120 of 1929 and 444 of 1929 in I.P. No. 266 of 1928 in the exercise of the Insolvency Jurisdiction of the High Court.

S. Duraiswami Ayyar (A. K. Ramachandra Ayyar with him) for appellant in both appeals.

* Original Side Appeals Nos. 75 and 79 of 1929.

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October, 16.

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V. *Varadaraja Mudaliyar* for first respondent in O.S.A. No. 75 of 1929 and for second respondent in O.S.A. No. 79 of 1929.

A. *Kuppuswami Ayyar* for third respondent in O.S.A. No. 75 of 1929.

M. *Ramachandra Rao* for fourth respondent in O.S.A. No. 75 of 1929.

The JUDGMENT of the Court was delivered by RAMESAM, J.—The facts of this case are as follows:—One Narayanaswami Nayakar became an insolvent. He was adjudicated on the 2nd of July 1928. One of the creditors mentioned in the schedule was Kuppammal. She was described as a mortgagee by deposit of title-deeds. She applied on the 3rd of October for the sale of the secured properties under article 18 of the Second Schedule to the Presidency Towns Insolvency Act. Before her application came on for orders, there was a meeting of the creditors and a composition scheme was settled, according to which the creditors were to be paid Re. 0-3-9 in the rupee; and two guarantors, namely Sankararaja, brother-in-law of the insolvent, and Govindarajulu Nayakar, promised to find Rs. 11,000 to make up the sum required for paying the creditors. They were to be given possession of the residuary assets of the insolvent and the benefit of the good will and possession of the business premises, namely, No. 134, Anna Pillai Street, and an iron safe. The first petition, the application for sanction of the scheme, and the application for sale came on before KUMARASWAMI SASTRI, J., for orders on the 18th of February. All the parties interested in all the three petitions seem to have appeared before him, and, so far as the scheme matter was concerned, handed over a memorandum of consent, and all the petitions were ordered in the following terms:—

“Order in terms within.”

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An order was drafted which purports to be an order disposing of all the three petitions and not merely the composition scheme matter. If there was any mistake in so drafting one order for all the three petitions, there would have immediately been an appeal. We have no doubt that all the three matters were discussed outside the Court and were brought up before the learned Judge for being dealt with in one combined order. The mortgagee Kuppammal afterwards advertised the sale of the properties. The advertisement was dated the 10th of May and the sale was on the 13th of May. One of the guarantors wanted the premises in Anna Pillai Street to be reserved to the last, but Kuppammal would not do it and the properties were sold. The purchasers filed an application for confirmation of the sale and for delivery of possession of the properties. O.S.A. No. 75 is against the order on this petition. WALLER, J., having confirmed the sale, ordered delivery. Another petition was filed by Sankararaja, one of the guarantors, for vacating the order of KUMARASWAMI SASTRI, J., dated the 18th of February. WALLER, J., refused to reconsider that order. O.S.A. No. 79 is against this order.

The power under article 18 of the Second Schedule seems to involve also the power to consider the validity of sales and, if a proper case is made out, not to confirm sales. A formal order of confirmation may not be necessary. If a proper case is made out for setting aside the sale, the Insolvency Court would have such power. If there is no reason to set aside, it merely confirms the sale. We have nothing to do here with the provisions of the Civil Procedure Code confirming sales in execution of decrees. The decision in *Narain Das v. Ramchandra*(1) relied on by the learned advocate for the appellant has no bearing on a matter of this kind. In this case the

(1) (1925) I.L.R., 48 All., 209.

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ground on which the sale was sought to be set aside was that there was misrepresentation and Sankararaja discovered sometime after the order of the learned Judge that Kuppammal was not a mortgagee at all. We have seen his deposition and we do not see any reason to differ from the learned Judge. His attempt to show that the promissory note and the letter showing the deposit of title-deeds were ante-dated does not even seem to have been hinted at in the affidavit and the learned Judge declined to consider that portion of the case. Whether it is recorded as a sale by the Court or as a sale by somebody authorized by the Court, articles 18, 19 and 20 imply jurisdiction of the Court to confirm the sale and refuse to set it aside. The decision in *Jogemaya Dasee v. Akhoy Coomar Das*(1) relates to an application to the Registrar to enquire into title. We have not got to do with a matter of that kind here. The decision of the learned Judge is right and this appeal (O.S.A. No. 75 of 1929) is dismissed with taxed costs of the purchasers.

As regards O.S.A. No. 79 of 1929, the learned Judge was right in refusing to vacate the order as no grounds were made out. He had jurisdiction to order delivery of possession not because of the provision in the Civil Procedure Code relating to such delivery to an auction-purchaser, but he could do so under the Insolvency Act, as all the parties concerned have submitted to the Court's jurisdiction, co-operated in procuring the order for sale, and ought not to be allowed to resist the purchaser's attempt to get possession (see the judgment of WALLIS, C.J., and SPENCER, J., in O.S.A. No. 6 of 1918). This appeal also must fail and be dismissed with taxed costs of Kuppammal.

B.C.S.

(1) (1912) I.L.R., 40 Cal., 140.

ORIGINAL CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Anantakrishna Ayyar.*

IN THE MATTER OF THE DEBTS AND SECURITIES
OF THE LATE G. A. KUPPUSWAMI NAYAGAR,
DECEASED.

1929,
November, 4.

K. KESAVA NAYAGAR (PETITIONER).*

*Indian Succession Act (XXXIX of 1925) as amended by Act
XVIII of 1929—Grant of succession certificate—Jurisdiction
of High Court, Original Side.*

Under the Indian Succession Act (XXXIX of 1925) as amended by Act XVIII of 1929, the High Court on the Original Side has jurisdiction to grant a succession certificate under Part X of the Act.

ORIGINAL PETITION for the grant of a succession certificate under Part X of the Indian Succession Act by the High Court on the Original Side. The petition came on before KUMARASWAMI SASTRI, J., in the first instance. Considering that the application was a novel one on the Original Side and that the Government revenue might be affected, he directed notice to issue to the Government. His Lordship was of opinion that the High Court had jurisdiction to issue the certificate, but having regard to the importance and novelty of the question, he directed that the matter should be set down for hearing before a Bench. At the time of the reference, the Succession Act, curiously enough, contained no definition of "District Judge," and one had to fall back upon the definition in the General Clauses Act, and the arguments and judgment proceeded upon that footing. After the reference and before the case came on before a Bench, Act XVIII of 1929 was passed, which amended the Succession Act by the insertion of the definition of

* O.P. No. 231 of 1929.

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In re.

"District Judge" as "the Judge of a Principal Civil Court of Original Jurisdiction." The referring order of the learned Judge was as follows:—

This is an application for the grant of a succession certificate in respect of certain shares standing in the name of the deceased, and the question is whether a succession certificate can be granted by the High Court under the provisions of the Indian Succession Act (XXXIX of 1925).

The Succession Certificate Act (VII of 1889) has been repealed and its provisions have been incorporated in Part X of the Indian Succession Act. In the Succession Certificate Act, "District Court" was defined as meaning a Court presided over by a District Judge, and as the provisions of that Act referred to a District Court, no applications were made to the High Court for grant of succession certificates, as that Act in terms gave power only to District Courts to grant succession certificates.

There is no definition of "District Court" in the Indian Succession Act, and we have to fall back on the definition of "District Judge" in the General Clauses Act (X of 1897). Section 3, sub-clause 15, of the General Clauses Act defines "District Judge" as the Judge of a Principal Civil Court of Original Jurisdiction but shall not include a High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction.

Part IX of the Indian Succession Act deals with the grant of Probate and Letters of Administration, and Chapter IV commencing with section 264 deals with the practice in granting and revoking Probates and Letters of Administration, and sections 264 to 302 in Chapter IV refer only to the District Judge as the Judge who is to grant probate or letters of administration, and there is no power given to the High Court as such in this chapter.

Section 264 refers to the District Judge as having jurisdiction in granting and revoking Probates and Letters of Administration and the other sections also refer to District Judge.

Section 300 gives concurrent jurisdiction to the High Court. But concurrent jurisdiction can only give the High Court power in such cases where the District Judge would have had the power. It does not confer any independent jurisdiction on the High Court. Section 300 says that

"the High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge".

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In dealing therefore with the definition of District Judge, I think the same interpretation should be given to the word "District Judge" in Chapter IV, which refers to the grant of probates and letters of administration, as in Part X which gives the District Judge jurisdiction to grant succession certificates. It seems to me that if the definition of "District Judge" excludes the High Court altogether, the High Court cannot grant probate or letters of administration under the Indian Succession Act.

Clause 34 of the Letters Patent which gives the High Court jurisdiction in testamentary and intestate matters runs as follows:—[His Lordship quoted the clause.]

The definition of "District Judge" as given in the General Clauses Act means a Judge of a Principal Civil Court of Original Jurisdiction, and this would apply to the High Court but with a proviso, and the proviso is that it shall not include a High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction.

Ordinary and Extraordinary Original Civil Jurisdiction of the High Court is dealt with in clauses 11 to 21 of the Letters Patent. The heading is "Civil Jurisdiction of the High Court," and clauses 11 to 21 deal with Ordinary Original Civil Jurisdiction, Extraordinary Original Civil Jurisdiction and Insolvency Jurisdiction. Clauses 22 to 30 deal with Criminal Jurisdiction. Clause 31 deals with the exercise of Jurisdiction outside the ordinary place where the High Court sits. Clauses 32 and 33 deal with Admiralty and Vice-Admiralty Jurisdiction. Section 34 deals with Testamentary and Intestate Jurisdiction.

It is argued by Mr. Tirunarayana Chariar that, under the Letters Patent, the High Court in the exercise of Ordinary Original Civil Jurisdiction only means the High Court exercising jurisdiction conferred by clauses 11 to 21 of the Letters Patent and cannot refer to any other Civil Jurisdiction (for example granting probate) and that except when the High Court is exercising Ordinary Original Jurisdiction conferred by clauses 11 to 21, when the word District Judge is used, it must be taken to include the High Court when it exercises Original Civil Jurisdiction in matters such as granting probate, etc.

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I think there is a distinction between the Original Jurisdiction of the High Court and the Ordinary Original Civil Jurisdiction of the High Court. All applications to the High Court are either civil or criminal. They are Original Civil when matters come for the first time to the High Court, and they are Appellate Civil when they come in the form of appeals. The granting of probates or succession certificates will come within the Original Civil Jurisdiction, but it would not come under Ordinary Original Civil Jurisdiction, which, by the Letters Patent, seems to be confined to suits and matters under clauses 12 to 21, which refer to the exercise by the High Court of its Ordinary Original Civil Jurisdiction.

In *In the matter of Candas Narrondas Navivahu v. C. A. Turner* (1), the Privy Council considered the various jurisdictions conferred on the High Court by the Letters Patent and held that the Insolvency Jurisdiction was part of the Original Civil Jurisdiction having regard to the grouping of the clauses in the Letters Patent. Their Lordships at page 532 refer to clauses 11 to 18 as a group of clauses headed "Civil Jurisdiction of the High Court" and they deal with this as one group.

Their Lordships observed :

"Sections 11 to 18 are a group of clauses headed 'Civil Jurisdiction of the High Court.' Sections 11 and 12 describe the local limits of the Ordinary Original Civil Jurisdiction which is said to extend to all kinds of suits within those limits except Small Cause Suits. Section 13 gives to the High Court power to remove, and to try as a Court of Extraordinary Original Jurisdiction any suit falling within the jurisdiction of any Court subject to its superintendence, when it shall think proper, either on agreement of the parties, or for the purposes of justice. Sections 15 and 16 confer Appellate Jurisdiction. Section 17 confers authority over infants, idiots and lunatics. Section 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in India."

I think this case supports the view that for the purpose of determining the meaning of the words Ordinary or Extraordinary Original Civil Jurisdiction in section 3, clause 15 of the General

(1) (1889) I.L.R., 13 Bom., 520.

Clauses Act, all that is excluded is the High Court acting under clauses 11 to 18 of the Letters Patent and that the High Court exercising any other Original Jurisdiction would fall within the definition of District Judge.

There is no reason why the High Court cannot grant succession certificate in cases where it could be granted outside Madras. Part X of the Indian Succession Act gives the limitation under which it could be granted. It cannot be granted where the law requires Probate or Letters of Administration to be produced, and there is no question of any evasion of stamp duty. There is no reason why there should be a facility for persons outside Madras in respect of collections of small debts and securities, such facility being denied to those in Madras.

The Indian Succession Act codifies the whole law on the subject, and repeals the Succession Certificate Act, and the omission in the Indian Succession Act of the definition of "District Court" given in the Succession Certificate Act is, I think, a matter which deserves notice in construing the definition of "District Judge." As I said before, the District Court is the Court which is referred to in the granting of Probates and Letters of Administration and it cannot be contended that the words "District Court" in those sections excludes the High Court.

I may state that in the Probate and Administration Act of 1881, "District Judge" is defined as meaning the Judge of a Principal Civil Court of Original Jurisdiction which obviously took in the High Court. But the Probate and Administration Act has been repealed by the Indian Succession Act of 1925 and the definition is omitted. So far as the succession certificate is concerned, it partakes the nature of a limited grant. Various forms of limited grants have fallen under the jurisdiction of Courts dealing with intestate matters in England (Tristram and Coote, p. 224), and I can see no difficulty in the High Court granting succession certificates under its general jurisdiction as regards matters falling within its Intestate Jurisdiction, unless wherever compelled by the definition of the words "District Judge" in the General Clauses Act to hold that the High Court has no jurisdiction.

For the reasons given by me, I am of opinion that, having regard to the Indian Succession Act of 1925, which has repealed both the Probate and Administration Act and the Succession Certificate Act, and incorporated the provisions of these Acts in

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the body of the Indian Succession Act and has omitted to define the words "District Judge" leaving us to fall back on the definition of "District Judge" in the General Clauses Act, the High Court is a "District Court" when it does not exercise its Ordinary or Extraordinary Civil Jurisdiction conferred by clauses 11 to 18 of the Letters Patent.

As the matter is one of considerable importance, and is opposed by the Collector, and as several applications are likely to be filed for the grant of succession certificates, I think it is desirable that the question should be settled by a Bench.

ON THE REFERENCE •

M. A. Tirunarayana Chari with *S. T. Krishnamachari* and *M. A. Srinivasan* for petitioner.

Advocate-General (A. Krishnaswami Ayyar) for the Crown.

JUDGMENT.

Having regard to the amendment of the Act, we consider that this petition is now maintainable in this Court, and order the case to be posted before the learned Judge in Chambers.

Government Solicitor for the Crown.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

A. N. B. RAMALINGA AYYAR FIRM,
PETITIONERS (APPELLANTS),

v.

N. M. RAYALU AYYAR FIRM,
RESPONDENTS (RESPONDENTS).*

1929,
November, 18.

Provincial Insolvency Act (V of 1920), sec. 78, proviso—Construction of—Proof of debt—Decree passed against insolvent and Official Receiver as parties—Subsequent annulment of adjudication—Application for execution of decree—Deduction of time—Formal proof of decree before Receiver, if necessary.

Where a person obtained a decree against an insolvent subsequent to his adjudication, and the Official Receiver was a party to the decree, the debt must be held to have been proved within the terms of section 78 of the Provincial Insolvency Act, 1920, and the proviso to the section did not apply; consequently, the decree-holder is entitled to the deduction of the time mentioned in the section in regard to an application for the execution of his decree, filed by him after the annulment of the adjudication.

APPEAL against the order of the Court of the First Additional Subordinate Judge of Madura in E.A. No. 484 of 1929 in E.P. No. 149 of 1929 in O.S. No. 23 of 1929.

The material facts appear from the judgment.

D. Ramaswami Ayyangar for *C. S. Venkatachariar* for appellants.—The decree-holder is not entitled to a deduction of time under section 78 of Provincial Insolvency Act, 1920. The proviso applies to this case. The decree-debt was provable but not proved. The proviso includes not merely debts which were rejected by the Official Receiver, but also debts for which no proof was tendered before him. In this case, the decree-holder

* Appeal Against Order No. 390 of 1929.

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did not attempt to prove the decree debt before the Official Receiver. Hence, he cannot have the benefit of section 78 for excluding the time for purposes of limitation. "Proof" is used in sections 33, 63, 64, 80, 78, etc. See also sections 45, 46 and 49 of the Act. See also 2, Halsbury, page 197; English Bankruptcy Act, 1914, Schedule II, rule 1; and Presidency Towns Insolvency Act, Schedule II, rule 2. The object of the proviso to section 78 is to compel creditors to prove under the Act.

K. Rajah Ayyar (with *K. Venguswami Ayyar*) for respondent.—In this case, the creditor had sued prior to the insolvency in 1920, and, in the pending suit, the Official Receiver was made a party to the suit and a decree was passed against both the insolvent and the Official Receiver. No further proof of this decree-debt before the Official Receiver is necessary. The decree-holder is consequently entitled to the exclusion of time.

JUDGMENT.

The question raised by the appeal relates to the construction of the proviso to section 78 of the Provincial Insolvency Act (V of 1920). That section enacts that where an order of adjudication has been annulled, in computing limitation in respect of an execution application, the period from the date of the order of adjudication to the date of the order of annulment, shall be excluded. This rule is subject to the proviso that it does not apply to a debt provable but not proved.

The decree that the respondent seeks to execute was obtained subsequent to the appellants' adjudication. It was obtained not only against the appellant, but also against the Official Receiver, who was impleaded as a party. It is the latter that under the rules has to admit or reject proof of debts. In this case, he was himself added as a defendant and the decree was passed in his presence. Although the Act provides a formal mode of proving a debt, which has not been here adopted, we are prepared to hold, having regard to the facts adverted to, that the debt has been proved and that the

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proviso in question does not apply. We do not in this case wish to lay down any general rule as regards the meaning of the word "proved" occurring in the other sections of the Act. The appeal fails and is dismissed, but we make no order as to costs, as the respondent has taken the point now raised for the first time in appeal.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madharan Nair.

PERAM CHENNAMMA (PLAINTIFF—PETITIONER), APPELLANT.*

1929,
October, 8.

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1—

Leave to appeal in forma pauperis—Question to be considered by Court before granting leave to appeal—Prima facie good case, if exists—Court not to strive to arrive at a definite and final conclusion, if decree is erroneous or unjust.

Order XLIV, rule 1, of the Civil Procedure Code does not contemplate that, before granting leave to appeal in *forma pauperis*, the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or otherwise erroneous or unjust; it is enough if the applicant shows that he has *prima facie* a good case, and if he does so, leave to appeal should be granted.

APPEAL under clause 15 of the Letters Patent against the order of PAKENHAM WALSH, J., in C.M.P. No. 3262 of 1929 on the file of the High Court (application for leave to appeal in *forma pauperis* against the decree of the Court of the Subordinate Judge of Guntūr in O.S. No. 72 of 1927).

The material facts appear from the judgment.

Ch. Raghava Rao for appellant.

* Letters Patent Appeal No. 92 of 1929.

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The JUDGMENT of Court was delivered by VENKATASUBBA RAO, J.—The plaintiff applied to the High Court to be allowed to appeal in *forma pauperis*. The application was rejected by a Judge of this Court, and the plaintiff files this Letters Patent Appeal.

Order XLIV, rule 1, says that the Court shall reject the application unless, upon a perusal thereof and of the judgment, it sees reason to think that the decree is contrary to law or some usage having the force of law, or is otherwise erroneous or unjust. The learned Judge who heard the application rejected it, quoting the words of this section and merely observing that its requirement had not been fulfilled. The lower Court dismissed the plaintiff's suit holding that the claim was barred under article 93 of the Limitation Act. The question to be decided is, what is the article applicable to such claims, article 93, as that Court has held, or article 144 or 142, as the appellant contends?

The lower Court discusses the question at great length and refers to various authorities. It says that *Narayanan Chetti v. Kannammai Achi*(1) supports the plaintiff's contention, but expresses the view that it must be taken to have been impliedly overruled as a result of certain later cases. The matter thus requires further investigation. In other words, the appeal raises a substantial question of law and we cannot foretell what view the Bench disposing of the appeal may take after hearing arguments on both sides. To decide the point at once would be to prejudge the appeal. It is unreasonable to hold that Order XLIV, rule 1, compels us to adopt such a course. This is the view that has generally been taken by this Court. In L.P.A. No. 248 of 1927, KUMARASWAMI SASTRI and WALLACE, JJ., were called on

(1) (1934) L. LR., 23 Mad., 338.

to interfere with an order made by a single Judge refusing leave. They reversed the order observing that the appeal raised a substantial question of law. The same question was again raised in L.P.A. No. 351 of 1926 to which one of us was a party. The Judge before whom the application was made having rejected it, a Letters Patent Appeal was filed against his order. The Bench which heard the appeal reversed the order, stating that the appellant had *prima facie* a good case. A similar view was taken in *Mervu Parasuramudu v. Manavilli Ramanna*(1). It is unnecessary in our opinion that the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or is otherwise erroneous or unjust. That certainly cannot be the intention of Order XLIV, rule 1. We therefore set aside the order and allow the Letters Patent Appeal.

We may add that, in conformity with precedents, we have not directed notice to the respondents before deciding this Letters Patent Appeal (see the two Letters Patent Appeals quoted above, Nos. 351 of 1926 and 248 of 1927).

The appellant was allowed to sue *in forma pauperis*, and no further inquiry seems necessary.

We understand that the application was made in time. We direct that the appeal may be admitted.

K.B.

(1) (1925) 22 L.W., 23.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Curgenven and Mr. Justice Pakenham Walsh.

1929,
October 22

MAHARAJA OF VENKATAGIRI (APPELLANT IN APPEALS
Nos. 109 TO 134 OF 1927, ETC., ON THE FILE OF THE
DISTRICT COURT OF GUNTUR), PETITIONER.*

*Consolidation of second appeals—Payment of one aggregate
court-fee and filing one vakalatnama for all appeals by the
appellant—Sec. 151, Civil Procedure Code—Sec. 4, Art.
10, Sch. II, Court-fees Act (VII of 1870).*

Where a landholder who filed several suits for rent against different sets of tenants failed in both the lower Courts and filed several second appeals in the High Court, held by the Full Bench that he could not be allowed under section 151, Civil Procedure Code to consolidate the second appeals, so as to enable him to pay one single Court-fee on the aggregate value of all the second appeals, or to prosecute them all on a single vakalatnama, as such a course would contravene Rules 1 and 3 of Order XLI, Civil Procedure Code, section 4 and Article 10 of Schedule II of the Court-fees Act and Rule 81 of the Appellate Side Rules of the High Court; *In re Perumal Nadar* (1927) 54 M.L.J., 595, overruled.

PETITION praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to consolidate the second appeals preferred to the High Court against the decrees of the District Court, Guntur, in Appeals Nos. 109 to 134, etc., of 1927 (Rent Suits Nos. 102, etc. of 1926, respectively on the file of the Court of the Deputy Collector of Ongole), for the purpose of filing a single vakalat and payment of Court-fees.

* Civil Miscellaneous Petition No. 2018 of 1929.

Rule 31 of the Appellate Side Rules of the High Court is as follows:—

“Where a person is a party in two or more connected suits he shall execute a separate vakalatnama in each case notwithstanding that he may retain the same pleader in all.”

This petition coming on for orders, the Court (PAKENHAM WALSH, J.) made the following

ORDER:—

1. The plaintiff filed 118 suits against 118 sets of tenants for recovery of arrears of rent under section 77 of the Estates Land Act. The suits were dismissed and he filed 118 appeals from these decrees. The appeals were also dismissed. He now seeks to prefer second appeals to the High Court from the decrees of the lower appellate Court and has put in this application under section 151, Code of Civil Procedure, to consolidate them so that he may file

(1) a single memorandum of appeal,

(2) a single vakalatnama,

(3) only one Court-fee on the aggregate value of the 118 second appeals.

2. The questions that arise are, should he be allowed to consolidate the appeals and if so how many memoranda of appeal, how many vakalatnamas and what sum as Court-fees must he pay.

3. The power of consolidation is an inherent power of the Court and there is no special section or rule relating to it, but it must of course be exercised in accordance with the provisions of law.

4. In the present case the petitioner did not file any application in the Court of First Instance or in the appellate Court to consolidate the suits or appeals. Obviously, he could not do so in the trial Court. The defendants were all different and the causes of action entirely distinct. I may perhaps mention that in paragraph 2 of the lower appellate Court's judgment the word “consolidate” is clearly not used in the sense in which we are now considering it. It appears that the appellant himself raised as an objection before the lower appellate Court that he was prejudiced in the trial Court by the “consolidation” of the suits. What was clearly meant

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was "the joint trial of the suits" which is a different thing. The suits obviously could not be and were not consolidated in the Court of First Instance. Still it is to be noted that he made even their joint trial a grievance, while he now asks to consolidate the second appeals.

5. I am unable to see how in a case like the present, the appeals can be consolidated without offending against Order I, Rule 3 of the Civil Procedure Code. The matter involves a considerable question of revenue, but unfortunately as the learned Advocate-General appears for the appellant, he cannot be called to represent the Government. However, in several of the cases cited the objections raised by Government have been considered. They are materially the same in all the cases and as I do not think the petitioner has made out a case for consolidation of the appeals, I do not consider it necessary to call on some one other than the Advocate-General to represent the Government. The petitioner quotes *Kashi Prosad Singh v. Secretary of State for India*(1) and *Vengu Naidu v. Deputy Collector of Madura Division*(2), but his chief reliance is on a recent case, *In re Perumal Nudar*(3), in which consolidation was allowed by DEVADOSS, J. The latter is the only case which I think is really on all fours with the present. 29 Calc., 140 was concerned with a land acquisition and the parties were the same in all cases. The plots of land were contiguous to each other. There were different tenants but they were not parties to the appeal. The appeals were allowed to be consolidated. 34 M.L.J., 279 was also a case of land acquisition. Though several plots of land were acquired from the appellants, only one notice was served on them under section 12 (2) and they made only one reference to the Collector to refer their objection to award. There was, therefore, in the words of the learned Judge "only one award, the correctness of which had to be determined by the District Court." Here there was clearly one cause of action between the same parties. That case bears no resemblance to the present.

Turning now to 54 M.L.J., 595 I have no doubt that it is on all fours with the present case, for it was also a request to consolidate appeals arising out of rent suits against different tenants.

(1) (1901) I.L.R., 29 Calc., 140.

(2) (1918) 34 M.L.J., 279.
(3) (1927) 54 M.L.J., 595.

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The learned Judge quotes *In the matter of the Falls of Ettrick*(1). This case was also referred to in 34 M.L.J., 279. It was a case of one steamer being salvaged by two tugs but not simultaneously. Three separate salvage claims were brought. What was held there was that the claims should not be consolidated against the will of the promovents and they were in fact not consolidated. There is a note at the end of the case that the Court of Admiralty has reverted to the old practice of allowing appeals to be consolidated when it may appear convenient to do so without regard to the consent of the parties.

This case has little bearing on the matter before me. The learned Judge then quotes 34 M.L.J., 279, in which as I have pointed out there was only one cause of action and the parties were the same. He devotes most of the judgment to discussing whether if consolidation is allowed one vakalatnama is sufficient, but the only discussion that I can find as to the ground on which the consolidation is allowed is in the following sentences:—"In these two batches the trials were only two and there were only two judgments. The appeals arise out of rent suits and the questions at issue are common to all the tenants. The landlord is only one person."

With due respect I find myself unable to agree with my learned brother that these facts enable the appeals to be consolidated. The causes of action and the parties are entirely different. If the appeals can be consolidated, why could not the original suits have been? Yet that would have clearly contravened Order I, Rule 3 of the Civil Procedure Code.

I find that the same learned Judge, PHILLIPS, J., who allowed the consolidation in 34 M.L.J., 279 refused it in Stamp Register Nos. 24378, 24380 of 1927 and 828 of 1928. These were two partition suits and in my opinion much stronger cases for allowing consolidation than the present.

DEVADOSS, J., quotes C.M.P. No. 1336 of 1925 in which WALLACE, J., ordered consolidation of appeals. I have sent for that Civil Miscellaneous Petition. The appeals appear to have been concerned with the bringing of the holdings of a number of ryots to sale, and as far as I can gather, the appeals were preferred by the tenants. They pleaded that the sums for which the sales were held were very small, such as Re. 1, Rs. 1½, etc., and that separate second appeals would involve enormous expense. No

(1) (1894) I.L.R., 22 Calc., 511.

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notice was sent to the Government though the Revenue involved was considerable and no reason for allowing consolidation is given in the order.

With great respect to my learned brother WALLACE, J., if the considerations urged by the tenants are applicable to the consolidation of appeals, I fail to see why they are not applicable to the consolidation of suits for petty sums of rent in the first instance.

It is quite clear to my mind that no Court could allow a landlord to bring a consolidated rent suit against a number of tenants holding separately merely because the rent demanded from each was small and because a common question was involved in all the suits, nor can I see how such tenants can bring a consolidated appeal if the suits go against them. After all, they can always file a test appeal. If it succeeds they will get their costs when they win the other appeals. I have only been able to find one other order of consolidation passed by JACKSON, J., in C.M.P. No. 905 of 1929. This was a land acquisition case and so far as I can gather the parties were the same and the only question involved was the apportionment of the compensation awarded. It is probable that this case resembled one or other of the two other land acquisition cases referred to above. The order was passed without notice to Government and no reasons for it are assigned but *prima facie* it is not a parallel case to the present. I am much influenced by the fact that though the filing of large batches of suits against tenants and the disposal of them by a common judgment and by a common first and second appellate judgment are very common, I have been able to find no case except *In re Perumal Nadar*(1), where consolidation of appeals in such cases was allowed by the High Court. C.M.P. No. 905 of 1929 referred to above may be a parallel instance but there consolidation was allowed without notice to the Government and no reasons for the order are given.

The following cases in other Courts where consolidation was allowed appear to me to bear out that the parties and causes of action must be the same if consolidation is to be allowed. *Lakshman Sahu v. Sheikh Abdul Karim*(2). A common declaration was asked in a single suit against a number of tenants. Even there, it was held that a Court-fee should have been paid in respect of each of the sets of tenants. *Bhagwan Singh v.*

(1) (1927) 54 M.L.J., 595.

(2) (1919) 4 Pat. L.J., 299.

Bharani Das Bhagwan Das(1). This dealt with an appeal to the King in Council (Order XLV). The parties were the same and the question at issue the same but there were two judgments. Held that though the valuation in one suit was below Rs. 10,000, the appeals might be consolidated under Order XLV (4) so as to get a judgment covering the decrees in both suits. *Moosa Soleman Saleji v. Secretary of State*(2). Held that where the matter for consideration was the same and the parties the same, the appeals might be consolidated but even then, Court-fees must be paid separately for each.

I am unable therefore to accede to the request to consolidate the appeals, and that being so, the question of a single vakalatnama and a single Court-fee on the aggregate value of all the suits does not arise, though on the latter point see *Moosa Soleman Saleji v. Secretary of State*(2), just quoted. Having regard to the importance of this matter and that I differ from my learned brother DEVADOSS, J., I would refer the matter to a bench of two Judges.

This petition coming on for orders in pursuance of the above order, the Court (KUNARASWAMI SASTRI and PAKENHAM WALSH, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This petition raises the important question as to the consolidation of second appeals so as to enable one Court-fee on the consolidated value being paid and also one vakalat being filed. The matter first came before one of us (PAKENHAM WALSH, J.) and his order referring the matter to a Bench refers to all the authorities on the subject and the difficulty which my learned brother finds in consolidation. We think the question is one of considerable importance and arises frequently and in view of the conflict of authority and the fact that it is necessary to have an authoritative decision of a Full Bench on the question, we refer the following question for decision:—

“Whether the Court has inherent jurisdiction to consolidate appeals in cases disposed of by a single judgment of the lower Court so as to enable the appellant to pay Court-fee on the value of the consolidated appeals and file only one vakalat.”

(1) (1920) I.L.R., 48 All., 223.

(2) (1929) A.I.R. (Calo.), 185.

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ON THIS REFERENCE—

M. Venkatasubbayya for petitioner.—The Court has inherent power to consolidate under section 151, Civil Procedure Code, whenever there is a common question of law or fact and there is one trial and one judgment: see Order I, Rules 1 and 3, Civil Procedure Code, and section 17 of the Court-fees Act; *Kashi Prosad Singh v. Secretary of State for India*(1), *Fink v. Secretary of State for India*(2), *Vengu Naidu v. Deputy Collector of Madura Division*(3), *In re Perumal Nadar*(4), *Enayetoollah v. Radha Churn Roy*(5), *Hukum Chand Boid v. Kamalanand Singh*(6), *Narayan Vithal v. Jankibai*(7), *Govindaraja Mudaliar v. Alagappa Thambiran*(8), and *Rumendra Nath Roy v. Brajendra Nath Dass*(9).

Advocate-General (A. Krishnaswami Ayyar) followed. The power of consolidation is for avoiding waste of time and money; see Order XLIX, Rule 8 of the Judicature Act and Supreme Court Rules, *Martin v. Martin & Co.*(10), *Stone v. Press Association, Ltd.*(11), *The Creta Forest*(12), *Nanda Kishore Singh v. Ram Golam Sahu*(13). After consolidation, the hearing is one; so one vakalat will do for all. Rule 31 of the Appellate Side Rules is consistent with this. If consolidation is allowed it relates back to date of filing; the appellant can file all the appeals and the petition for consolidation at the same time; see also Stamp Register No. 1336 of 1925.

Government Pleader (P. Venkataramana Rao).—Most of the cases relied on are cases under the Land Acquisition Act concerning only one award. There is no power of consolidation inherent in a Court, except for the purpose of hearing and there is no power to consolidate for reducing the Court-fees, whether for memoranda of appeals or vakalats. According to Order XLI, Rules 1 and 3, there must be a separate memorandum of appeal in each appeal and each should be signed and presented either by the appellant or his pleader duly authorized; see also Rule 31 of the Appellate Side Rules of the High Court. Section 4 of the Court-fees Act requires separate

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| (1) (1901) I.L.R., 29 Calc., 149. | (2) (1907) I.L.R., 34 Calc., 599. |
| (3) (1916) 34 M.L.J., 279. | (4) (1927) 54 M.L.J., 595. |
| (5) (1871) 15 W.R., 395. | (6) (1905) I.L.R., 33 Calc., 927. |
| (7) (1915) I.L.R., 39 Bom., 604 (F.B.). | |
| (8) (1926) I.L.R., 49 Mad., 836. | (9) (1917) I.L.R., 45 Calc., 111. |
| (10) [1897] 1 Q.B., 429. | (11) [1897] 2 Q.B., 159. |
| (12) [1920] P. 111 | (13) (1912) I.L.R., 40 Calc., 965. |

Court-fees for each appeal; only if all these are complied with, there will be proper presentation of the appeal; otherwise the Court cannot take cognizance of it, *Lakhi Narain v. Kirthibas Das*(1), *Shib Dayal v. Meharban*(2), *Rakhal Chandra Tewari v. Manmotho Nath Mitter*(3), *Mossa Soleman Saleji v. Secretary of State for India in Council*(4).

OPINION.

KUMARASWAMI SASTRI, J.—The Maharaja of Venktagiri who is the petitioner filed separate suits against his tenants for rent on the ground that they raised a second crop. The tenants defended the suits on the ground that they did not raise a second crop and that the suit was barred by limitation. The suits were tried together and the witnesses examined were treated as witnesses in all the suits. There was one judgment but separate decrees were passed. Separate appeals have been filed in the High Court. The present application is to consolidate the appeals so filed for the purpose of (1) treating the Court-fee payable as the Court-fee on the entire value of the suits and (2) filing only one vakalat in all the suits, and the question is whether such consolidation is permissible.

As to the inherent power of the Court to consolidate suits or appeals, there can be no question. *Vengu Naidu v. Deputy Collector of Madura Division*(5), *Narayan Vithal v. Jankibai*(6), *Kalichand Dutt v. Surya Kumar Mondal*(7), *Dharamdas v. Dharamdas*(8), *Kasi Prosad Singh v. Secretary of State for India*(9). But the point which we have to determine is whether a consolidation can be effected which will conflict with the specific provisions of the Court-fees Act and

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| (1) (1913) 18 C.L.J., 133. | (2) (1920) I.L.R., 43 All., 56. |
| (3) (1910) 15 C.W.N., 994. | (4) (1929) A.I.R. (Calc.), 135. |
| (5) (1916) 34 M.L.J., 279. | (6) (1915) I.L.R., 30 Bom., 601. |
| (7) (1912) 17 Calc. W.N., 523. | (8) (1917) 40 I.C., 132. |
| (9) (1901) I.L.R., 29 Calc., 140. | |

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the Civil Procedure Code as to the filing of appeals against the decrees of the lower Courts.

Consolidation of suits or appeals may be for various purposes and the main object of consolidation is to prevent unnecessary delay in the disposal of suits or appeals and also to prevent unnecessary costs being incurred, *Martin v. Martin & Co.*(1) and *The Oreto Forest*(2). The costs saved are costs as between party and party and cannot mean stamp duty payable to the Crown under specific enactments.

Section 4 of the Court-fees Act enacts that no document of any kind specified in the first or second schedule to the Act as chargeable with fees shall be filed, exhibited or recorded in, or shall be received by, any of the High Courts in the exercise of its jurisdiction as regards appeals from the Courts subject to its superintendence or in the exercise of its jurisdiction as a Court of reference or revision, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the above schedules as the proper fee for such document.

Section 6 contains a similar provision as regards Court-fee payable in respect of suits or appeals in the Subordinate Courts.

Where therefore there is nothing either in the Code or in any other enactment to prevent this course from being adopted, Courts have power to consolidate, but I do not think that such power can be extended in a manner to conflict with the provisions of any enactment like the Court-fees Act or the express provisions of the Civil Procedure Code as regards the filing of appeals.

It seems to me that consolidation can only be asked when there are suits or appeals properly instituted and on

(1) [1897] 1.Q.B., 429.

(2) [1920] P. 111.

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the file. Where the legislature lays down certain requirements necessary to be satisfied before the Court can be seized of the suit or appeal, e.g., a plaint or memorandum of appeal on a proper stamp, it is difficult to see how an order can be passed consolidating suits or appeals for the purpose of getting over the stamp duty payable.

There are two classes of cases in which consolidation can be ordered. One relates to cases where although one suit could have been filed against several defendants in the lower Court, the party has not chosen to do so but has filed separate suits, and the other relates to cases where although one suit could not have been filed, the questions for determination are the same, and it will save costs and expenses to consolidate the suits, either in the lower Court or in appeal. In the former case, the provisions of section 17 of the Court-fees Act are imperative because in the case of a suit embracing two or more distinct subjects, the plaint or memorandum of appeal should be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing each of such subjects would be liable under the Act. In cases where one suit could not have been filed, it is difficult to see how the aggregate value of the subject-matter in all the suits can be treated as the amount on which Court-fee has to be paid. In cases which do not fall under section 17, there is no question of treating the aggregate value of the various suits or appeals as one for the purpose of Court-fee, as the provisions of the Court-fees Act are specific and state that each of such suits should bear the Court-fee prescribed by the schedules to the Act.

Reference has been made to *Kashi Prosad Singh v. Secretary of State for India*(1). It was a case under

(1) (1901) I.L.R., 29 Cal., 140.

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the Land Acquisition Act and it was held that as the parties were the same in all the cases and the plots of land were contiguous to one another and formed part of an estate, although in the occupation of different tenants who were not parties to the appeals, the appeals should be consolidated and the Court-fee paid upon the value of the consolidated appeals under section 17 of the Court-fees Act subject to the maximum of Rs. 3,000. The maximum of Rs. 3,000 has, however, now been omitted and Court-fee has to be paid *ad valorem* without any maximum so that consolidation cannot in any view affect the Court-fee.

In *Vengu Naidu v. Deputy Collector of Madura Division*(1), there was an application to consolidate several appeals filed from the awards passed by the District Judge of Madura on reference made to him by the Land Acquisition Officer. The District Judge treated all the references as forty-seven separate petitions and passed a separate award on each of them although they were all tried together and disposed of in one judgment. PHILLIPS, J., held that the power of consolidation was inherent in the Court although no express power was conferred by the Code and followed *Enayetullah v. Radha Churn Roy*(2), *Kashi Prosad Singh v. Secretary of State for India*(3), *Fink v. The Secretary of State for India*(4), *In re Dorabji Cursetji*(5), and *In the matter of the Falls of Eltrick*(6). The learned Judge considered the objection that consolidation would affect the revenue and says the fact that only one notice was sent under section 12 and one objection filed under section 18 *prima facie* indicated that there was only one award the correctness of which had to be determined by the

(1) (1916) 34 M.L.J., 279.
(3) (1901) I.L.R., 29 Calc., 140.
(5) (1907) 10 Bom., L.R., 675.

(2) (1871) 15 W.R., 395.
(4) (1907) I.L.R., 34 Calc., 599.
(6) (1894) I.L.R., 22 Calc., 511.

District Court. He was of opinion that the fact that the award contained several items did not make any difference.

I do not think that Land Acquisition cases afford any safe guide as the considerations which exist in such cases and which the learned Judge points out are absent in ordinary suits and it is doubtful whether having regard to the amendment of the Land Acquisition Act in 1921 (section 26, clause (2) of the Act) the same considerations can now exist.

I may also point out that the same learned Judge refused consolidation in S.R. No. 828 of 1928 (Civil Miscellaneous Petition). There were two suits filed for partition in the District Munsif's Court and second appeals were filed. An application was put in that the second appeals should be consolidated on the ground that the two suits must be deemed to be one suit and consolidated for purposes of appeal. The learned Judge refused consolidation on the ground that the suits did not relate to the same subject matter.

I now come to the question of consolidation for the purpose of filing one vakalat in all the appeals.

Order XLI, Rule 1, of the Civil Procedure Code provides that every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader.

Rule 3 provides that if the memorandum is not drawn up in the manner prescribed it may be rejected or be returned for the purpose of being amended.

So, before there could be a valid presentation of an appeal, the memorandum must be signed by the appellant or his pleader. If a pleader is employed, article 10 of Schedule II to the Court-fees Act prescribes the fee to be paid on the vakalat.

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Having regard to the provisions of the Civil Procedure Code and the Court-fees Act, there can be little doubt that every appeal presented if not signed by the party should be signed by a pleader who has authority to act and such authority has to be stamped under the provisions of the Court-fees Act.

Rule 31 of the Appellate Side Rules also provides that where a person is a party to two or more connected suits he shall execute a separate vakalatnama in each, notwithstanding he may retain the same pleader in all the suits.

In *In re Perumal Nadar*(1) the question as to consolidation arose as regards vakalats. There were several second appeals filed. An application was made to consolidate thirty-eight second appeals into one batch and fifty-two into another batch for the purpose of filing one vakalatnama in each of the batches. The Government Pleader contended that separate vakalatnamas ought to be filed. DEVADOSS, J., held that only one vakalatnama in each batch need be filed. The learned Judge was of opinion that the very object of consolidation was to save the party unnecessary expense and the Court unnecessary trouble, that where the Court allows consolidation it allows the parties to the appeals to treat the consolidated appeals as one and that article 10 of Schedule II to the Court-fees Act does not stand in the way of consolidation.

Dealing with the argument based on Order XLI, Rule 1, which requires a separate memorandum of appeal, the learned Judge was of opinion that it does not follow that because a separate memorandum ought to be filed in each case the engagement of the pleader should be separate. He, however, held that the production of one

(1) (1927) 54 M.L.J., 595.

vakalatnama in different cases does not at all obviate the necessity of producing the decree in each case though the Court may dispense with the production of copies of judgments in each case.

With all respect, I am unable to agree with the conclusion. It is difficult to see how the requisites of the Civil Procedure Code and the Court-fees Act, the compliance with which is a condition precedent to the Court being seized of the appeals, can be got over by an order of consolidation. Again, Rule 31 of the Appellate Side Rules which are framed under statutory powers expressly requires separate vakalatnamas.

I would answer the reference in the negative.

CURGENVEN, J.—I agree.

PAKENHAM WALSH, J.—This matter came in the first instance before me and in my referring order I considered the cases quoted in support of consolidation and specially the judgment of DEVADOSS, J., reported in *In re Perumal Nadar*(1). It was because I doubted the correctness of that decision that I made the reference which has finally come before a Bench of three Judges. I have given in my Order of Reference my reasons for doubting that decision and for distinguishing it from the salvage case and the Land Acquisition cases quoted in support of it. I entirely agree with the reasons given by my learned brother Sir KUMARASWAMI SASTRI and have nothing to add.

Deficient Court-fee should be paid in one month. Separate vakalats will be filed in one month.

N.R.

(1) (1927) 54 M.L.J., 595.

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APPELLATE CIVIL—FULL BENCH.

*Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Gurgenren and Mr. Justice Pakenham Walsh.*

1923,
November 1.

VYTHILINGA PANDARA SANNADHI, PETITIONER.*

Consolidation of civil revision petitions by one person—Single vakalat and one process fee—Sec. 20, Court-fees Act.

The High Court has no power to consolidate two or more revision petitions filed by a single petitioner, though the cases in respect of which the petitions are filed may be related and disposed of by the lower Court in one judgment or order, so as to enable the petitioner to file one vakalatnama in all the petitions or to pay one process fee for such respondents as are common therein, as such a course would be contrary to Rules 41 and 61 of the Appellate Side Rules of the High Court framed under section 20 of the Court-fees Act and Rule 2 (1) of Order XLI-A of the Civil Procedure Code; *In the matter of the application of Studd*, (1898) I.L.R., 26 Cal., 124, followed.

PETITIONS praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to consolidate the Civil Revision Petitions presented to the High Court against the order of the Court of the Sub-Collector of Negapatam in S.S. Nos. 39 etc., of 1928, for the purpose of filing a single vakalat and payment of one process fee for common respondents.

Rule 2 of Order XLI-A, Civil Procedure Code, is as follows:—

(1) "The Memorandum of Appeal shall be accompanied by the prescribed fees for service of notice of appeal. . . ."

Rule 41 of the Appellate Side Rules of the High Court is as follows:—

"Civil Revision Petitions . . . shall be accompanied by the fees prescribed for service of notice on the respondent."

* Civil Miscellaneous Petitions Nos. 1194 and 1259 of 1929.

Rule 61 of the above rules is as follows:—

"The following fees shall be chargeable for serving and executing processes issued by the High Court of Madras in its appellate jurisdiction. For each . . . notice (a) to single respondent . . . Re. 1, (b) to every additional respondent . . . residing in the same village, if the processes be applied for at the same time As. 8."

These petitions coming on for orders, the Court (KUMARASWAMI SASTRI and PAKENHAM WALSH, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

These petitions are for consolidating Civil Revision Petitions: and the question here also is whether the Court has power to consolidate so as to entitle a party to file only one vakalat and pay only one process fee so far as the common respondents are concerned. For the reasons given in C.M.P. No. 2016 of 1929, we refer this question also to a Full Bench as to whether the Court has inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court so as to enable the party to file one vakalat in the petitions and pay one process fee for the common respondents.

ON THIS REFERENCE—

Government Pleader (P. Venkataramana Rao).—A single process fee for the common respondents in the revision petitions cannot be filed. Process fees are prescribed by the High Court for appeals by rules framed under section 20 of the Court-fees Act; and those rules require separate process fee for the respondent in each appeal or petition; see rules 41 and 61 of the Appellate Side Rules of the High Court, Chapter VII and also rule 2 (1) of Order 41-A, Civil Procedure Code. The fact that the same person may be respondent in more than one petition is immaterial; see *In the matter of the application of Studd*(1). It is true there is no separate rule for revisions, but there is a general rule that rules for appeals apply also for revisions.

R. Sundaralingam (with *K. Bashyam*) for the petitioner.—Though under the rules we pay process fee when filing revision petitions, the notices go only after they are admitted. Rules 60 and 61 apply only for appeals and not for revisions.

(1) (1898) I.L.R., 26 Cal., 124.

OPINION.

VYTHILINGA
PANDARA
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—
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VEN, J.

CURGENVEN, J.—The question referred to us is whether the Court has inherent jurisdiction to consolidate Civil Revision Petitions in cases which have been disposed of by a single judgment of the lower Court, so as to enable the party to file one vakalat in the petitions and to pay one process fee for the common respondents. In C.M.P. No. 2016 of 1929(1), we have held generally that this Court has no power to consolidate appeals in such a manner as to conflict with the provisions of any statutory enactment, and specifically that it cannot so consolidate as to permit a single vakalat to be filed in a number of appeals or a single Court-fee, calculated upon the aggregate value of the appeals, to be paid. This decision of course applies equally to the case of Civil Revision Petitions and it accordingly settles the question with regard to vakalats.

There remains the question of process fees,—whether, when one person figures as respondent in a number of cases, a single process can be issued to him, to embrace all the cases, upon payment of a single fee. We have to see whether such a course would transgress any provision of law. Section 20 of the Court-fees Act empowers the High Court to make rules regulating the fees chargeable for serving and executing processes issued by it in its appellate jurisdiction, which comprises also its revisional jurisdiction. Rule 2 (1) of Order XLI-A provides that a memorandum of appeal shall be accompanied by the prescribed fees for the service of notice of appeal, and Appellate Side rule No. 41 makes a similar provision in the case of Civil Revision Petitions. The rules for the service of notices form the subject of Chapter VII of the Appellate Side Rules, rule 61 fixing the fees chargeable. The schedule to that rule prescribes

(1) Page 248 ante.

a fee of Re. 1 for each summons or notice “to a single respondent or witness”. This is a rule framed under section 20 of the Court-fees Act and has the force of law. Unless, therefore, we can construe the word, “single respondent” as embracing any one person, though he may be a respondent in a number of cases, permission to consolidate would involve permission to pay a single fee where the rule prescribes a separate fee in each case. We do not think that such a construction would be correct. The rule, in our view, makes no provision for the circumstances, accidental from the point of view of procedure, that the respondent in one case may be the same individual as the respondent in another, but requires that each respondent be treated independently of the other. Accordingly, it would conflict with the rules to allow process to issue in two or more cases on payment of a single process fee, and, as we have held in C.M.P. No. 2016 of 1929 (1), we have no power to relax the terms of an enactment or statutory rule for the purpose of consolidation. A similar application to consolidate was refused by a Bench of the Calcutta High Court in *In the matter of the application of Studd(2)*, RAMPINI, J., basing his refusal upon the inability of the Court to relax a statutory rule.

We accordingly answer the question referred to us in the negative. We would add that there appears to be no objection to issue a single consolidated process with several causes entered in it, provided that the amount of process fees for the issue of process in each case is paid. We give the petitioners one month from this date to file duly stamped vakalats and pay process fees.

KUMARASWAMI SASTRI, J.—I agree.

PAKENHAM WALSH, J.—I agree.

N.R.

(1) Page 249 ante.
19-A

(2) (1898) 1 L.R., 26 Cal., 124.

VYTHILINGA
PANDARA
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VEN, J.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Curgenven and Mr. Justice Pakenham Walsh.

1929,
October 25.

DAMODARAN (PETITIONER), PETITIONER,

v.

BOARD OF COMMISSIONERS FOR THE HINDU RELI-
GIOUS ENDOWMENTS, MADRAS (RESPONDENTS),
RESPONDENTS.*

*Madras—Court-fees Amendment Act (V of 1922), Sch. II,
art. 17 (1)—Application under section 84 (2) of the
Madras Religious Endowments Act (II of 1927)—Court-fee.*

The Court-fee payable on an application under section 84 (2) of the Madras Religious Endowments Act (II of 1927) to modify or set aside a decision of the Endowments Board under section 84 (1) of the Act is Rs. 15 under article 17 (1) of Schedule II of the Madras Court-fees Amendment Act of 1922 and not the fee prescribed by articles 17-B or 17-C of the Act. *Sundara Aiyar v. Commissioners of Hindu Religious Endowments Board*, (1928) I.L.R., 52 Mad., 388, approved; *Godasankara Valia Rajah v. Board of Commissioners for Hindu Religious Endowments, Madras*, (1928) 56 M.L.J., 113, overruled.

PETITION under section 115 of Act V of 1908 and section 105 of the Government of India Act, praying the High Court to revise the Orders of the District Court of South Malabar at Calicut in O.P. Nos. 81 of 1928 and 163 of 1927, respectively.

— These petitions coming on for hearing, the Court (JACKSON, J.) made the following

ORDER:—

There are two bench decisions on this point which seem to be diametrically opposed; *Godasankara Valia Rajah v. Board of*

* Civil Miscellaneous Petitions Nos. 91 and 100 of 1929.

Commissioners for Hindu Religious Endowments, Madras(1), and *Sundara Aiyar v. Commissioners of Hindu Religious Endowments Board*(2). This petition must therefore go before a Full Bench. I think Civil Revision Petition No. 100 of 1929 must also go before a Full Bench.

ON THIS REFERENCE—

C. Unnikanda Menon, K. Chandrasekharam Thampian and P. Govinda Menon for petitioners.—Article 17 (1), alone and not articles 17-A or 17-B of the Madras Court-fees Amendment Act (V of 1922) will apply. I adopt the reasons given in *Sundara Aiyar v. Commissioners of Hindu Religious Endowments Board*(2) which has declined to follow *Godasankara Valia Rajah v. Board of Commissioners for Hindu Religious Endowments, Madras*(1). Moreover these are not *suits* for declaration but only *applications* to modify or set aside an order within the principle of *Phul Kumari v. Ghanshyam Misra*(3).

Government Pleader (P. Venkataramana Rao) for the Government.—The old article 17 contained six subdivisions for all of which a uniform fee of Rs. 10 was levied; but under the Madras Court-fees Amendment Act, these six subdivisions have been grouped into 17, 17-A and 17-B with varying fees according to the nature of the Courts and the value of the cases in which the order is made. Hence articles 17-A and 17-B are not different from article 17 but are its parts; and so the principal reason of *Sundara Aiyar's* case falls to the ground; and we have to see which of the three articles 17, 17-A or 17-B is more suitably applicable to this case. See *Rajagopala Naidu v. Ramasubramania Aiyar*(4).

The OPINION of the Court was delivered by

KUMARASWAMI SASTRI, J.—The point referred to us for decision is what is the proper Court-fee payable in respect of an application filed under section 84 (2) of the Madras Hindu Religious Endowments Act (II of 1927) to modify or set aside a decision of the Hindu Religious Endowments Board under section 84 (1) of the Act? Under Schedule II of the said Act, the Court-fee payable on such an application is the fee leviable on

(1) (1928) 56 M.L.J., 113.

(2) (1907) I.L.R., 35 Cal., 202 (P.C.).

(3) (1928) I.L.R., 52 Mad., 388.

(4) (1923) I.L.R., 46 Mad., 782.

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a plaint under article 17, Schedule II of the Madras Court-fees Amendment Act of 1922. The Madras Court-fees Amendment Act contains three articles, namely, 17, 17-A and 17-B. The short point for consideration is whether articles 17-A and 17-B must be read as parts of article 17 or as independent articles.

The view taken by PHILLIPS and ODGERS, JJ. in *Godasankara Valia Rajah v. Board of Commissioners for Hindu Religious Endowments, Madras*(1) is that articles 17-A and 17-B must be read as parts of article 17. The learned Judges observe that when the whole article is referred to, it must include its component parts and it cannot be read as meaning article 17 alone. The ground of their decision seems to be that articles 17-A and 17-B, numbered as they are in the Act following article 17 with various sub-clauses, must really be treated as clauses to article 17, as otherwise none of the clauses of article 17 will cover a case like the present. Strictly speaking, none of the sub-sections to section 17-A or section 17-B covers a case like the present as the application is to set aside an order of the Religious Endowments Board and not for any declaratory decree. This decision has been dissented from by RAMESAM and VENKATASUBBA RAO, JJ., in *Sundara Aiyar v. Commissioners of Hindu Religious Endowments Board*(2). The learned Judges go into the matter in great detail and give their reasons for coming to the opposite conclusion. RAMESAM, J., refers to the practice of numbering sections and sub-sections of enactments and also discusses the way in which new provisions are introduced—where the intention is to add a clause or a sub-clause and where the intention is to introduce a new section without altering the order or the numbers of the existing sections.

(1) (1928) 56 M.L.J., 113.

(2) (1928) I.L.R., 52 Mad., 888.

The learned Judge also deals with the nature of the relief sought and the way in which it is described in Schedule II of the Act. He is of opinion that article 17 stands by itself, that articles 17-A and 17-B are really separate articles and that they cannot be read together for the purpose of determining the Court-fee. VENKATASUBBA RAO, J., also comes to the same conclusion as to the construction of article 17. We think that, in construing an enactment like the Court-fees Act, it is not for us to see what the legislature intended, if the meaning of the article is plain. We agree with the view taken by RAMESAM and VENKATASUBBA RAO, JJ., for the reasons given by them in their judgments. We may also add that the application contemplated in section 84 (2) of the Madras Hindu Religious Endowments Act is one to modify or set aside a decision of the Board regarding the application of the Act to the institution over which jurisdiction is claimed. Similarly, in section 76 (2) of the Act, the alienation of immovable trust property is the subject of the decision of the Religious Endowments Committee and the application to the Court is to modify or cancel an order of the Board or Committee granting or refusing sanction. These applications are analogous to a regular suit filed by an unsuccessful claimant. They are not really suits for any declaratory decrees. The observations of the Privy Council in *Phul Kumari v. Ghanshyam Misra*(1) may be considered in dealing with a matter like the present.

We prefer to follow the decision in *Sundaram Aiyar v. Commissioner of Hindu Religious Endowments Board*(2) and answer the question referred to us that the Court-fee payable on an application like the present is the Court-fee leviable under article 17 (1), that is, Rs. 15.

N.R.

(1) (1907) I.L.R., 35 Cal., 202.

(2) (1928) I.L.R., 52 Mad., 388.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Curgenven and Mr. Justice Pakenham Walsh.

1929,
November 13.

SUBBU CHETTI (THIRD DEFENDANT), APPELLANT,

v.

ARUNACHALAM CHETTIAR (PLAINTIFF), RESPONDENT.*

Contract—Third party's right to sue on.

Where on a contract between *A* and *B*, *B* agrees to pay a sum of money to *C* and no more circumstances appear, *C* being a stranger to the contract, cannot sue *B* for the money, though all the parties to the contract are parties to the suit. This is the general rule, though some exceptions to the rule arise under the following circumstances, e.g., (a) where *B* afterwards agrees with *C* to pay him direct or becomes estopped from denying his liability to pay him personally; (b) where the contract between *A* and *B* creates a trust in favour of *C*; (c) where the contract charges the money to be paid out of some immovable property or (d) where it is due to *C* under a marriage settlement, partition or other family arrangement; *Jamna Das v. Ram Autar Pande*, (1911) I.L.R., 34 All., 63 (P.C.), followed.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 99 of 1923, preferred against the decree of the Court of the District Munsif of Periyakulam in Original Suit No. 425 of 1923.

The facts are given in the Opinion of the Full Bench.

This appeal coming on for hearing the Court (WALLACE, J., and SUNDARAM CHETTI, J.), made the following

ORDER OF REFERENCE TO A FULL BENCH:—

In view of the conflicting decisions on the point of law, we consider that there ought to be an authoritative decision by a Full Bench on it.

* Second Appeal No. 159 of 1926.

ON THIS REFERENCE—

B. Satyanarayana for appellant.—As the plaintiff was not a party to the contract, he cannot sue the promisor, though the promisee also is a party to the suit; this is the general rule; *Jamna Das v. Ram Autar Pande*(1), *Itti Panku Menon v. Dharman Achan*(2), *Iswaran Pillai v. Sonniavaveru Taragan*(3). *Jiban Krishna Mullik v. Nirupama Gupta*(4), *Krishna Lal Sadhu v. Pramila Bala Dasi*(5). [KUMARASWAMI SASTRIYAR, J., referred to *Raju Chettiar v. Shukkoor & Co.*(6).] There are exceptions to the rule but this case does not come under any of the exceptions; the exceptions are (a) when the promisor afterwards enters into direct relationship with the stranger, (b) when the promisor becomes a trustee for him, (c) when any amount due to the stranger under the contract has been charged on immovable property or (d) when the stranger is given some benefit under a marriage settlement, partition or other family arrangement; see *Khwaja Muhammad Khan v. Husaini Begum*(7), *Shuppu Ammal v. Subramaniyan*(8), *Sundararaja Ayyangar v. Lakshmi Ammal*(9), *Sivasubramania Mudaliar v. Gnanasammanda Pandara Sannadhi*(10), *Raghunatha v. Sadagopa*(11), *Ramaswami Aiyar v. Deivasigamani Pillai*(12), and section 23 of the Specific Relief Act and section 94 of the Trusts Act.

K. Rajah Ayyar for respondent.—A direction to pay creates a trust in favour of the person to be paid. Moreover if the parties to the contract are parties to the suit, the suit is maintainable; *Munisami Naicker v. Vedachella Naicken*(13), *Peria Thiruvadi Ayyangar v. Pokutti Janaki*(14), *Areti Singarayya v. Areti Subbayya*(15), *Krishnaswami Battar v. Gopalakrishna Reddiar*(16), *Debnarayan Dutt v. Chunilal Ghose*(17), *Gandy v. Gandy*(18). He referred to and explained the cases quoted by the appellant.

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| • (1) (1911) I.L.R., 34 All., 63 (P.C.). | (2) (1917) I.L.R., 41 Mad., 488. |
| (3) (1913) I.L.R., 38 Mad., 753. | (4) (1926) I.L.R., 53 Calc., 922. |
| (5) (1928) I.L.R., 55 Calc., 1315. | (6) (1926) 25 L.W., 44. |
| (7) (1910) I.L.R., 32 All., 410 (P.C.). | (8) (1909) I.L.R., 33 Mad., 238. |
| (9) (1914) I.L.R., 38 Mad., 788. | (10) (1911) 21 M.L.J., 359. |
| (11) (1911) I.L.R., 36 Mad., 348. | (12) (1922) 48 M.L.J., 129. |
| (13) (1928) A.I.B. (Mad.), 23. | (14) (1923) 45 M.L.J., 693. |
| (15) (1924) 47 M.L.J., 517. | (16) (1926) 25 L.W., 190. |
| (17) (1913) I.L.R., 41 Calc., 137. | (18) (1885) 30 Ch.D., 57. |

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The OPINION of the Court was delivered by KUMARASWAMI SASTRI, J.—The facts leading to this Reference are these—The first defendant executed a sale-deed, dated the 21st of December 1922, in favour of the third defendant for Rs. 3,500, and he directed the vendee to pay the plaintiff Rs. 1,200 which he, the first defendant, owed the plaintiff. The plaintiff sued to recover the sum of Rs. 1,574-10-3 the balance which was due on a promissory note executed by the first and second defendants, dated the 25th of June 1921. He made the third defendant a party on the ground that he was a vendee from the first defendant under an obligation to pay the debt due by the first defendant to the plaintiff.

The sale-deed has been filed as Exhibit D in the case. It purports to be for Rs. 3,500. After reciting that the vendee had undertaken to pay Rs. 1,500 due to one Viswanatham Chetti and another sum of Rs. 500 due to the same creditor, the material portion continues as follows :—

“Whereas you have consented to pay on my behalf to P. L. M. Palaniappa Chettiyar firm carrying on money-lending business at Tenkarai, Periyakulam Town, the amount due by me to him and obtain a receipt, I am in receipt of Rs. 1,200.”

Then it proceeds to state the other creditors who were to be paid and the consideration is said to have been received in that manner.

The third defendant pleaded that there was no privity between him and the plaintiff and that there was no cause of action.

The District Munsif dismissed the suit against the third defendant and passed a decree against the first and second defendants.

On appeal the Subordinate Judge reversed the judgment of the District Munsif and remanded the case for trial.

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On appeal against this order of remand, the High Court set aside the order of remand and directed the Subordinate Judge to dispose of the case in the light of the observations made by the High Court. One of the questions which the High Court wanted the Subordinate Judge to decide was whether the third defendant undertook orally to pay the money to the plaintiff and pointed out that if the oral agreement was proved, the plaintiff would be entitled to a decree against the third defendant, but if it was not proved, then the question whether the principle in *Tweddle v. Atkinson*(1) would apply would have to be considered.

The Subordinate Judge found on the evidence that the oral agreement was not proved and that the third defendant did not, apart from the obligation under Exhibit A, orally agree to pay the sum to the plaintiff. He, however, held, following the decisions in *Itti Panku Menon v. Dharman Achan*(2), *Debnarayan Dutt v. Chunilal Ghose*(3), and *Areti Singarayya v. Areti Subbayya*(4), that the principle in *Tweddle v. Atkinson*(1) did not apply and passed a decree against the third defendant also.

Against that judgment this second appeal was filed, which came on before WALLACE and SUNDARAM CHETTI, J.J., and they were of opinion that in view of the conflict of decisions on the point of law, it was desirable to have the decision of a Full Bench on the question.

On the findings of facts of the Courts below, the only question for decision is whether a contract between A and B to pay C who is a creditor of A would without more entitle C to sue B. We have already set out the sale-deed and we think, on the terms of the sale-deed, there is no trust express or implied created and that

(1) (1861) 1 B. & S., 393; 121 E.R., 762.
(3) (1918) I.L.R., 41 Calc., 187.

(2) (1917) I.L.R., 41 Mad., 488.
(4) (1924) 47 M.L.J., 517.

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the sale-deed merely constitutes the vendee the agent of the vendor to pay some of his creditors.

The law in England is that the mere payment of money by *A* to *B* with a direction to pay it to *C* in cases where *B* is not *C*'s agent is revocable and confers no right of action. A distinction has been drawn between cases where the defendant has constituted himself the agent of plaintiff to pay him a particular sum of money received from a third person and cases where there is no such agency or trust, express or implied.

A similar view has been taken in India in *Raghunatha v. Shadagopa*(1). There it was held that where *A* transferred his property to *B* in consideration of *B* agreeing to pay certain sums to third persons, *A* was himself entitled to sue *B* for the recovery of those sums as if they were due to him in case of *B*'s failure to pay the creditors within a reasonable time. The learned Judges have referred to all the cases bearing on the point. We may also refer to *Komu Kutti v. Kumara Menon*(2).

The question has therefore to be decided on the footing that no trust has been created, that the third defendant was not plaintiff's agent and that there was no novation or obligation undertaken by the third defendant to the plaintiff.

The rule of common law laid down in *Tweddle v. Atkinson*(3) is that a stranger to the consideration cannot sustain an action on the promise made between two persons, unless he has in some way intervened in the agreement.

As regards relief given by Courts of Equity, *Gandy v. Gandy*(4) gives a right of action to the third person, only when the person with whom the contract is made

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is a trustee express or implied for the third person for whom the benefit is intended. The conditions necessary to be fulfilled before a person not a party to a contract can enforce any claim under it in a Court of Equity are laid down in *Gandy v. Gandy*(1), in *In re Empress Engineering Company*(2), and in *In re Rotherham Alum and Chemical Company*(3). The observations of Lord HATHERLEY in *Touche v. Metropolitan Railway Warehousing Company*(4) have been dissented from as stating the rule too widely.

Section 23 of the Specific Relief Act deals with the persons for whom contracts may be specifically enforced, and clause (c) of that section enacts that specific performance may be obtained where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, by any person beneficially entitled thereunder.

There has been great divergence of opinion in the Courts in India as to how far a stranger to a consideration can enforce the contract and how far the rule in *Tweddle v. Atkinson*(5) is applicable in India. There are decisions which decide that the rule of English law as laid down in *Tweddle v. Atkinson*(5) and *Gandy v. Gandy*(1) will apply to cases in India. There are other decisions which are to the effect that the principle in *Tweddle v. Atkinson*(5), founded as it is on English law on the form of action known as *assumpsit*, is not applicable to contracts in India governed by the Indian Contract Act where all the parties are before the Court and the Court can do complete justice between them. There are other decisions which take a middle course and decide that the rule in *Tweddle v. Atkinson*(5) is applicable

(1) (1911) I.L.R., 36 Mad., 348.

(3) (1861) 1 B. & S., 353.

(2) (1918) 35 M.L.J., 492.

(4) (1885) 30 Ch.D., 57.

(1) (1885) 30 Ch.D., 57.

(3) (1883) 25 Ch.D., 103.

(2) (1880) 16 Ch.D., 125.

(4) (1871) L.R., 6 Ch. App., 671.

(5) (1861) 1 B. & S., 393.

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subject to certain specified exceptions which we shall refer to later on.

It is difficult to reconcile the various views and we think the balance of authority is in favour of the view that a stranger to a contract cannot without more sue to enforce it.

In *Jamnadas v. Ram Autar Pande*(1), *A* mortgaged certain properties to *B*. He sold the property to *C* and left with him sufficient money out of the consideration to redeem *B*. *B* obtained a decree on his mortgage and as the sale-proceeds were insufficient to meet his claim, he applied for a personal decree against *C* on the ground that *C* was liable as he retained part of the consideration payable to *A*, agreeing to pay it to *B*. It was held by RICHARDS and GRIFFIN, JJ., that *C* did not become liable to *B*. The learned judges observed :

"It is contended that by retaining in his hands part of the purchase money and expressly or impliedly agreeing to pay the amount to *Jamna Das*, the respondent became personally liable. In our opinion this contention is not sound. *Jamna Das* was no party to the contract between *Mussammat Lakhpai Kuar* and *Pandit Ramautar Pande*. No Indian or English case has been cited to us in which it has been ever held or suggested that the transferee of the equity of redemption in mortgaged property becomes personally liable to the mortgagee."

The case was carried in appeal to the Privy Council, and the decision of their Lordships of the Privy Council is reported in *Jamna Das v. Ram Autar Pande*(2), and the decision of the Allahabad High Court was upheld. Lord MACNAGHTEN observed :

"This is a perfectly plain case. The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. The mortgagee has no right to avail himself of that. He was no party to the sale. The purchaser entered into no contract

with him, and the purchaser is not personally bound to pay this mortgage debt."

In *Itti Panku Menon v. Dharman Achan*(1), the question arose as to a third party's right to sue on a contract. Sir JOHN WALLIS, C.J., and BAKEWELL, J., were of opinion that a *jenmi* was not entitled to sue on an assignment by a *melkanomdar* to a *kanomdar* whereby as between them the *kanomdar* agreed to pay the rent due by the *melkanomdar* to the *jenmi*. The case arose out of a difference of opinion between ABDUR RAHIM and PHILLIPS, JJ. PHILLIPS, J., held that the *jenmi* could sue, whereas ABDUR RAHIM, J., differed. Sir JOHN WALLIS, C.J., observed :

"One of the questions argued before us was whether the plaintiff is entitled to sue on this contract made between the first defendant and second defendant. As regards this, I agree with ABDUR RAHIM, J., that he cannot, and that the question is concluded by the recent decision of the Privy Council in *Jamna Das v. Ram Autar Pande*(2), where Lord MACNAGHTEN in delivering their Lordships' judgment held that a purchaser's contract with his vendor to pay off a mortgage on the property sold could not be enforced by the mortgagee."

Then the learned CHIEF JUSTICE refers to *Khwaja Muhammad Khan v. Husaini Begam*(3), and distinguishes the case on the ground that it was a contract made by a guardian for the benefit of a minor in contemplation of her marriage.

The question has been elaborately considered by AYLING and TYABJI, JJ., in *Iswaram Pillai v. Sonivaveru Taragan*(4). That was a case where *A* mortgaged his lands to *B* and part of the consideration was *B*'s promise to discharge a debt of *A* to *C*. *C* sued *B* and it was held that *C* who was a stranger to the contract cannot sue *B* for the payment of his debt without joining *A* as a party.

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(1) (1909) I.L.R., 31 All., 352.

(2) (1911) I.L.R., 34 All., 63 (P.C.).

(1) (1917) I.L.R., 41 Mad., 488.
(3) (1910) I.L.R., 32 All., 410.

(2) (1911) I.L.R., 34 All., 63 (P.C.).
(4) (1913) I.L.R., 33 Mad., 703.

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The learned Judges deal exhaustively with the cases and lay down the general rule of law to be that a party who is a stranger to a contract cannot sue on the contract. The exceptions which the learned Judges enunciate are (a) the creation of a trust in favour of the plaintiff in respect of the amount sued for, (b) the creation of a charge on immovable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff, (c) the creation of a settlement on marriage in which the plaintiff may be beneficially entitled as provided by section 23 of the Specific Relief Act, and (d) estoppel as against the promisor owing to transactions between the plaintiff and the promisor.

This question again arose in C.S. No. 325 of 1926 on the Original Side of the High Court. BEASLEY, J., after an exhaustive review of the authorities, came to the conclusion that a second mortgagee who retained in his hands sufficient portion of the consideration to discharge the first mortgage and who does not discharge the first mortgage, cannot be sued by the first mortgagee on the covenant between the mortgagor and the second mortgagee. This case was carried in appeal (O.S.A. No. 95 of 1927) where Sir MURRAY COUTTS TROTTER, C.J., and PAKENHAM WALSH, J., upheld the decision of BEASLEY, J. The learned Judges observed :

“The learned Judge held that as there was no privity between the plaintiff and second defendant with regard to the mortgage, Exhibit A (1), the plaintiff could not claim any benefit under it . . . The point of law has been fully discussed by the learned Judge and he has considered all the important authorities. It is not disputed as a general rule of law that only those who are parties to a contract can sue on it. The Privy Council decisions in *Jamna Das v. Ram Autar Pande* (1), and in *Nanku Prasad Singh v. Kamta Prasad Singh*(2), are conclusive that the reservation of part of the purchase

money to pay a previous mortgagee does not of itself create a trust in favour of that previous mortgagee nor can the prior mortgagee make the purchaser personally liable. The case of such a reservation in a mortgage is indistinguishable from its reservation in a sale deed.”

This decision was given on the 1st of May this year. In view of this decision of BEASLEY, J., which was confirmed in appeal, we think we may take it as settled law in Madras that a stranger to a contract cannot without more sue to enforce it. It is unnecessary therefore to refer in detail to cases in Madras which took the opposite view. This view was based upon a decision of their Lordships of the Privy Council in *Khawaja Muhammad Khan v. Husaini Begum*(1). In that case there was an arrangement made between the defendant and the father of the plaintiff who was then a minor on the occasion, and in consideration of, her marriage with the defendant's son who was also a minor, that a certain sum should be paid to the plaintiff for her betel-nut expenses, etc., from the date of the marriage. A suit was filed to recover the arrears of allowance and the contention was that the plaintiff being a stranger to the contract could not sue on it, and reliance was placed on *Tweddle v. Atkinson*(2). Their Lordships of the Privy Council distinguished the case and said that the rule in *Tweddle v. Atkinson*(2) had no application to the circumstances of the case which they were trying, in which the agreement specifically charged immovable property for the payment of the allowance and the plaintiff was the only person beneficially entitled under it. Their Lordships pointed out that in India where marriages were arranged during minority and contracts for the benefit of minors were entered into by parents and guardians, it would cause serious injustice if the

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(1) (1910) I.L.R., 32 All., 410.

(2) (1861) 1 B. & S., 398.

(1) (1911) I.L.R., 34 All., 63.

(2) (1922) 26 C.W.N., 771.

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strict rule of English Law were applied. Their Lordships, in dealing with the contention based on the rule laid down in *Tweddle v. Atkinson*(1), observed :

"First it is contended, on the authority of *Tweddle v. Atkinson*(1), that as plaintiff was no party to the agreement, she cannot take advantage of its provisions. With reference to this, it is enough to say that the case relied upon was an action of assumpsit, and that the rule of Common Law, on the basis of which it was dismissed, is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff. She is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled to proceed in equity to enforce her claim. Their Lordships desire to observe that in India and among communities circumstanced as the Muhammadans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the Common Law doctrine was applied to agreements or arrangements entered into in connexion with such contracts."

This case has in some decisions of this Court been taken as laying down the rule that Indian Courts are not bound by the Common Law doctrine laid down in *Tweddle v. Atkinson*(1). In *Itti Panku Menon v. Dharman Achan*(2), one of us (KUMARASWAMI SASTRI, J.) took this view, while Sir JOHN WALLIS, C.J., and BAKEWELL, J., took the opposite view. He referred to the numerous cases on the subject. The view he was inclined to take was that having regard to the definition of the word "contract" in the Indian Contract Act and the observations of their Lordships of the Privy Council, the ruling in *Tweddle v. Atkinson*(1) had no application, and it was open to us to follow the rule laid down in *Dutton v. Poole*(3) and earlier cases. We may also refer to *Ramaswami Ayyar v. Deivasigamani Pillai*(4).

(1) (1861) 1 B. & S., 393.

(2) (1917) I.L.R., 41 Mad., 489.

(3) (1888) 2 Lev., 210; 88 E.R., 523.

(4) (1922) 48 M.L.J., 129.

In *Areti Singarayya v. Areti Subbayya*(1) and in *Krishnaswami Batter v. Gopalakrishna Reddiar*(2), the same view was taken by JACKSON, J., and DEVADOSS, J.

A similar view was taken in *Debnarayan Dutt v. Ohunilal Ghose*(3), but it was not followed in *Jiban Krishna Mullik v. Nirupama Gupta*(4) and *Krishna Lal Sadhu v. Pramila Bala Dasi*(5).

We do not think that in view of the current of authority in Madras which we have referred to and especially the last pronouncement by BEASLEY, J., confirmed on appeal by Sir MURRAY COUTTS TROTTER, C.J., and PAKENHAM WALSH, J., the view which some of our learned brothers took can be followed.

Cases where on a partition a benefit is secured to the female members of the family who would be entitled in law to maintenance or cases of family settlement stand on a different footing.

In *Shuppu Ammal v. Subramaniyan*(6), there was a deed of partition whereby provision was made for the plaintiff's maintenance and it was held that although the plaintiff was no party to the document she was entitled to sue. The learned Judges held that a person who was not a party to a document but in whose favour a charge was created by such document was entitled to maintain a suit to enforce its terms, either as the actual beneficiary or as the charge-holder, and referred to *Rukhmabai v. Govind*(7) and *Husaini Begam v. Khwaja Muhammad Khan*(8).

In *Sundararaja Ayyangar v. Lakshmi Ammal*(9), OLDFIELD, J., held that a person though not a party to a contract could sue to enforce its terms if it was a

(1) (1924) 47 M.L.J., 517.

(2) (1926) 25 L.W., 190.

(3) (1913) I.L.R., 41 Cal., 137.

(4) (1928) I.L.R., 53 Cal., 922.

(5) (1928) I.L.R., 55 Cal., 1315.

(6) (1909) I.L.R., 33 Mad., 238.

(7) (1904) 6 Bom. L.R., 421.

(8) (1906) I.L.R., 29 All., 151.

(9) (1914) I.L.R., 38 Mad., 788.

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settlement by which some provision was made for him as a member of the family, e.g., for maintenance or marriage, though the same was not made a charge.

We may also in this connexion refer to *Sudalai v. Gomathi*(1), *Arumuga v. Chinnammal*(2) and *Rajagopala v. Radhayya*(3). Reference has been made by the respondent's advocate to the observations of COTTS TROTTER, C.J., in *Muniswami Naicken v. Vedhachalla Naicken*(4). All that was decided was that the case fell within the rule in *Khwaja Mohammad's case*(5). After referring to that case and to the provisions of Hindu Law, he observes :—

"All I desire to say is that I think that in view of that, the provisions of law in such matters should be applied with greater flexibility than they would be applied in England and that it is quite possible to argue that such a case as this if it occurred in England would be covered by the general principle I have referred to."

Cases of estoppel or of novation obviously stand on a different footing and have nothing to do with the principle laid down in *Tweddle v. Atkinson*(6).

We may point out in this connexion that the view taken in *Debnarayan Dutt v. Chunilal Ghose*(7) by JENKINS, C.J., and MOOKERJI, J., which lays down broadly that the doctrine in *Tweddle v. Atkinson*(6) is inapplicable to British Courts in India and that the aim of the mufassal Courts of Justice in British India is to do complete justice in one suit according to the general principles of justice, equity and good conscience, has not been followed in later cases. We may refer to *Jiban Krishna Mullik v. Nirupama Gupta*(8). In that case, a patnidar created a darpatni and the darpatnidar created

a sepatni in favour of another person. The sepatnidar was to pay certain sums due both to the patnidar and darpatnidar. The patnidar sued the sepatnidar for the rent due. It was held that he could not sue. PAGE, J., referred to and discussed the English cases and was of opinion that the rule laid down by JENKINS, C.J., was too wide, and the learned Judge was inclined to support the decision in *Debnarayan Dutt v. Chunilal Ghose*(1), on the ground that it came within the ruling of COTTON, L.J., in *Gandy v. Gandy*(2).

In *Krishna Lal Sadhu v. Pramila Bala Dasi*(3), it was held that where a life policy was expressed to be for the benefit of the wife of the assured, she was not entitled to sue, as no trust was created in her favour and she was a third party to the contract. So far as the decision that no trust was created in her favour was concerned, the learned Judges dissented from the view taken in *Balamba v. Krishnayya*(4) and to that extent this case may not be authority binding on us, but the view of RANKIN, C.J., and GHOSE, J., on the general question of the legal consequences following from that view supports the view taken in the Madras cases which we have already referred to. GHOSE, J., at page 1321 refers to the rule of English Law that if *A* contracts with *B* for a benefit to be given to *C*, although that was the object and purpose of the contract, *C* may not sue on that contract unless in certain excepted cases and then refers to the excepted cases. After referring to *Khwaja Muhammad Khan v. Husaini Begam*(5), the learned Judge deals with *Debnarayan Dutt v. Chunilal Ghose*(1) and attempts to bring that case within the exceptions laid down in the English cases on the ground

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(1) (1912) M.W.N., 908.

(3) (1911) M.W.N., 39.

(5) (1910) 32 All., 410.

(7) (1913) I.L.R., 41 Cal., 137.

(2) (1911) 2 M.W.N., 524.

(4) (1928) A.I.R. (Mad.), 28.

(6) (1861) 1 B. & S., 393.

(8) (1926) I.L.R., 53 Cal., 922.

(1) (1913) I.L.R., 41 Cal., 137.

(2) (1885) 30 Ch. D., 57.

(3) (1928) I.L.R., 55 Cal., 1315.

(4) (1914) I.L.R., 37 Mad., 488.

(5) (1910) I.L.R., 32 All., 410.

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of the special facts of that case. The learned Judge however agrees with the criticism passed on that case by PAGE, J., in *Jiban Krishna Mullik v. Nirupama Gupta* (1). RANKIN, C J., took the view that it was wrong on the authority of either *Khawaja Muhammad Khan's* case (2) or *Debnarayan Dutt's* case (3) to suppose that in India persons who were not parties to a contract could be admitted to sue thereon except where there was an obligation in equity amounting to a trust arising out of the contract, or in case of communities where marriages were contracted for minors by parents and guardians. The learned Chief Justice observed :—

“ But putting aside such cases, I see no reason to think that the law in India contains a series of exceptions to the principle that a contract can only be sued upon as such by a party thereto. A trust may be founded on the contract and is capable of being enforced by a party to the trust in appropriate proceedings as was pointed out in *Page v. Cox* (4). It is another matter altogether to say that a person not a party to a contract may bring a suit upon the contract by reason of near relationship to the promisee. Nearness of relationship is a fact which, like many other facts, cannot be disregarded in determining the question whether or not a trust arises out of or is founded on a contract but it has no other importance. Cases such as the present can be decided and ought to be decided on the settled principles of equity. In *Cleaver v. Mutual Reserve Fund Life Association* (5), the Court considered whether the policy amounted to a trust for the widow and, having found that it did not, determined the matter by the ordinary law of contract. This, in my judgment, is the only method which can be justified in principle. To hark back to such cases as *Dutton v. Poole* (6), and *Bourne v. Mason* (7), is, in my judgment a clear mistake, and the mistake is not cured by the circumstance that, under the Contract Act, the definition of ‘ consideration ’ is wider than in English Law.”

- (1) (1926) I.L.R., 53 Cal., 922. (2) (1910) I.L.R., 32 All., 410.
(3) (1913) I.L.R., 41 Cal., 137. (4) (1852) 10 Haro, 183; 68 E.R., 882
(5) [1892] 1 Q.B., 147. (6) (1868) 2 Lev., 210; 88 E.R., 523.
(7) (1680) 1 Ventris., 6; 86 E.R., 5.

A similar view was taken in *Shankar Vishvanath v. Umabai* (1), where, after holding that though the policy of insurance effected by the assured upon his own life was for the benefit of his wife, it did not create any trust in her favour, the learned Judges dealt with the question whether she could sue on the contract apart from any trust and observed :

“ It was however argued that as under section 2, clause (d), of the Contract Act, the consideration might be provided by some other person, the plaintiff could sue on a policy the consideration for which was provided by her husband. There is however nothing in the present case to show that the plaintiff was either the promisor or the promisee and therefore a party to the agreement. There is nothing in the Act to show an intention that a person not a party to the contract can sue on it. So far as it goes, section 2 (i) is an indication to the contrary.”

The learned Judges distinguish *Samuel v. Ananthanatha* (2) and *Chinnaya Rau v. Ramaya* (3), on the ground that there was a contract between the parties in those cases. This decision was referred to with approval in *Rose Fernandes v. Joseph Gonsalves* (4).

In *Achuta Ram v. Jainandan Tewary* (5), it was held that a person who was not a party or privy to a contract could not maintain an action to secure any benefit conferred on him by it. In that case A executed a mortgage in favour of the plaintiff and subsequently sold the property to B. In the recital in the sale deed, B agreed to pay off the mortgage and the plaintiff sued B. It was held that the plaintiff could not avail himself of the stipulation in the sale deed between the mortgagor and the vendee that the vendee was to redeem the mortgage. BUCKNILL, J., in the course of the judgment refers to *Nanku Prasad Singh v. Kamta Prasad Singh* (6), where their

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- (1) (1913) I.L.R., 37 Bom., 471. (2) (1883) 1 L.R., 6 Mad., 351.
(3) (1881) I.L.R., 4 Mad., 137. (4) (1924) I.L.R., 48 Bom., 673.
(5) (1926) I.L.R., 5 Pat., 468. (6) (1922) 26 C.W.N., 771.

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Lordships of the Privy Council held that a recital in a sale by A to B that B is to pay off a mortgage would give no cause of action to the mortgagee to sue B. The learned Judge quotes the judgment of Lord ATKINSON who dismissed the appeal with the following remark:—

“ Their Lordships have considered this case and they think it is clear that no personal liability was incurred by the purchasers of the equity of redemption. Their Lordships therefore think that the decree of the High Court was right and that the point made by the appellant failed.”

It is argued that where all the parties to a contract are before the Court and complete justice can be done between them, there is nothing to prevent the Court from giving a decree to a person although he is not a party to the contract, and that this is one of the exceptions that should be grafted on the rule in *Tweddle v. Atkinson*(1), and reliance was placed on the observations of TYABJI, J., in *Iswaram Pillai v. Sonnivaveeru Taragan*(2) at page 763, where the learned Judge deals with the question as to how far the rule in *Tweddle v. Atkinson*(1), can be said to be a rule of procedure. There is nothing in the observations of TYABJI, J., to indicate that the mere presence of parties would make the rule in *Tweddle v. Atkinson*(1) inapplicable.

Reliance has also been placed on the judgment of DEVADOS, J., in *Areti Singarayya v. Areti Subbayya*(3), where the learned Judge after referring to *Iswaram Pillai v. Sonnivaveeru Taragan*(2), and the observations of Sir LAWRENCE JENKINS, C.J., in *Debnarayan Dutt v. Chunilal Ghose*(4), observed:

“ But apart from that, where a Court has before it all persons and is in a position to do complete justice to the case, it would be straining the law to hold that the suit should fail on the

(1) (1861) 1 B. & S., 393.
(3) (1924) 47 M.L.J., 517.

(2) 1913) I.L.R., 38 Mad., 753.
(4) (1913) I.L.R., 41 Cal., 137.

ground that the defendant did not contract with the plaintiff to pay the amount which he contracted to pay on his behalf.”

The learned Judge also refers to the observations of VENKATASUBBA RAO, J., in *Peria Thiruvadi Ayyangar v. Pookutti Janaki*(1).

With respect, it seems to us that if the law is that a person not a party to a contract cannot sue on the contract though a benefit is secured to him and, unless the case falls within the exceptions indicated in the case above referred to, the plaintiff has no cause of action, it is no answer to say that all the parties are before the Court.

Order I, rule 3, of the Civil Procedure Code is very clear. There should be a right to relief in respect of the transaction set out in the plaint before a party can be added as defendant. The addition of others would not so far as he is concerned alter his rights. We do not think that there is any legal basis for holding that the mere joinder of the original parties to the contract would give the plaintiff a cause of action which does not exist before the suit.

We are of opinion that where all that appears is that a person transfers property to another and stipulates for the payment of money to a third person, a suit to enforce that stipulation by the third party will not lie.

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(1) (1923) 45 M.L.J., 698.

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APPELLATE CIVIL—FULL BENCH.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
Mr. Justice Krishnan Pandalai and Mr. Justice
Curgenvven.

1929,
November 12.

PALANI GOUNDAN (ALIENEE-PETITIONER), PETITIONER,

v.

THE OFFICIAL RECEIVER OF COIMBATORE
(RESPONDENT), RESPONDENT.*

*Ss. 5, 27 (2), 43 (1) of the Provincial Insolvency Act (V of 1920)
—Sec. 148, Civil Procedure Code (V of 1908)—No applica-
tion in time for discharge of insolvent—Annulment of
adjudication, when mandatory—Power of Court to extend
time for application.*

Under section 27 (2) of the Provincial Insolvency Act, the Court can extend the time for an application for discharging an adjudicated insolvent. Hence the words "the period specified" in section 43 (1) of the Act, mean the period either originally fixed or subsequently extended from time to time. Though if a debtor does not apply for discharge within "the period specified," the Court is bound to annul the adjudication and section 43 (1) is in this sense mandatory, yet if no express order of annulment is passed, as it should be passed, an annulment does not *ipso facto* take place. Until such an express order is made, any one can apply for extension of time for discharge and the Court can, by virtue of sections 5 and 27 (2) of the Act and section 148, Civil Procedure Code, extend the period, whether the application for it is made before or after "the period specified;" *Chinnappa Reddy v. Thomasu Reddy*, (1927) I.L.R., 51 Mad., 839, overruled; *Gopal Ram v. Magni Ram*, (1927) I.L.R., 7 Pat., 375, followed. *Bhadri Narain v. Sheo Koer*, (1889) I.L.R., 17 Calc., 512 (P.C.), applied.

PETITIONS under section 75 of Act V of 1920 praying the High Court to revise the orders of the District

Court of Coimbatore, in C.M.A. Nos. 69 and 68 of 1928 preferred against the orders of the Court of the Subordinate Judge of Coimbatore, made respectively in I.A. Nos. 223 and 298 of 1928 in I.P. No. 1 of 1923, on the file of the District Court of Coimbatore.

These petitions coming on for hearing, the Court (RAMESAM and JACKSON, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The decision relied on by the District Judge while making some observations in favour of the respondent ultimately proceeds on the ground that the proceeding before the learned Judges was a Revision Petition and the learned Judges thought that it was a ground good enough for rejecting the petition. The contention of the respondent is supported by the decisions of the Calcutta, Patna, Lahore and Rangoon High Courts; *Abraham v. Sookias*(1), *Gopal Ram v. Magni Ram*(2), *Lakhi v. Molar*(3), and *K. K. S. A. R. A. Chetty v. Mg. Myat Tha* (4). The opposite view was taken in this Court by two learned Judges in *Chinnappa Reddy v. Thomasu Reddy*(5). It is unnecessary to refer to other decisions in this Court. One matter is clear. As observed by CHATTERJEA and PANTON, JJ., section 43 of the Act does not operate as an automatic annulment on the failure of the debtor to apply for a discharge. On this point, there is an authority which says that the adjudication shall stand cancelled on the debtor's default. The only question that arises is—whether the Court can extend the time before the order of annulment is passed, though after the expiry of the time originally fixed under section 27. We refer the following question for the decision of a Full Bench:—

Whether a Court has jurisdiction to extend the time originally fixed under section 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43, either under section 5 of the Insolvency Act taken with section 148, Civil Procedure Code, or under section 27 (4) of the Act itself, or otherwise?

(1) (1923) I.L.R., 51 Calc., 337.

(2) (1927) I.L.R., 7 Pat., 375.

(3) (1925) 86 I.C., 115.

(4) (1927) A.I.R. (Rang.), 136.

(5) (1927) I.L.R., 51 Mad., 839.

* Civil Revision Petitions Nos. 1349 and 1350 of 1928.

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ON THIS REFERENCE—

S. Venugopalachari for petitioner.—After the expiry of time fixed for applying for discharge not only the Court is bound to annul the adjudication, but the adjudication itself stands annulled *ipso facto*; and no express order annulling the adjudication is necessary for section 43 (1) to operate. No application for extension can be made after the expiry of the time; otherwise, section 148, Civil Procedure Code, would be unnecessary. Wherever the legislature requires an order to be made expressly or an application to be made by a party to create a certain effect, it has so enacted. Section 43 (1) has been held to be mandatory by almost all the decisions of this Court; *per* WALLER, J., in *Arunagiri Mudaliar v. Kandasami Mudaliar*(1), *Chinnappa Reddy v. Thomas Reddy*(2), *Venugopalachari v. Chunnilal Sowcar*(3), *per* REILLY, J. in *Jethaji Peraji Firm v. Krishnayya*(4); though under the English Bankruptcy Act an application for extension can be made after the time fixed, *In re Lord Thurlow*(5). The latest decisions of other High Courts are against me.

N. S. Srinivasa Ayyar and *G. Jagadisa Ayyar* for respondent.—It is true that if the debtor does not apply for discharge, the Court is bound to annul the adjudication under section 43 (1); the section is mandatory only in this sense, but it does not follow that there is an automatic annulment then; the Court has to pass an express order of annulment. This is implied in section 37 (2) of the Act. "Period fixed" in section 43 (1) means "period fixed either originally or as extended from time to time;" see *per* VENKATASUBBA RAO, J. in *Jethaji Peraji Firm v. Krishnayya*(4), *Gopal Ram v. Magni Ram*(6), *Abraham v. Sookias*(7) and *Maharaj Hari Ram v. Sri Krishna Ram*(8). Extension can be applied for even after expiry of time. See sections 5, 27 (2) of the Act and section 148, Civil Procedure Code; *Bhadri Narain v. Sheo Koer*(9).

OPINION.

BEASLEY,
C.J.

BEASLEY, C.J.—The question referred to us is "Whether a Court has jurisdiction to extend the time

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| (1) (1923) 19 L.W., 418. | (2) (1927) I.L.R., 51 Mad., 839. |
| (3) (1928) I.L.R., 49 Mad., 935. | (4) (1929) I.L.R., 52 Mad., 648. |
| (5) [1895] 1 Q.B., 724. | (6) (1927) I.L.R., 7 Pat., 375. |
| (7) (1923) I.L.R., 51 Cal., 337. | (8) (1926) I.L.R., 49 All., 201. |
| (9) (1889) I.L.R., 17 Cal., 512 (P.O.). | |

originally fixed under section 27 of Provincial Insolvency Act for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under section 43, either under section 5 of the Insolvency Act taken with section 148, Civil Procedure Code, or under section 27 (2) of the Act itself, or otherwise." This reference is made necessary because of the view taken by Courts other than the Madras High Court in opposition to the balance of opinion in the Madras High Court.

The facts are that the insolvency petition was presented on the 5th January 1923 and on this petition there was an order of adjudication on the 31st January 1924 and one year's time was granted to the insolvent to apply for his discharge. This time was further extended and the finally extended period expired on the 30th June 1927. No further applications for extension of time were made and nothing was done in the insolvency until in 1928 an alienee applied for the annulment of the adjudication. Notice was ordered to the insolvent to show cause against the annulment of the adjudication and then a creditor filed an application to extend the time for the application for discharge.

We have now to consider whether the Court has any jurisdiction to extend the time for an application for discharge having regard to the fact that the time specified by the Court expired on the 30th June 1927 and the application for an extension of time was only made in 1928. The first section to be considered is section 43 (1) of the Provincial Insolvency Act, which reads,

"If the debtor does not appear on the day fixed for hearing his application for discharge or on such subsequent day as the Court may direct, or if the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly."

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WALLER, J., in *Arunagiri Mudaliyar v. Kandaswami Mudaliyar*(1), held that the Judge had no option under section 43 but to annul the adjudication and that he had no power under section 27 to extend the period after it had expired. His reason for so holding is that section 43 is in his view absolutely peremptory in its terms and that the only course open to a Court, on default of the insolvent to apply for his discharge, is to annul the adjudication, and that being so, no application for extension of the period can lie after it has expired. In the same case, KRISHNAN, J., took the contrary view. In *Chinnappa Reddy v. Thomas Reddy*(2), KUMARASWAMI SASTRI and WALLACE, JJ., agreed with WALLER, J.'s view in a judgment which reviewed most of the decided cases upon this point and they held that the word "shall" in its ordinary signification is mandatory and saw no reason why that word in section 43 should not receive its ordinary interpretation. PHILLIPS and MADHAVAN NAIR, JJ., followed WALLER, J.'s opinion in *Arunagiri Mudaliyar v. Kandaswami Mudaliyar*(1), in *Venugopalachariar v. Chinnulal Sowcar*(3). VENKATASUBBA RAO and REILLY, JJ., considered this question in *Jethaji Peraji Firm v. Krishnayya*(4). VENKATASUBBA RAO, J., in the first place, observes that the adjudication does not get automatically annulled under section 43 (1) on the expiry of the original period. Next he holds that section 27 (2) of the Provincial Insolvency Act, whilst 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, and in his view, section 148, Civil Procedure Code, clearly allows the Court to enlarge the time, irrespective of the fact that the application is made either before or after

(1) (1923) 19 L.W., 418.

(3) (1926) I.L.R. 49 Mad., 935.

(2) (1927) I.L.R., 51 Mad., 839.

(4) (1929) I.L.R., 52 Mad., 648.

the expiry of the period originally specified, and for this, *Bhadri Narain v. Sheo Koer*(1) is direct authority. He holds, therefore, that it is open to the Insolvency Court under section 27 (2) of the Provincial Insolvency Act to extend the time on a proper application to that effect made at any time before the adjudication is annulled under section 43 (1). REILLY, J., is inclined to the view that the words "shall be annulled" in section 43 of the Act are mandatory. In the view of the majority of the Judges of this High Court who have considered this question, the answer to the question referred to us would be in the negative.

But other High Courts, namely, Calcutta, Patna and Lahore, have taken the opposite view. This question was very carefully dealt with by a Full Bench of the Patna High Court in *Gopal Ram v. Magni Ram*(2) holding that the Court has power under section 27 (2) of the Provincial Insolvency Act to extend the time originally fixed by it for the insolvent to make an application for discharge, in spite of the fact that the time originally fixed by it may have expired and no application for discharge was made by that time, and that the power so conferred by section 27 (2) can only be curtailed or withdrawn when the Court's power to deal with the question of adjudication has come to an end by reason of its having passed the final order annulling the order of adjudication. It also held that the annulment of adjudication does not, under section 43 (1) of the Act, come into operation without an express order of the Court to that effect. All the decisions were carefully considered in the judgment of JWALA PRASAD, J. On page 381, he says :

"The interpretation sought to be placed upon section 43 of the Act by Mr. Shambhu Saran could only be accepted if the

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(1) (1889) I.L.R., 17 Cal., 512.

(2) (1927) I.L.R., 7 Pat., 375.

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Court was not required to pass an order of annulment after the failure of the insolvent to make an application within the period specified by the Court. The annulment of adjudication would not *ipso facto* come into operation without an express order of the Court to that effect under section 43 of the Act. This is clear from the section itself and it gains support from clause (2) of section 37 which says 'Notice of every order annulling an adjudication shall be published in the Local Official Gazette and in such other manner as may be prescribed,' so that an order annulling an adjudication has to be passed by the Court and so long as that order is not passed, the question, as observed above, remains pending before the Court in spite of the expiry of the period fixed by the Court for the insolvent to make an application for his discharge."

It was strongly contended before us that this view of the Patna High Court is wrong and that directly the time has expired for the application for the discharge and the debtor has made default in making such an application, the order of adjudication is *ipso facto* annulled. But this contention quite overlooks section 37 (2) of the Act to which JWALA PRASAD, J., referred. That, in terms, refers to the order annulling the adjudication. It seems clear that no adjudication can be annulled without an order. If the annulment were automatic on the expiry of the period prescribed by section 27 (1), the order annulling the adjudication specified in section 37 (2) would be quite unnecessary. In *Abraham v. Sookias*(1), CHATTERJEA and PANTON, JJ., took the same view as was taken afterwards in the case in 7 Patna, namely, that the Court has power to extend the time even after the expiry of the period originally fixed and that furthermore the annulment of the adjudication is not automatic. On the latter point, *Maharaj Hari Ram v. Sri Krishan Ram*(2) is in agreement with 7 Patna and 51 Calcutta.

(1) (1923) I.L.R., 51 Calc., 387.

(2) (1926) I.L.R., 49 All., 201.

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In my opinion, the view taken by the Calcutta, Patna and the Allahabad High Courts is the correct one. I think that too much importance has been given in the decided cases in this Court to the question of whether the word "shall" in section 43 (1) of the Act is to be used in a mandatory sense or not. No doubt it is mandatory and gives the Court no option but to order an annulment of the adjudication, but that does not necessarily imply that the Court cannot grant an extension of time before passing such an order. In my view, all that is intended by that section is that if no one applies for an extension of time or no extension of time is given, the Court must then annul the adjudication. Section 27 (2) of the Act cannot be lost sight of. That gives the Court power to extend the time within which the debtor shall apply for his discharge and section 43 (1) only compels the Court to annul the order of adjudication, if the debtor does not apply for an order of discharge within the period specified by the Court and, in my view, section 27 (2) applies as much to cases beyond the extended period as to those within it, so long as the application is made before any order of annulment is made by the Court and the words "within the period specified by the Court" in section 43 (1) mean the period extended by the Court from time to time beyond the original period and up to the date of annulment.

I also agree with VENKATASUBBA RAO, J., in *Jethaji Peraji Firm v. Krishnayya*(1) that section 148 of the Civil Procedure Code allows the Court to enlarge the time irrespective of the fact that the application is made after the expiry of the time originally fixed or afterwards extended.

(1) (1929) I.L.R., 52 Mad., 648.

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J.

For the above reasons, I would answer the question referred to us in the affirmative.

KRISHNAN PANDALAI, J.—I agree.

CURGENVEN, J.—I also agree. The question is not, in my view, whether the terms of section 43 (1) of the Act are mandatory. Granting that the Court is obliged to annul an adjudication if the debtor does not apply for an order of discharge "within the period specified by the Court," it remains to be decided how that expression is to be construed. Sub-section (1) of section 27 requires the Court, on making an order of adjudication, to "specify in such order the period within which the debtor shall apply for his discharge." Sub-section (2) empowers the Court to extend such period. "The period specified by the Court" will clearly comprise not only the period originally specified under sub-section (1), but any extension granted under sub-section (2). Then the only further question is whether such extension may be sanctioned even after the original period, together with any extension already ordered, has expired. Section 5 of the Act attracts the provisions of the Code of Civil Procedure, and among them the power, conferred by section 148 of the Code, to grant an extension of time, even though the period originally fixed may have expired. It is scarcely necessary to go further than this; but if it were, the Privy Council judgment in *Badri Narain v. Sheo Koer* (1) would support the view that power to enlarge a period after its expiry is implicit in such a provision as section 27 (2). That case was decided under the old Code, which contained nothing corresponding to section 148, and the point for decision was as to a Court's power retrospectively to enlarge the period for furnishing

(1) (1889) I.L.R., 17 Cal., 512.

security under section 549 (now Order XLI, rule 10). The section contained the direction

"If such security be not furnished within such time as the Court orders, the Court shall reject the appeal."

Purely upon a construction of the section, their Lordships say that

"the application to the Court to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so."

I can discover no reason for construing section 43 (1) of the Provincial Insolvency Act in any different manner.

N.R.

APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.*

RAJAH SOMASEKHARA ROYAL AND TWO OTHERS
(DEFENDANTS 4, 6 AND 2), APPELLANTS,

v.

RAJAH SUGUTOOR IMMADI MAHADEVA ROYAL YES-
WANTHA BAHADUR AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS 3 AND 5), RESPONDENTS.*

*Lingayats—Custom of adoption of a married man—Lingayats of
North Kanara, not governed by Mayukha Law of adoption.*

Under the Hindu Law obtaining in the Madras Presidency, the adoption of a married man is invalid; this rule applies also to Lingayats, who are only a sect of Hindus, in the absence of a custom to the contrary.

As the district of North Kanara formed part of the Madras Presidency till 1861 and was then transferred to the Bombay

* Appeal No. 354 of 1926.

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MAHADEVA. Presidency only for administrative purposes, the Lingayats of that district are governed by the above rule and not by the law of Mayukha, prevailing in the Bombay Presidency, which expressly allows such adoption.

APPEAL against the decree of the Court of the Subordinate Judge of Chittoor in Original Suit No. 14 of 1919.

The parties to the suit who belong to the Lingayat community are members of the Punganur Zamindar's family. Punganur was permanently settled in 1861. It is an impartible estate governed by the law of primogeniture. On the 22nd of December 1896, the then zamindar of Punganur executed a will by which he directed that his eldest son should be the zamindar, and that after him, his eldest son should succeed to the zamindari and so on in succession. The will further directed that his eldest son should give his (testator's) second and third sons Rs. 100 each, and his wife Rs. 40, a month, as allowances and bequeathed some landed property to the second and third sons. The second son filed a suit in 1901 against his elder brother, the then zamindar, for partition of the zamindari and in the alternative for maintenance. The zamindar pleaded that the estate was impartible and that the plaintiff was entitled only to what was bequeathed under the will. A compromise was effected pending an appeal to the High Court, by which the zamindar agreed to give the second son and his descendants Rs. 100 a month as allowance and Rs. 125 a month in lieu of the lands bequeathed to him under the will. This compromise was at the end of 1906. In September 1907, this second son and his mother went to North Kanara and the allegation in the present suit is that he was then adopted there by a lady, a relation of his mother. He returned in 1908 to Punganur and filed a suit in 1912 for Rs. 6,695, arrears of maintenance as per compromise against the then

zamindar, the son of his brother who had died by that time. The zamindar pleaded that the compromise was not binding on him and though he raised various other defences he did not plead that the plaintiff was not entitled to any maintenance by reason of his alleged adoption to another family. A decree for arrears of maintenance according to the terms of the above compromise was made by the trial Court and confirmed by the High Court. The decree was executed and the plaintiff got the money. He filed the present suit, Original Suit No. 14 of 1919, for arrears of maintenance subsequent to the above decree, on the basis of the above compromise. Various defences were raised but the main defence was that the plaintiff was not entitled to claim anything from the zamindar as he had been adopted into another family. To this, the answer was that there was no adoption as a matter of fact and, secondly, that the adoption, even if true, was invalid because the plaintiff was, at the date of the adoption, a married man about 23 years of age. The plaintiff pleaded that the adoption not having been pleaded in the previous suit was *res judicata*. Defendants pleaded that they were not aware of the adoption at that time. The suit was originally laid against the first defendant only, the zamindar, but pending the suit, he died, and defendants 2 to 6 were brought on record as his legal representatives, and they adopted the written statement of the first defendant. The Subordinate Judge decreed the suit holding that the plaintiff was in fact adopted, but that his adoption was invalid, as he was then a married man.

The defendants 4, 6 and 2 preferred this appeal.

S. Varadachari and E. Krishnamurthy for the appellant.
—Lingayats differ in many respects from other Hindus; among them the religious basis for an adoption is utterly absent; they do not acknowledge the caste system or Brahman supremacy and

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MAHADEVA. they have no Upanayanam; hence the onus of proving that among them the adoption of a married boy is legally valid is very slight; *Sooratha Singa v. Kanaka Singa*(1). Moreover the parties to the adoption in this case must be held to be governed by the Mayukha Law which expressly allows such adoption, as they lived in North Kanara, which belongs to the Bombay Presidency. *Basava v. Lingangouda*(2), *Chenava v. Basavangauda*(3). Prohibition of such adoption even among Sudras is wrong. The custom validating such adoptions among the Lingayats, in whatever Presidency they are, has been proved.

Advocate-General (A. Krishnaswami Ayyar) and B. C. Seshachala Ayyar for respondent.—North Kanara until 1861 was part of this Presidency and was governed by its law and unless it is proved that the people of that district later on adopted the Mayukha Law, which has not been proved, they must be held to be governed only by the law prevailing here; *Prithee Singh v. The Court of Wards*(4). Lingayats being Hindus are governed by ordinary Hindu law unless a special custom is proved to the contrary which on the evidence in this case must be held as not proved; compare, *Gettappa v. Erramma*(5) and *Vannia Kone v. Vannichi Ammal*(6). Though the adoptive mother belonged to Bombay Presidency, as the adopted son belongs to Madras Presidency, the law here as to his status governs, not that of the adoptive mother; vide Wharton's Conflict of Laws, 3rd Edition: Section 251.

JUDGMENT.

After stating the facts, their Lordships proceeded as follows:—

As in our view the adoption even if true is invalid, it is unnecessary to give a finding on this point.

As regards the validity of the adoption, two questions arise, namely, (1) whether the plaintiff was married at the time of the adoption and (2) whether the adoption of a married man among Lingayats is valid.

(1) (1920) I.L.R., 43 Mad., 867.

(3) (1895) I.L.R., 21 Bom., 105.

(5) (1926) I.L.R., 50 Mad., 228.

(2) (1894) I.L.R., 19 Bom., 428.

(4) (1875) 28 W.R., 272.

(6) (1927) I.L.R., 51 Mad., 1.

It is admitted that the first plaintiff was a married man at the time of the adoption. The parties are Lingayats and the question is whether the adoption of a married man by a Lingayat is valid.

The Subordinate Judge held that as the adoptive mother belongs to North Kanara which was part of the Madras Presidency before it was transferred to the Bombay Presidency in 1861, the law applicable to the parties is the law as applied in the Madras Presidency, that as the adoption of a married man has been held to be invalid, the first plaintiff's adoption was invalid and inoperative and that he therefore remained a member of his natural family and was entitled to the rights conferred on him by the rajinama.

North Kanara originally formed part of the dominions of Hyder Ali and his son Tippu who were the Rulers of Mysore, and in 1799 on the fall of Tippu Sultan, North Kanara and other territories were ceded to the East India Company and formed part of the Madras Presidency till 1861, when for administrative purposes the administration of that district was transferred to the Bombay Presidency.

So far as the Presidency of Madras is concerned, the law has always been that the adoption of a married man is invalid. The latest decision of this Court is *Lingayya Chetty v. Chengal Ammal*(1).

Except in the Bombay Presidency where the Mayukha prevails, it has been held by the Courts in all the provinces in India that the adoption of a married man even though he happens to be a Sudra is invalid. The decisions are referred to in *Lingayya Chetty v. Chengal Ammal*(1). It is argued for the appellants that the decisions to the effect that in the case of

(1) (1924) I.L.R., 48 Mad., 407.

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So far as the Bombay Presidency is concerned, in places where the Mayukha is followed as the paramount authority, it has been held that the adoption of a married man is valid. We may refer to *Kalgavda Tavanappa v. Somappa Tamangavda*(1) and *Manik Bai v. Gokuldas*(2). This is not by reason of any custom in derogation of the law but by reason of the express text of the Mayukha to the effect that a married man may be adopted.

It is argued for the appellants that as North Kanara has been incorporated in the Bombay Presidency from 1861, the law as administered in the Bombay Presidency should be the law to be administered to Lingayats in the Bombay Presidency where the adoption of married men has been held to be valid. An alternative ground has been taken that among the Lingayats, wherever they are, whether in the Madras Presidency or the Bombay Presidency, the adoption of a married man is valid by custom, that evidence of such a custom has been adduced in this case and that the Judge was wrong in holding that the custom has not been proved.

When the North Kanara District formed part of the Madras Presidency, the law as administered by the Madras High Court was that the adoption of married men was invalid: and it would have been necessary for a person there who sets up a custom to the contrary to prove it. The transfer of North Kanara to the Bombay

Presidency for administrative purposes would not by itself change the personal law of persons residing in the North Kanara District. Whether it is a case of an individual migrating from one province to another or a case of territory where he resides being transferred from one province to another, the presumption until the contrary is shown is that he carries his personal law with him, and it is difficult to see how the Mayukha can be said to apply to the North Kanara District, simply because it was transferred to the Bombay Presidency. We may in this connexion refer to *Huro Pershad Roy v. Shibo Shunkuree Chowdrain*(1), and *Balwant Rao v. Baji Rao*(2).

Turning to the custom set up, the custom alleged is a custom among the Lingayat community to which the parties belong, permitting the adoption of married men. It is a general custom that is alleged, that Lingayats, wherever they are, are permitted to make adoptions of married men.

Before dealing with this question, it is necessary to refer shortly to the Lingayat community. The Lingayats who were originally Hindus are a body of dissenters, and the founder of their religion was one Basava who was born about 1100 A.D. Their religion is correctly summarised by Thurston in his *Castes and Tribes of Southern India*, Vol. IV, at page 236 as follows:—

“ Their religion is a simple one. They acknowledge only one God, Siva, and reject the other two persons of the Hindu Triad. They reverence the Vedas, but disregard the later commentaries on which the Brahmans rely. Their faith purports to be the primitive Hindu faith, cleared of all priestly mysticism. They deny the supremacy of Brahmans, and pretend to be free from caste distinctions, though at the present day caste is in fact observed amongst them. They

(1) (1909) I.L.R., 33 Bom., 669.

(2) (1924) I.L.R., 49 Bom., 520.

(1) (1870) 13 W.R., 47.

(2) (1920) I.L.R., 48 Calc., 80 (P.C.).

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MAHADEVA. declare that there is no need for sacrifices, penances, pilgrimages or fasts. The cardinal principle of the faith is an unquestioning belief in the efficacy of the Lingam, the Image which has always been regarded as symbolical of the God Siva."

Mysore, the Southern Mahratta country, and the Bellary District contain most of these Lingayats. Though the sacred thread is not worn by the Lingayats, a ceremony called Deeksha ought to be performed about their eighth year but as in the case of Upanayanam it is often performed much later. The sacred Mantra is whispered in the ear by their Guru and this ceremony corresponds to Upanayanam among the Brahmans. We may also refer to *Veerasangappa v. Rudrappa*(1), where some of the Lingayat tenets are set out.

It is conceded in this case that so far as their religious duties are concerned, the Lingayats have got Agamas or sacred books which are of primary authority. One of such books is Vathulagama which has been filed as Exhibit Q in this case. It deals with adoption. These Agamas are dialogues between Siva, their chief God, and his consort, Parvathi. As regards adoption, this is what it states:

"The wise should take a boy possessing all the limbs, clean, endowed with beauty, born of the same gotra, having a liking to good conduct, aged five years, excluding the eldest, of good conduct, highly intelligent, of sweet speech, tender-hearted."

So far as the age-limit is concerned, this age corresponds with the age given in the Dattaka Chandrika. As regards the ceremonies of adoption which appear after this passage, homam is performed with Vedic Mantras. As regards the age of five years, custom has relaxed that rule and the evidence of the plaintiffs' witnesses in this case is that adoption can be made before the Deeksha ceremony is performed. The question however

(1) (1885) I.L.R., 8 Mad., 440.

is whether custom has relaxed the rule that an adoption cannot be made after a person is married.

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In the case of Jains, it is undoubted law that in the absence of any custom to the contrary which has to be set up and proved, they are subject to the rules of Hindu Law. We may refer to *Gattappa v. Erramma*(1), where the authorities are collected. The Jains do not worship Siva nor do they recognize the authority of the Vedas. But in the case of Lingayats whose only God is Siva and who acknowledge the authority of the Vedas, they are all the more bound by Hindu Law except in so far as it is modified by custom.

As regards the evidence of custom, the Subordinate Judge is of opinion that the custom has not been made out. The custom pleaded, as said before, is a general custom among the Lingayats and not a special or local custom in North Kanara, or in the family of the adoptive mother. A large number of Lingayats are found in the Mysore Province, Bellary, and the Southern Mahratta country. The zamindari of Punganur is on the borders of the Mysore Province. So far as the Mysore Province is concerned, it has been held by the Chief Court of Mysore that the adoption of a married Lingayat is invalid. The judgment of the Chief Court is marked as Exhibit WW in this suit. The learned Judges of the Chief Court observed:

"It is however desirable to say a few words on the validity of Kariappa's adoption which is referred to in the first and second grounds of appeal. It is found that Kariappa was married but the Courts have held that it was not a disqualification as he was widower at the time of his adoption by the first defendant. The parties are Lingayats. Even if it be held that the law governing Sudras applied to them, according to Mr. Mayne, "as regards Sudras, adoption could be performed effectually till marriage." And in another place he quotes the Pandit's

(1) (1926) I.L.R., 50 Mad., 228.

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MAHADEVÄ. opinion that the period fixed for adoption is "with respect to Sudras, prior to their contracting marriage," page 178 (6th Edition). See also reference at page 179 to the case of *Pappamma v. Appa Rau*(1). Though there is no express authority on the point, having regard to the fact that the questions of age, marriage, etc., are determined in the texts on the consideration of certain rites, such as Upanayanam, marriage, etc., having to be performed to the individual to be adopted in the adopted family, there is strong reason for holding that marriage is a bar, in spite of the fact that the person concerned was a widower at the time of adoption."

So far as Bellary which is part of the Madras Presidency is concerned, we have not been referred to any decision where the adoption of a married man among the Lingayats in Bellary was upheld. As North Kanara was part of Mysore and the Madras Presidency, least for 80 years, the presumption is that the rules as to adoption which are prevalent in the other parts of the Presidency and which are based on the Smritis are current in this Presidency and Mysore.

Though the Lingayats in the Vathulagama which, as the witnesses state, is binding on the Lingayats, fixed the fifth year as the proper age for a boy to be adopted, and though amongst the Lingayats and other communities adoption may by custom take place at a later age, there is no reason to suppose that there is a custom among the Lingayats in the Madras Presidency or in Mysore or in North Kanara which was part of the Madras Presidency and Mysore, to so extend the age as to render valid by custom the adoption of a married man. It has therefore to be proved that in North Kanara where the adoption took place and the adoptive mother was living, there was a custom among the Lingayats by which the adoption of a married man was legal.

(1) (1893) I.L.R., 16 Mad., 384.

So far as the plaintiffs' witnesses are concerned, ^{SOMASEKHARA}
their evidence is that such an adoption is not valid but ^{v.}
the defendants' witnesses speak to instances of adoptions ^{MAHADEVÄ.}
of married men and those witnesses are defendants' 1st, 2nd, 4th, 5th, 8th to 15th and 21st witnesses. The difficulty in the case of some of these witnesses is that there is nothing to test their general statement that the adoption they speak to was that of a married man. There must have been deeds of adoption but no deeds are produced and such deeds, if the adopted boy was a major, would disclose the fact, as there would be no guardian mentioned and generally it may be taken that any boy over 18 would be married. The cross-examination of some of the witnesses when they speak of the man adopted being married shows that they have no conception of the years which they were speaking of.

The Subordinate Judge deals with the evidence of the witnesses in detail in paragraph 33 onwards of his judgment and it is not necessary for us again to refer in detail to it. He observes in conclusion :

"I have shown that the evidence adduced to establish the custom alleged is not convincing nor clear. The custom has not obtained any judicial recognition so far either in Bombay or in Madras. In Bombay, adoptions of married men have obtained judicial sanction, not because they are customary but because the Mayukha Law approves of their validity. In the Mysore Province, such adoptions have been declared invalid by the Mysore Chief Court."

We agree with the Subordinate Judge that as a custom it has not been proved. In this view, it is unnecessary to consider the argument of the learned Advocate-General that as the adopted son, i.e., the first plaintiff, was a resident of Punganur in the Madras Presidency, it is his personal law that should govern the adoption, and that even if the adoptive mother belonged to North Kanara and the custom as to adoption was

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proved, the adoption would still be invalid. It is also unnecessary to consider the argument that the defence based on the validity of the adoption is *res judicata* by reason of the fact that it was not set up in the previous suit for recovery of arrears upon the agreement now sued on, as the knowledge of the defendant would not affect the question of *res judicata*, or the further question that even if the adoption is valid, the rights created by the agreement could still be enforced. As regards the questions raised in the Memorandum of Objections as to the amounts payable under the agreement being payable to the plaintiff's descendants also, we think it unnecessary to express any opinion and leave the question open. As regards claims of hunting and forest rights, it is conceded that plaintiff will be entitled to them under the agreement. Plaintiff will be entitled to interest at 6 per cent on the amount claimed from date of suit to date of payment. No order as to costs on Memorandum.

We think the Subordinate Judge was right in holding that the custom as to the validity of the adoption of a married man has not been proved. The first plaintiff therefore continues to be a member of the Punganur family and the agreement entered into is enforceable by him.

We think the decision of the Subordinate Judge is right and dismiss the appeal with costs.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and
Mr. Justice Cornish.

THANGAMMAL AYIYAR (DEFENDANT), PETITIONER,

v.

KRISHNAN AND ANOTHER (PLAINTIFFS 2 AND 3),
RESPONDENTS.*1929,
October 4.

Legal Practitioners Act (XVIII of 1879), sec. 28—Oral agreement between pleader and client—Validity of—Suit by pleader on the agreement or in the alternative, for quantum meruit—Right of pleader to get reasonable remuneration for work and labour done—Indian Contract Act (IX of 1872), sec. 65—Contract discovered to be void—Applicability of sec. 65—Compensation for benefit received under void contract, liability for—Stare decisis, as to construction of sec. 28 of Legal Practitioners Act.

Where a pleader sued to recover from his client a sum of money as remuneration for his services as a pleader, on the basis of a verbal agreement entered into with his client, or; if the agreement was held to be invalid, on the basis of *quantum meruit*,

Held, that, though the agreement was void under section 28 of the Legal Practitioners Act, the pleader was entitled to reasonable compensation for work and labour done by him on behalf of the client.

It is too late to go behind the uniform course of decisions in Madras on this question, and reconsider the correctness of the reasoning as to the construction of section 28 of the Act.

Held, further, that the provisions of section 65 of the Indian Contract Act, requiring compensation to be paid or restoration of advantage received, by a party under a contract discovered to be void, apply to this case: *Harnath Kunwar v. Indar Bahadur Singh*, (1922) I.L.R., 45 All., 179 (P.C.) and *Ananda Mohan Roy v. Gour Mohan Mullick*, (1923) I.L.R., 50 Calc., 929 (P.C.), relied on.

* Civil Revision Petition No. 1357 of 1927.

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PETITION, under section 25 of Act IX of 1887, to revise the judgment and decree of Court of the Subordinate Judge of Tanjore in Small Cause Suit No. 293 of 1926.

The material facts appear from the judgment of MADHAVAN NAIR, J.

S. Rangaswami Ayyangar for petitioner.—The suit is to recover money by a legal practitioner for remuneration for services rendered on the basis of an oral agreement entered into between him and his client, the husband of the defendant. There was no written agreement; an oral agreement is bad under section 28 of the Legal Practitioners Act (XVIII of 1879); oral agreements are excluded by section 28. Section 28 is based on grounds of public policy. Agreements contrary to section 28 are illegal and void on grounds of public policy. Courts cannot give compensation under section 65 of the Indian Contract Act; section 65 does not apply to contracts which are initially void in law, and known to be so void. The legal practitioner certainly knew that an oral agreement was void under section 28 of the Legal Practitioners Act. He did not 'discover it to be void' within the terms of section 65 of the Contract Act: See *Veeranan Ambalam v. Ayyachi Ambalam*(1), *Kumar Kamakshya Narayan Singh v. Kalyan Singh*(2), *Saratchunder Roy Chowdry v. Chandra Kanta Roy*(3) *Sibkisor Ghose v. Munik Chandra*(4).

In the Madras cases, such as *Subba Pillai v. Ramasamy Ayyar*(5), there is no discussion of the essentials of section 65 of the Contract Act. The decision in *Ramasami Chetty v. The Municipal Council, Tanjore*(6) is contradictory to that in *Subba Pillai v. Ramasami Ayyar*(5). No *quantum meruit* can be given in such cases.

S. Rangachari for respondents.—Section 28 of the Legal Practitioners Act only says that the agreement cannot be enforced. It is not illegal. The Act itself contemplates reasonable compensation. See sections 28, 29, 30 and 31 of the Act. Section 28 does not preclude *quantum meruit*. Section 65 of the Indian Contract Act applies to this case. The expression "discovered to be void" has been interpreted by the Privy

(1) (1925) 49 M.L.J., 791.

(3) (1898) I.L.R., 25 Calc., 805.

(5) (1903) I.L.R., 27 Mad., 512.

(2) (1927) I.L.R., 6 Pat., 614.

(4) (1915) 21 O.L.J., 618.

(6) (1906) I.L.R., 29 Mad., 360.

Council in *Harnath Kunwar v. Indar Bahadur Singh*(1), *Ananda Mohan Roy v. Gour Mohan Mullick*(2). The principle of *stare decisis* applies to this case.

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JUDGMENT.

MADHAVAN NAIR, J.—The defendant is the petitioner. This Civil Revision Petition arises out of a suit instituted by the first plaintiff for the recovery of Rs. 500 as vakil's fees due to him in respect of his appearance as pleader on behalf of the defendant's deceased husband, the Zamindar of Nagaram, in Summary Suit No. 559 of 1923 on the file of the Revenue Divisional Officer, Pattukottai. The first plaintiff died subsequent to the filing of the suit and his undivided sons were added as his legal representatives, plaintiffs 2 and 3. The case of the plaintiffs is that the first plaintiff, the deceased vakil Appasami Aiyar, appeared in the above suit for 28 hearings and the late Zamindar of Nagaram agreed to pay him at a certain rate per diem, and that, even if the Court thinks that the agreement is not valid, the sum claimed should be paid on the basis of *quantum meruit*. The defendant pleaded that the contract set up by the plaintiff was not true or valid, and that, even if the first plaintiff was entitled to any remuneration, the sum claimed was excessive. The two main issues in the case were (1) whether there was a specific contract as alleged in the plaint and (2) whether the plaintiffs can claim compensation on the principle of *quantum meruit*. On these issues, the learned Subordinate Judge found in favour of the plaintiffs and gave them a decree for a sum of Rs. 390, according to the rate mentioned in the agreement.

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In the Civil Revision Petition, the only point urged before us is that, having regard to section 28 of the

(1) (1922) I.L.R., 45 All., 179.

(2) (1923) I.L.R., 50 Calc., 929.

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Legal Practitioners Act, the agreement entered into between the petitioner's husband and the first plaintiff is not valid and binding and therefore the first plaintiff is not entitled to recover any sum as remuneration for his services. This argument is admittedly opposed to the decision in *Subba Pillai v. Ramasami Ayyar*(1), which will be referred to presently. As the learned Chief Justice, before whom the case came up for disposal, doubted the correctness of that decision, he has referred it to a Bench with the following note:—

"This case must be referred to a Bench. Sitting as a single Judge here, I have no power to refuse to follow *Subba Pillai v. Ramasami Ayyar*(1), although I take the liberty of saying that I think that it amounts to an absolute departure from the plain words of the section of the Statute. But that must be said, if it is to be said with effect, by a Bench and not by a single Judge."

Section 28 of the Legal Practitioners Act is in these terms:—

"No agreement entered into by any pleader . . . with any person retaining or employing him, respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges or disbursements in respect of business done by such pleader . . . shall be valid unless it is made in writing signed by such person and is, within fifteen days from the day on which it is executed, filed in the District Court or in some Court in which some portion of the business in respect of which it has been executed has been or is to be done."

It is argued that the contract in this case, being an oral one, contravenes the provisions of this section and is void, and so the decree of the lower Court should be set aside. In support of this argument, reliance is placed on the decision in *Kumar Kamakshya Narayanan Singh v. Kalyan Singh*(2), and *Sarat Chunder Roy*

Chowdhury v. Chunder Kanta Roy(1), both of which support the petitioner's contention; but the trend of the decisions of this Court is to the effect that, even if the agreement is opposed to the provisions of section 28 of the Legal Practitioners Act and is invalid, the pleader is still entitled to recover remuneration for his services, either in full as under the agreement or a reasonable portion thereof. The leading decision on the question is the one in *Subba Pillai v. Ramasami Ayyar*(2), which refers to *Rama v. Kunji*(3), and *Krishnasami v. Kesava*(4), two earlier decisions of this Court. In *Rama v. Kunji*(3), remuneration for services was decreed to a pleader, in the absence of an agreement, under section 70 of the Indian Contract Act. In *Krishnasami v. Kesava*(4), the plaintiff based his claim for fee on a promissory note which was not filed in Court in that suit and it was held that, though the promissory note was invalid under section 28 of the Legal Practitioners Act as it was not filed in any Court within fifteen days of its execution as required by that section, yet, the plaintiff was entitled to recover the amount to which he was found to be entitled for his labour. A similar view was taken in *Anantayya v. Padmayya*(5). In *Sundararaja Ayyangar v. Pattanathusami Tevar*(6), and *Narasimhachariyar v. Sinnavan*(7), this Court held that section 28 of the Act is no bar to a decree being passed for such reasonable remuneration as may be found due on the principle of *quantum meruit*. The question has been discussed at some length with reference to principle in *Subba Pillai v. Ramasami Ayyar*(2), which was also a case where a claim for fees was made by a pleader based upon a promissory note which had not been filed in Court as

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(1) (1898) I.L.R., 25 Calc., 805. (2) (1903) I.L.R., 27 Mad., 512.
(3) (1886) I.L.R., 9 Mad., 375. (4) (1890) I.L.R., 14 Mad., 63.
(5) (1892) I.L.R., 16 Mad., 278. (6) (1894) I.L.R., 17 Mad., 306.
(7) (1896) I.L.R., 20 Mad., 365.

(1) (1903) I.L.R., 27 Mad., 512.

(2) (1927) I.L.R., 6 Pat., 614.

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required by section 28 of the Legal Practitioners Act and was in consequence invalid. It was held in that case that, though the contract was void, the pleader was still entitled to recover the out-fees advanced by him. In holding so, the learned Judges stated that the Legal Practitioners Act does not enact that no claim by a pleader for professional services rendered or for recovery of out-fees advanced shall be sustainable unless an agreement made in writing for the same has been entered into with the client and filed in Court, but only that an agreement, if any, in respect thereto, shall be void unless the same has been reduced to writing and filed in Court. This decision has been followed in *Natesa Mooppan v. Ramachandra Ayyar*(1). The learned Judges in *Subba Pillai v. Ramasami Ayyar*(2) seem to base their decision on the policy of sections 28, 29 and 30 of the Legal Practitioners Act, corresponding to sections 4, 9 and 6 of the English Attorney and Solicitors Act, 33 and 34 Vict., Ch. 28. The policy underlying those sections and their conclusion based upon that policy is thus stated by the learned Judges.

"The policy of sections 28, 29 and 30 of the Legal Practitioners Act, corresponding to sections 4, 9 and 6 of the English Attorney and Solicitors Act, 33 and 34 Vict., Ch. 28, is that, whenever an agreement is entered into between a pleader and his client respecting his remuneration or payment for out-fees, such agreement should be reduced to writing, not only so, but also filed in Court, and that, when a suit is brought upon such agreement, the Court should have the power if, in its opinion, the agreement is not fair and reasonable, to reduce the amount payable thereunder or order it to be cancelled, and, in the latter case, to award such amount only as would have been decreed in the absence of any agreement between the pleader and his client. Section 30, however, provides that a pleader shall not be entitled to claim anything beyond the terms of such

(1) (1903) I.L.R., 27 Mad., 512.

(2) (1914) 27 M.L.J., 728.

agreement, except in respect of services, fees, charges or disbursements expressly excepted from the agreement.

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It seems therefore clear that, though an agreement entered into will be invalid unless reduced to writing and filed in Court, yet the pleader is not disentitled, in the absence of any agreement, to claim reasonable remuneration in respect of professional services or the re-payment of out-fees advanced by him."

It is argued that this view amounts to an absolute departure from the plain words of section 28 of the Statute and that if an oral agreement or a written agreement not filed in Court, being invalid under section 28 of the Legal Practitioners Act and therefore unenforceable, is "void" (vide section 2, clause (g) of the Indian Contract Act), as pointed out by their Lordships, then, the plaintiff is not entitled to any relief. I am not inclined to accept this contention in all its entirety, but I agree with it to this extent, that I am prepared to say, with due respect to the learned Judges, that the reasoning on which their conclusion is based does not appear to me to be sound. Having held that the suit contract was void, i.e., unenforceable owing to the provisions of section 28 of the Act, the learned Judges held that the pleader was entitled to recover the amount mentioned in the agreement, apparently acting on the policy underlying sections 28 to 30 of the Act, which they thought justified them in dealing with the case as if it was one in which there was "an absence of an agreement", i.e., in which no agreement was pleaded by the parties. It is open to question whether the policy underlying sections 28 to 30 of the Act is intended to enable the Court to deal with the case in this manner, when the agreement which is the basis of the suit is void under section 28. These sections refer specifically to "such agreements," i.e., agreements valid under section 28, and provide that in enforcing such agreements Courts may modify

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or cancel them and that such agreements shall exclude further claims of the pleader, etc. I find it difficult to extract from these sections any policy of the Legislature which would justify the Court in ignoring the provisions of section 28 when the plaintiff relies on an "agreement" as the basis of his claim. Thus far, I agree with the contentions of the appellant; but having regard to the uniform course of decisions in this Court, I think it must be held that it is too late to give effect to the arguments now urged and to decline to give the plaintiffs any relief in respect of the first plaintiff's claims, especially so, as I am prepared to hold that, though the contract is void, the respondent in 27 Mad., 512 was entitled to succeed, having regard to the provisions of section 65 of the Indian Contract Act which deals with the obligation of a person to restore any advantage received by him under an agreement which is "discovered to be void" or to make compensation for it. The section runs as follows:—

"When an agreement is discovered to be void . . . any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it."

The expression "discovered to be void" in this section has caused some difficulty in its application. In *Sibkisor Ghose v. Manik Chandra*(1), Mr. Justice MUKERJEE pointed out that an agreement which is opposed to section 28 of the Legal Practitioners Act, being *ab initio* void, cannot be said to be an agreement "discovered to be void" within the meaning of section 65. Since, then it has been held by the Privy Council that an agreement "discovered to be void" would include an agreement *ab initio* void. In *Harnath Kunwar v. Indar Bahadur Singh*(2), their Lordships held

that an agreement "discovered to be void" within the meaning of this section

"is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

This decision has been approved by the Privy Council in *Ananda Mohan Roy v. Gour Mohan Mullick*(1), in which their Lordships held that the time at which an agreement is discovered to be void within the meaning of section 65 of the Indian Contract Act is, in the absence of special circumstances, the date of the agreement. In the case before us, the agreement in question was manifestly void from its inception as it contravened the provisions of section 28 of the Legal Practitioners Act and as such an agreement can be described to be one "discovered to be void" within the meaning of section 65 of the Indian Contract Act as explained by the Privy Council, the defendant's husband was bound to make compensation to the first plaintiff for the advantage which he has received under the contract. It has not been argued before us that the sum awarded to the respondents by the lower Court is excessive or disproportionate to the services rendered by the first plaintiff. The decree awarding the plaintiff Rs. 390 can be thus justified under section 65 of the Indian Contract Act.

I would uphold the decision of the lower Court and dismiss the Civil Revision Petition with costs.

CORNISH, J.—I agree. The agreement made between the pleader and his client as to the pleader's remuneration was a verbal agreement, and, therefore, a compliance with the requirements of section 28, Legal Practitioners' Act, was impossible. That, however,

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(1) (1915) 21 C.L.J., 618.

(2) (1922) I.L.R., 45 All., 179.

(1) (1923) I.L.R., 50 Cal., 929.

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according to the construction put upon the section by the rulings of this Court (see *Rama v. Kunji*(1), *Krishnaswami v. Kesava*(2), *Anantayya v. Padmayya*(3), *Subba Pillai v. Ramaswami Ayyar*(4), does not preclude the pleader from recovering the amount which he could properly claim for work done and disbursements made by him on behalf of the client in pursuance of the agreement. The abovementioned decisions make no distinction between a verbal agreement, which is incapable of being filed in accordance with the requirements of section 28, and an agreement in writing which is invalid because it has not been filed. The view taken by this Court is that the purpose of section 28 is to give the Court a control over agreements between pleaders and their clients with respect to fees and costs, and is not intended to make the right of the pleader to recover his fees, etc., conditional upon the agreement fulfilling the requirements of the section. A sanction for this view is to be found in section 29 which enables the Court to order an agreement, otherwise in order

“to be cancelled if the agreement is not proved to be fair and reasonable, and the costs, fees, charges and disbursements in respect of the business done to be ascertained in the same manner as if no such agreement had been made.”

The Calcutta, Allahabad and Patna High Courts have placed a stricter interpretation upon section 28, holding that the object of the section would be defeated by allowing exceptions to its requirements. But even assuming the stricter interpretation to be preferable, it is certainly too late now to resist the current of authority of this Court.

There is no doubt that the relations of the parties are contractual, notwithstanding that the agreement is

(1) (1886) I.L.R., 9 Mad., 375.

(3) (1892) I.L.R., 16 Mad., 278.

(2) (1890) I.L.R., 14 Mad., 63.

(4) (1903) I.L.R., 27 Mad., 512.

invalid by virtue of section 28. In the cases where the question has arisen, although it has been recognized that the pleader is entitled to recover, the precise footing upon which he can do so has been left in some uncertainty. In 9 Mad., 375, it seems to have been considered by the Court that the suit by the pleader, being for work and labour done, might lie under section 70, Indian Contract Act. The question was further considered in *Sibkisor Ghose v. Manik Chandra*(1), and it was there pointed out that section 70 could not apply to a claim based on contract. The learned Judges in that case expressed the further opinion that section 65, Contract Act, would be unavailing in aid of a claim arising out of an agreement void by section 28, Legal Practitioners Act, for the reason that the agreement being void *ab initio* could not be aptly described as an agreement which has been *discovered* to be, or has become, void. All doubt upon this point has, however, been resolved by the ruling of the Judicial Committee in *Harnath Kunwar v. Indar Bahadur Singh*(2), where their Lordships laid it down that an agreement discovered to be void is one discovered to be not enforceable by law, and on the language of section 65 would include an agreement that was void in that sense from its inception, as distinct from a contract that becomes void. And in *Ananda Mohan Roy v. Gour Mohan Mullick*(3), their Lordships emphasise this principle that an agreement is discovered to be void from the date of the agreement. The claim of the plaintiff-respondent before us was, therefore, clearly maintainable.

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(1) (1915) 21 C.L.J., 618.

(2) (1922) I.L.R., 45 All., 79.

(3) (1923) I.L.R., 50 Calc., 929.

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APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Cornish.

1929,
October 11.

MUTHUSWAMI SERVAIGARAN AND ANOTHER (PETITIONERS),
PETITIONERS,

v.

THANGAMMAL AYIYAR (RESPONDENT), RESPONDENT.*

Code of Criminal Procedure, as amended by Act XVIII of 1923
—Orders under sec. 144—Jurisdiction of High Court to
interfere in revision.

Under the Code of Criminal Procedure as amended by Act XVIII of 1923, the High Court has jurisdiction to interfere in revision with orders passed under section 144 of the Code.

Vedappan Servai v. Periannan Servai, (1928) I.L.R., 52 Mad., 69, overruled.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Additional District Magistrate of Tanjore, dated 23rd February 1929, in M.C. No. 4 of 1929 presented to the said Court to rescind the order of the Court of the Subdivisional Magistrate of Pattukkottai, dated 23rd January 1929, in C.M.P. No. 4 of 1929.

K. S. Jayarama Ayyar (S. Rangachari with him) for petitioners.—Clause 3 of section 435 in the Criminal Procedure Code of 1898 is omitted in the amended Code of 1923. There is now no prohibition against the High Court exercising its revisional jurisdiction under section 435 in respect of orders

* Criminal Revision Case No. 273 of 1929.

passed under section 144 of the Code. It is useful to trace the history of this power in the earlier enactments. In Act XV of 1861, section 62 corresponds to the present section 144, and section 404 to section 435. In the Code of 1872, section 518 corresponds to present section 144, section 297 to section 435, and section 520 clearly stated that orders under section 518 were not judicial proceedings. In the Act of 1882, section 520 was deleted, but a clause was added to section 435 stating that proceedings under section 144 were not proceedings within the meaning of that section. In the Act of 1898 the same position was continued. In the amended Act of 1923, clause 5 of section 435 refers to appearance by person or pleader. The order contemplated is judicial in character.

Turning to the decided cases, *Abbas Ali Chowdhry v. Illim Meah*(1) decided, with reference to the 1861 Act, that an order under section 62 was not revisable under section 404 of that Act. *Ramanuja Jeeyarswami v. Ramanuja Jeeyar*(2) decided on the basis of section 520 of 1872 that it was not a judicial proceeding. In *Sundaram Chetti v. The Queen*(3), proceedings under section 518 were said to be not judicial proceedings. *Queen-Empress v. Thirunarasimhachari*(4) definitely stated that a Magistrate making an enquiry before issuing an order under section 144 was acting in a stage of a judicial proceeding. *Arunachalam Pillai v. Ponnuswami Pillai*(5) held that an order passed by a Sub-Magistrate under section 144 was an order made by him in his capacity as a Court. In *Nataraja Pillai v. Rangaswami Pillai*(6), AYLING and RAMESAM, JJ., differed from the view in *Arunachalam Pillai v. Ponnuswami Pillai*(5). and held that a Magistrate passing an order under section 144 was not acting as a Court, but was only acting as a public servant. In *Vedappan Servai v. Periannan Servai*(7), RAMESAM, J., following *Nataraja Pillai v. Rangaswami Pillai*(6), held that the High Court had no power under section 435 to revise an order passed under section 144.

Chapter XIII which confers powers upon Magistrates is entitled "Powers of Courts"—See also *Clarke v. Brojendro*

(1) (1870) 14 W.R. (Orl.), 46. (2) (1881) I.L.R., 8 Mad., 354.
(3) (1883) I.L.R., 6 Mad., 203 at p. 222. (4) (1895) I.L.R., 19 Mad., 18.
(5) (1918) 8 L.W., 422. (6) (1923) I.L.R., 47 Mad., 56.
(7) (1928) I.L.R., 52 Mad., 69.

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Kishore Roy Chowdhury(1), and *Nandalal Ganguli v. Khetra Mohan Ghose*(2).

Finally, when by deletion of clause 3 in section 435, the ban has been removed, the High Court can now exercise revisional jurisdiction in respect of orders under section 144.

Public Prosecutor (L. H. Bewes) for the Crown.—The deleted clause was merely explanatory. The decision in *Vedappan Servai v. Periyannan Servai*(3) is correct. An order under section 144 lasts only for two months, and there may not be enough time to come up to the High Court.

K. S. Sankara Ayyar for respondent.—In the Act of 1861 there was no specific provision that proceedings under section 62 (corresponding to the present section 144) were not judicial proceedings. The omission in the Code of 1923 means that the Code of 1861 remains in force so far as this matter is concerned. Under section 145, the Code intends parties to let in evidence and the decision is a decision of the Court. The scheme of section 144 is to make the Magistrate the sole person to decide on his own opinion and to make his act an executive act. *Ramanuja Jeeyarswami v. Ramanuja Jeeyar*(4) refers to section 15 of the Charter Act which confers powers wider than those conferred under sections 435 and 439.

It is not correct to say that proceedings under section 144 have always been treated as judicial proceedings. The decision in *Abbas Ali Chowdhry v. Illim Meah*(5) was responsible for the addition of clause 3 in the 1872 Act. In the Code of 1923, clause 3 is deleted as being surplusage. Omission of "not judicial" will not make it judicial. *Nataraja Pillai v. Rangaswami Pillai*(6) refers to the previous state of the law.

Further there is no regular procedure prescribed for an order under section 144. The making of the order is the beginning and the end of the proceeding. Under clause 2 of section 144, the Magistrate may pass an order *ex parte*. We can therefore only conclude that a proceeding under section 144 is not a judicial proceeding.

As to the effect of the deletion of clause 3 of section 435, mere omission would not necessarily mean that the converse is authorized. See Maxwell on Interpretation of Statutes (6th

(1) (1912) I.L.R., 39 Cal., 953 (P.C.). (2) (1918) I.L.R., 45 Cal., 585.
(3) (1928) I.L.R., 52 Mad., 69. (4) (1881) I.L.R., 3 Mad., 354.
(5) (1870) 14 W.R. (Cr.), 146. (6) (1923) I.L.R., 47 Mad., 56.

edition), pages 482–485. Omission does not imply conscious departure from the earlier state of the law.

K. S. Jayarama Ayyar replied.

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JUDGMENT.

This Criminal Revision Petition has been posted before us for a decision upon two preliminary points.

The facts are that the Subdivisional Magistrate of Pattukkottai in the exercise of his powers under section 144, Criminal Procedure Code, directed the petitioners to vacate the Nagaram palace building forthwith on the ground that the occupation caused annoyance and obstruction to the Zamindarini and was likely to cause an immediate disturbance of the public tranquillity and a riot. In accordance with this order the place was vacated, and an application was subsequently made under sub-section (4) of section 144, Criminal Procedure Code, to the Additional District Magistrate of Tanjore to rescind the order of the Subdivisional Magistrate of Pattukkottai. This application he rejected. The original order was dated the 23rd January 1929 and the order rejecting the petition was on the 23rd February. The petitioners then presented this revision petition. When it came on for hearing before REILLY, J., in view of the question raised, namely, whether the High Court has power to interfere in revision with orders under section 144, Criminal Procedure Code, and the importance of that question, he directed that the petition should be heard by a Bench of two Judges. Another question raised before him was whether the petition is out of time, because orders under section 144, Criminal Procedure Code, are in force only for two months. This question also has been left for this Bench to decide.

Dealing with the latter question first, on the assumption that the Subdivisional Magistrate acted

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within his jurisdiction in passing the order, it cannot be questioned that, as the two months have now elapsed since the order was passed, the High Court has nothing to revise. The question as to whether or not the Sub-divisional Magistrate had jurisdiction to make the order is one of the matters raised in the petition, but we are not disposing of that question here, as that is not one of the preliminary questions we have to decide. In view of the fact that the High Court has now no order to revise, the determination of the larger and more important question as to whether such orders are revisable would be unnecessary but for the fact that two petitions which came on recently for hearing before ANANTA-KRISHNA AYYAR, J., were ordered to stand over, pending the decision by us of this point, and we accordingly allowed the matter to be argued.

It is necessary, first of all, to trace the history of sections 144 and 435 of the Code of Criminal Procedure. In the Code of 1861, section 62 corresponds to the present section 144 and section 404 corresponds to section 435. Section 404 reads as follows :—

“The Sudder Court may, on the report of a Court of Session or of a Magistrate, or whenever it thinks fit, call for the records of any criminal trial or the record of any judicial proceeding of a Criminal Court, other than a criminal trial, in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court, and may determine any point of law arising out of the case, and thereupon pass such order as to the Sudder Court shall seem right.”

The earliest decision upon the point we have to decide was under the Code of 1861 and that is *Abbas Ali Chowdhry v. Illim Meah*(1). That was a decision of a Full Bench of the Calcutta High Court which

(1) (1870) 14 W.R. (Crl. Rulings), 46.

decided, PHEAR, J., dissenting, that an order passed by a Magistrate under section 62 of the Code of Criminal Procedure is not of the nature of a judicial proceeding and therefore cannot be interfered with by the High Court under section 404 of that Code. COUCH, C.J., in his judgment on page 51 in referring to section 62 says :

“The language of it seems to point out that it was intended to give the Magistrate a power to be exercised with the utmost promptitude ; and, if he should make an order which he had no authority to make, and the party on whom that order is made should not obey it, and be convicted, its legality may then be tried. That is the ground upon which I have always been of the opinion that this is not a judicial proceeding.”

In the Code of 1872, section 518 corresponds to section 144 of the present Code and section 520 states that orders made under section 518 are not judicial proceedings. This latter section was obviously the result of the decision of the Full Bench of the Calcutta High Court already referred to. Under the Code of 1872, we have two decisions upon this point, namely, *Ramanuja Jeyarswami v. Ramanuja Jeeyar*(1), a decision of INNES and MUTHUSAMI AYYAR, JJ., in which it was held that proceedings under section 518 of the Code were not revisable by the Courts as such orders were expressly declared in that Code to be not judicial proceedings, and *Sundaram v. The Queen*(2), where at page 222, Sir CHARLES TURNER stated :—

“It should always be borne in mind that orders under section 518 of the Code of Criminal Procedure of 1872 are not judicial proceedings, and if the High Court has power to correct them otherwise than indirectly, which is doubtful, that power can rarely be exercised in time to prevent hardship. The law in sanctioning this imperfectly controlled power is careful to provide it shall be committed only to Magistrates whose

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(1) (1881) I.L.R., 3 Mad., 354.

(2) (1882) I.L.R., 6 Mad., 203.

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discretion is presumably guaranteed by their responsible position, or by selection."

The next decision is one under the Code of 1882, and it is a decision strongly relied upon by Mr. Jayarama Ayyar in support of his argument that proceedings under section 144 of the Code are judicial proceedings. That is *Queen-Empress v. Tirunarasimhachari*(1), in which it was held by Sir ARTHUR COLLINS, C.J., and PARKER, J., that a Magistrate making an enquiry before the issue of an order under section 144 of the Code is acting in a stage of a judicial proceeding and has, therefore, jurisdiction to direct the prosecution of a witness for giving false evidence before him at such enquiry. Under the Code of 1882, differing from the Code of 1872, proceedings under section 144 were stated to be not proceedings within the meaning of section 435. In that case, Sir ARTHUR COLLINS stated:—

"The difficulty arises from the variation in language between section 297 of the old Code and section 435 of the present Code. Under the old Code powers of revision were granted to the High Court in judicial proceedings only, and the enacting of section 520 would seem to imply that, but for that section, orders under section 518 would be "judicial proceedings." Section 435 of the present Code enables the High Court to call for the record of "any proceeding before any inferior Criminal Court" and, therefore, orders under section 144 would certainly be subject to revision, were it not for the proviso in the third clause of the section. Under section 4 of the present Code "judicial proceeding" is defined to be "any proceeding in the course of which evidence is or may be legally taken." It seems to us impossible to deny that a Magistrate acting under section 144 may legally take evidence before issuing an order . . . From this it would appear that both under the old Code and under the present Code these urgent orders were regarded as in their nature "judicial proceedings", the only difference being that, whereas under the old Code, section 520 somewhat inaccurately declared them not to be

(1) (1895) I.L.R., 19 Mad., 18.

judicial proceedings for the purpose of ousting the High Court's powers of revision under section 297, the present Code equally bars the High Court's jurisdiction without making an illogical declaration."

Sir ARTHUR COLLINS therefore took the view that when in the Code of 1872 proceedings under section 518 were declared not to be judicial proceedings, it was not because they were not judicial proceedings but because it was intended to prevent these orders made upon sudden emergencies from being the subject of revision, and the Code of 1882 by stating that they were not proceedings more accurately described them. The next Code to be considered is that of 1898 and it is similar to the Code in 1882 in that by sub-section (3) of section 435 orders made under section 144 are not proceedings within the meaning of section 435. On the 1898 Code, there is a decision in *Arunachalam Pillai v. Ponnuswami Pillai*(1) of SADASIVA AYYAR and NAPIER, JJ., which is strongly relied upon by Mr. Jayarama Ayyar in support of his argument. In that case it was held that the High Court has no appellate or revisional power to interfere with the orders of a public servant, except in so far as they are orders passed by the public servant in his capacity of a Court subordinate to the High Court, and that an order passed by a Sub-Magistrate under section 144 of the Criminal Procedure Code is an order made by him in his capacity as a Court, and he is also acting as a Court when he grants or refuses sanction for a prosecution for the disobedience of such order. In that case the order passed under section 144 of the Code had been disobeyed but the Stationary Sub-Magistrate passed an order refusing sanction to prosecute the person who had disobeyed the order, and NAPIER, J., on page 424 says:

(1) (1918) 8 L.W., 422.

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"We are clear that the Stationary Sub-Magistrate in passing this order refusing sanction was acting judicially, for the original order which it was alleged was disobeyed was an order passed under section 144, Criminal Procedure Code. These orders have always been treated as judicial orders and we cannot separate the authority issuing the order from the authority granting sanction for disobedience of it."

When NAPIER, J., stated that these orders have always been treated as judicial orders, he was referring to the numerous cases to which our attention has been drawn where the High Court has interfered with orders passed under section 144 of the Code on the ground that the Magistrate had no jurisdiction to pass such orders. The High Court obviously could not in the face of the Code revise those orders but interfered on the question of want of jurisdiction alone under section 15 of the Charter Act and section 107 of the Government of India Act. As he points out in his judgment, the High Court could have no appellate or revisional power if the Magistrate acts administratively, and it is only where he acts judicially that the High Court can possibly interfere under the Charter Act or the Government of India Act. We have therefore this position, that the High Court has always been acting under its inherent powers and interfering with Magistrates who have acted under section 144 without jurisdiction but has been expressly prevented from revising the orders of these Magistrates under section 435. It is argued from this by Mr. Jayarama Ayyar that it was not because such orders were not in the nature of judicial proceedings that the power of the High Court to revise them was ousted, but because it was undesirable that the discretion of Magistrates acting very often on a sudden emergency should be revised by the High Court, and that whereas in 1872 such proceedings were said not to be judicial proceedings, in 1882 they were said not to be

proceedings within the provisions of section 435, and the same under the Code of 1898, that ban on the High Court has now been removed by the Code of 1923 where sub-section (3) of section 435 has been omitted.

We now come to the Code of 1923. But before doing so, there is another case to which reference has been made which, although it was decided in 1923, was before the Code of that year came into force. That is *Nataraju Pillai v. Rangaswami Pillai*(1), a decision of AYLING and RAMESAM, JJ. The facts in that case were that a Subdivisional Magistrate passed an order under section 144, Criminal Procedure Code, prohibiting certain persons from interfering with a religious ceremony. On disobedience of that order he sanctioned their prosecution for an offence under section 188, Indian Penal Code, and it was held that the Magistrate was not, when passing the order under section 144, Criminal Procedure Code, acting as a Court within the meaning of clause 7 of section 195 of the Criminal Procedure Code, but was only acting as a public servant, and hence the proper appellate authority to revoke the sanction was not the Sessions Court but the District Magistrate as provided by clause 6 of section 195. The decision of SADASIVA AYYAR and NAPIER, JJ., in *Arunachalam Pillai v. Ponnuswami Pillai*(2), was not followed. The Court followed the Calcutta Full Bench case and also relied on *Sundaram v. The Queen: Ponnuswami v. The Queen*(3). But that was a decision under the Code of 1872 which expressly stated that proceedings under the section corresponding to section 144 were not judicial proceedings, and the Full Bench in that case could not possibly therefore have held that the proceedings were judicial proceedings. Moreover,

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(1) (1923) I.L.R., 47 Mad., 56.

(2) (1918) 8 L.W., 422.

(3) (1882) I.L.R., 6 Mad., 203.

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the judgment in *Nataraja Pillai v. Rangaswami Pillai*(1) does not deal with the other aspect of the case presented by NAPIER, J., namely, that such orders must be judicial orders and not administrative, for, otherwise, the High Court could not interfere in those cases where the Magistrate has acted without jurisdiction, whereas the High Court has invariably done so under the Charter Act and the Government of India Act. No doubt most of the orders passed by a Magistrate do not in the least seem to be judicial proceedings, and AYLING, J., gives such an instance on page 59. Then came the Code of 1923, and there sub-section (3) to section 435 is omitted, and one question to be considered by us is, what is the effect of that omission? There have been two decisions with regard to this question under that Code, *Vedappan Servai v. Periannan Servai*(2) and *Suthadi Alaga Thevar v. G. A. Baker*(3), which is reported in a foot-note to the report of the former case in the Madras Law Journal. The former decision is one of RAMESAM, J., and the latter is one of REILLY, J., following *Nataraja Pillai v. Rangaswami Pillai*(1), already referred to. In *Vedappan Servai v. Periannan Servai*(2), RAMESAM, J., held that no revision lay to the High Court against an order passed under section 144 of the Criminal Procedure Code, as the Magistrate acting under that section was not a Court and the amendment of section 435 of the Criminal Procedure Code by the omission of clause 3 from that section had not the effect of permitting a revision to the High Court from such an order, though it had the effect of permitting a revision from an order under section 145. On page 623, RAMESAM, J., states,

"It seems to me that as to section 144, clause 3, section 435 was somewhat redundant and only made matters clear. Even without it, it is doubtful whether section 435 applies.

(1) (1923) I.L.R., 47 Mad., 56.

(2) (1928) I.L.R., 52 Mad., 69.

(3) (1928) 55 M.L.J., 321.

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."

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He was referred to a decision of the Privy Council in *Clarke v. Brojendra Kishore Roy Chowdhury*(1), but in his opinion that case did not help the petitioner, because it only showed 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 did not conclude the matter as to section 144. In our view, it is a decision strongly in support of Mr. Jayarama Ayyar's contention. There the District Magistrate issued a search warrant in connexion with the investigation of some offence. A suit for trespass against him was instituted, but it was held by the Privy Council that by section 36, Schedule III, and section 96 of the Criminal Procedure Code, the power of issuing a search warrant was among the "ordinary powers" of the District Magistrate, and therefore under section 105 he had power to direct a search to be made in his presence if he thought it advisable to do so. Lord MAONAGHTEN in delivering the judgment of the Judicial Committee referred to section 36 of the Criminal Procedure Code, which is as follows:—

"All District Magistrates, Subdivisional Magistrates, and Magistrates of the first, second and third classes have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers."

Section 36 is in Chapter III which is headed "Powers of Courts." When Schedule III is referred to, it will be seen that under Part IV of that schedule which is headed "Ordinary Powers of a Subdivisional Magistrate," clause 6 is power to make orders under section

(1) (1912) 39 I.A., 163; s.c., I.L.R., 39 Cal., 953.

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144. On page 966, Lord MAONAGHTEN states: "For the sake of brevity the Code uses the terms 'Court' and 'Magistrate' generally, if not always, as convertible terms." It is impossible to avoid the conclusion that this case decides that every act done by a Magistrate in pursuance of the powers given to him by section 36 and Schedule III is done by him as a Court, particularly when it is remembered that the chapter is headed "Powers of Courts." The present Code like the Code of 1898 and that of 1882 merely speaks of "proceedings", and not "judicial proceedings", so that it is not necessary really to consider anything more than the power of the High Court to revise a "proceeding before an inferior Criminal Court." Although judicial proceedings are defined in the Code as including "any proceeding in the course of which evidence is or may be legally taken on oath," it was admitted in argument before us that it may sometimes be necessary for the Magistrate before issuing an order under section 144 to take evidence on oath, so that, even if that test is applied, it would appear that these proceedings may be judicial proceedings. It is quite true that in the Calcutta Full Bench case such proceedings were held not to be judicial proceedings, but that decision was not unanimous and it was undoubtedly in consequence of it that the Code of 1872 described such proceedings as not judicial. The decision of the Full Bench of this Court in *Sundaram v. The Queen: Ponnusami v. The Queen*(1) could not have been otherwise than it was, as we have already stated, because the Code of 1872 stated that such proceedings were not judicial proceedings. There is also the other description to be applied, namely, "proceedings of an inferior Criminal Court." The Privy Council case, in

(1) (1882) I.L.R., 6 Mad., 203.

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our view, makes such proceedings, proceedings of a Court, so that that description is also applicable. If this is so, then we are bound to take a different view to that of RAMESAM, J., in the case in *Vedappan Servai v. Perianman Servai*(1), where he says that clause 3 to section 435 was redundant. What is the effect of the omission of that clause in the present Code? We cannot say that that omission was unintentional. We have to take the Code as it is. Up to the present Code, from 1872 until 1923, a ban was placed upon the High Court's power of revision with regard to proceedings under section 144. Now that ban has been removed. It may have been unintentionally removed but we are not concerned with that. We must hold that the effect of that omission is that the ban is removed and that the High Court has now power to revise such orders. We are aware that, if this decision is right, it may lead to most unfortunate consequences. It is obvious that the Magistrate has most frequently to act in an emergency and that it will be a disaster if, when he does make an order, a Criminal Revision Petition is at once presented to the High Court and a stay order applied for. We come to the decision we have with great regret and only say that, if clause 3 to section 435 was omitted by mistake, we hope that legislation will as soon as possible restore it at any rate as far as section 144 of the Criminal Procedure Code is concerned.

Petition is dismissed as the order expired before the petition was presented.

B.C.S.

(1) (1928) I.L.R., 52 Mad., 69.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Curgenven and Mr. Justice Pakenham Walsh.

1929,
November 5.

BALARAJU CHETTIAR (THIRD RESPONDENT IN THE
APPEAL), PETITIONER,

v.

MASILAMONY PILLAI AND TWO OTHERS (PETITIONER AND
1 AND 2 COUNTER-PETITIONERS), RESPONDENTS.*

O. XXXVIII, r. 9, Civil Procedure Code (V of 1908)—
Attachment before judgment—Dismissal of suit—No formal
order withdrawing attachment, effect of.

Upon the dismissal of a suit, an attachment before judgment
necessarily ceases under Order XXXVIII, rule 9, Civil Procedure
Code, even though the Court did not pass an order withdraw-
ing it.

APPEAL ordered to be treated as a Civil Revision Petition
against the order of the Court of Small Causes, Trichi-
nopoly, in A.S. No. 120 of 1925 preferred against the
order of the Court of the Principal District Munsif of
Kulittalai in E.P. No. 612 of 1924 in O.S. No. 702 of
1921.

The facts are given in the Opinion of the High Court.
This case coming on for hearing, the Court (JACKSON,
J.), made the following

ORDER OF REFERENCE TO A FULL BENCH:—

The appellant is permitted to treat this as a Civil Revision
Petition and to raise the question whether upon the dismissal of
the suit, the attachment before judgment necessarily ceases under
Order XXXVIII, rule 9, Civil Procedure Code, or whether that
rule merely permits an application to be followed by the order of
the Court. That, the attachment ceases, has been held in *Seethai*

Ammal v. Narayana Aiyangar(1), *Abdul Rahman v. Amin Sharif*(2), *Rama Chand v. Pitam Mal*(3), *Manackjee v. R.M.N. Chettiyar Firm*(4), and the view that a Court's order is necessary is supported by *Namagiri Ammal v. Muthu Velappa Goundan*(5) and *Rasappa Pillai v. Doraiswami Reddiar*(6), and obiter by WALLACE, J., in *Meyyappa Chettiar v. Chidambaram Chettiar*(7).

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In these circumstances I think that the question should be referred to a Full Bench. I may add, a very similar line of discussion has been pursued in regard to the working of section 43, Provincial Insolvency Act.

ON THIS REFERENCE—

T. V. Muthukrishna Ayyar, for petitioner.—Order XXXVIII, rule 9, Civil Procedure Code, shows that the Court is bound, even when there is no appeal by the plaintiff, to raise the attachment before judgment on the dismissal of the suit. The attachment lapses with the dismissal of the suit.

[KUMARASWAMI SASTRI, J.—An appeal being only a continuation of the suit, if the suit is decreed on appeal, do not the interlocutory orders revive automatically?]

No. That view will be correct only with reference to the liability of the subject matter of the suit, owing to the doctrine of *lis pendens* or in suits after an adverse order on claim petitions; but interlocutory orders which are only of a temporary nature, i.e., till the passing of a decree, will not revive. I rely on *Abdul Rahman v. Amin Sharif*(2), *Protap Chandra Gope v. Sarat Chandra Gangopadhyaya*(8), *Sailesh Chandra Dutta v. Joy Chandra Roy*(9), *Jyotish Chandra Sen v. Har Chandra Saha*(10), *Ram Chand v. Pitam Mal*(3), *Sasirama Kumari v. Meherban Khan*(11), *Manackjee v. R.M.N. Chettiyar Firm*(4), *Seethai Ammal v. Narayana Aiyangar*(1) and *Chindha v. Chhaganlal*(12). The decision in *Namagiri Ammal v. Muthu Velappa Goundan*(5) is wrong. See also *Meyyappa Chettiar v. Chidambaram Chettiar*(7) and *Subbarama Aiyar v. Subba Aiyar*(13). If the suit is dismissed, the plaintiff must apply for fresh attachment pending his appeal.

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| (1) (1928) M.W.N., 710. | (2) (1918) I.L.R., 45 Cal., 780. |
| (3) (1888) I.L.R., 10 All., 506. | (4) (1926) I.L.R., 5 Rang., 422. |
| (5) (1928) 56 M.L.J., 70. | (6) (1925) 49 M.L.J., 88. |
| (7) (1923) I.L.R., 47 Mad., 483 at 515. | (8) (1920) 25 C.W.N., 544. |
| (9) (1925) A.I.R. (Cal.), 1147. | (10) (1927) 47 C.L.J., 282. |
| (11) (1911) 13 C.L.J., 243. | (12) (1928) 30 Bom. L.R., 1488 at 1491. |
| | (13) (1924) 47 M.L.J., 523. |

* Civil Revision Petition No. 1762 of 1929.

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M. S. Vaidyanatha Ayyar, for respondent.—Order XXXVIII, rules 6 and 9 specifically contemplate an order being passed withdrawing the attachment, unlike Order XXI, rule 57, which enacts that on the dismissal of an execution application, the attachment shall cease. This view was not given effect to in the Calcutta and other High Courts. *Namagiri Ammal v. Muthu Vellappa Goundan*(1) discusses the difficulties in accepting the Calcutta view. It is the duty of the party to see that the order of withdrawal is made and signed; otherwise, he must suffer; compare *Grace v. Clinch*(2). See also Appendix F, Form 7. On attachment, the property whether movable or immovable is in *custodia legis*. Hence an order of release is necessary. He distinguished the cases quoted by the petitioner and quoted *Raj Raghubar Singh v. Jai Indra Bahadur Singh*(3).

OPINION.

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PAKENHAM WALSH, J.—In this case the property of the judgment-debtor had been attached before judgment. After the attachment the suit was dismissed but no order was passed by the Court releasing the attachment. In appeal, the suit was decreed. The decree-holder sought to bring the property to sale on the strength of the attachment before judgment. The person who had purchased the property from the judgment-debtor after the attachment before judgment intervened with a claim. The learned District Munsif was of opinion that the attachment before judgment was not subsisting. The execution petition was accordingly dismissed. The decree-holder appealed to the Subordinate Judge who held that the attachment subsisted. Against this an appeal was filed which was allowed to be treated as a Civil Revision Petition. It came up before JACKSON, J., who referred the question to a Full Bench, whether upon the dismissal of the suit, the attachment before judgment necessarily ceases under Order XXXVIII, rule 9, Civil Procedure Code, or whether that rule merely permits an

(1) (1928) 56 M.L.J., 70. (2) (1843) 4 Q.B., 806; 114 E.R., 1026.
(3) (1919) I.L.R., 42 All., 158 (P.O.).

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application to be followed by the order of the Court. He points out that it has been held in *Seethai Ammal v. Narayana Aiyangar*(1), *Abdul Rahman v. Amin Sharif*(2), *Rama Chand v. Pitam Mal*(3) and *Manackjee v. R. M. N. Chettiyar Firm*(4), that the attachment ceases but that the opposite view that the Court's order is necessary is supported by *Namagiri Ammal v. Muthu Vellappa Goundan*(5), *Rasappa Pillai v. Doraiswami Reddiar*(6) and a remark *obiter* by WALLACE, J., in *Meyyappa Chettiar v. Chidambaram Chettiar*(7).

We may perhaps here notice the reasons given by the Subordinate Judge for his conclusion. The learned Subordinate Judge says that the view of the Madras High Court in *Meyyappa Chettiar v. Chidambaram Chettiar*(7), is in conflict with *Abdul Rahman v. Amin Sharif*(2) (the reference to *Abdul Rahman v. Amin Sharif*(2), in his judgment appears to be a mistake) but he is incorrect in saying so. As will be pointed out below, the question in 47 Madras was different. Two of the Judges specifically mentioned the present question *obiter*, RAMESAM and WALLACE, JJ., taking different views. So also the learned Subordinate Judge is wrong in his inference from the statement of PHILLIPS, J., in *Rasappa Pillai v. Doraiswami Reddiar* at page 1043 of the All-India Reporter, Madras, 1925 (same as (1925) 49 M.L.J., 88.)

"I may also add that, in the opinion of the Judges forming the Full Bench in *Meyyappa Chettiar v. Chidambaram Chettiar*(7), attachment before judgment continues in force, until it is put an end to by the Court."

This is the same Full Bench case, *Meyyappa Chettiar v. Chidambaram Chettiar*(7), and the suit had not been

(1) (1928) M.W.N., 710. (2) (1918) I.L.R., 45 Calc., 780.
(3) (1888) I.L.R., 10 All., 503. (4) (1926) I.L.R., 5 Rang., 492.
(5) (1928) 56 M.L.J., 70. (6) (1925) 49 M.L.J., 88.
(7) (1923) I.L.R., 47 Mad., 483 at 515.

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dismissed but decreed. The majority of the Full Bench held that the attachment which therefore remained in force was the same attachment under which the execution proceedings were taken and therefore, on default of the decree-holder in execution proceedings, lapsed under Order XXI, rule 57. The argument which the Subordinate Judge deduces from rule 11 was urged in *Abdul Rahman v. Amin Sharif*(1) and was rejected. His final argument drawn from the claim petition has also been considered in *Protap Chandra Gope v. Sarat Chandra Gangopadhyaya*(2) and distinguished. The learned Subordinate Judge says "when a claim is allowed, an attachment in execution is withdrawn. What happens when a claimant fails in the regular suit? Is not the attachment revived?" In *Protap Chandra Gope v. Sarat Chandra Gangopadhyaya*(2) in which it was held that such an attachment was revived, MOOKERJEE, J., has distinctly distinguished that case from one where the suit has been dismissed and where therefore the attachment should have been withdrawn by the Court under Order XXXVIII, rule 9. MOOKERJEE, J., says at page 547

"We are not unmindful that a different rule has been adopted with regard to attachments before judgment. There the view has prevailed that it is obligatory upon the Court to withdraw an attachment before judgment upon the dismissal of the suit, and the reversal of the judgment of dismissal on appeal does not operate to revive an attachment which has been cancelled. As explained in the case of *Sasirama Kumari v. Meherban Khan*(3), this result follows from the provisions of Order XXXVIII, rule 9, which directs the withdrawal of attachment on dismissal of the suit and contains no provision which makes such withdrawal temporary and liable to be vacated on reversal of the decree of dismissal; in other words, Order XXXVIII, rule 9, contains no provision

(1) (1918) I.L.R., 45 Calc., 780.

(2) (1920) 25 C.W.N., 544.

(3) (1911) 18 C.L.J., 243.

corresponding to Order XXI, rule 63, which makes the order in the claim case and the release from attachment thereupon subject to the result of a regular suit. Consequently, in a case of attachment before judgment, the general rule applies that a revival of execution proceedings does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property."

Order XXXVIII, rule 9, reads thus :—

"Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed."

As regards authority on the point, until the remark which is *obiter* by WALLACE, J., in 47 Madras, 483, the matter had never come before this Court and the decision in 1928 Madras Weekly Notes, 466 (56 Madras Law Journal, 70) is the first note of dissent in a decided case from a view which has been taken consistently by Calcutta beginning with 45 Calc., 780, followed in *Sailesh Chandra Dutta v. Joy Chandra Roy*(1) and in *Jyotish Chandra Sen v. Har Chandra Saka*(2). The latter was even a stronger case, for the suit had only abated. A decree had been passed in ignorance of the fact that one of the defendants died. It was set aside two years afterwards but it was held that the attachment obtained before judgment ceased with the abatement of the suit. In *Rama Chand v. Pitam Mal*(3), it was held that an attachment obtained before judgment ceased with the dismissal of the suit even though the Court failed to pass an order. In *Chindha v. Chhaganlal*(4), it was held that an attachment obtained before judgment must be considered to have been withdrawn when the suits were dismissed. On similar lines is

(1) (1925) A.I.R. (Calc.), 1147.

(2) (1927) 47 O.L.J., 282.

(3) (1888) I.L.R., 10 All., 506.

(4) (1928) 30 Bom. L.R., 1488 at 1491.

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the decision in *Manackjee v. R.M.N. Chettiar Firm*(1) which held that when security is given to obtain removal of attachment before judgment under Order XXXVIII of the Civil Procedure Code, the liability of the surety ceases as soon as the suit is dismissed in the first Court. There is therefore a consensus of opinion in Calcutta, Allahabad and Bombay that an attachment before judgment ceases when the suit is dismissed, even though no formal order be passed, and that a decree being obtained in appeal does not *ipso facto* revive it. Against this, there is only the decision in (1928) 56 M.L.J., 70, by a Bench of two Judges, DEVADOSS and PHILLIPS, JJ., which has not been followed in the later case in 1928 M.W.N., 710. The consensus of authority therefore is very much in favour of the view that an attachment before judgment ceases automatically when the suit is dismissed, and where the matter is one of procedure and uniformity is desirable, it would require strong reasons to hold that this consensus of authority is wrong.

Turning to the Madras cases in question, *Meyyappa Chettiar v. Chidambaram Chettiar*(2) decided a different point, namely, that where property had been attached before judgment and a decree given and in subsequent execution proceedings, owing to the decree-holder's default the execution petition is dismissed, the attachment also ceases under Order XXI, rule 57, that is to say, that when the attachment automatically ceases under Order XXI, rule 57, the decree-holder cannot fall back on the attachment made before judgment and claim that it still exists. There was nothing in that decision affecting the present question. But some of the learned Judges made remarks *obiter* on the point. SCHWABE, C.J., remarks at page 494,

(1) (1926) I.L.R., 5 Rang., 492.

(2) (1923) I.L.R., 47 Mad., 483.

"If the matter were *res integra*, I should without hesitation be prepared to hold that the attachment before judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of Order XXXVIII, but that it cannot by implication be brought to an end by an order under Order XXI, rule 57."

In so far as there is anything in this remark that bears on the present question, it would rather support the view that the attachment before judgment comes to an end automatically with the dismissal of the suit even though the Court passes no order, for the words "until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of Order XXXVIII" might be held to contemplate that the attachment can come to an end under some provision of Order XXXVIII without an order of Court. However the remark was probably made without any reference to this matter but merely in connexion with the question then referred to the Bench to which the remark is equally apposite. RAMESAM, J., at page 509 states,

"I do not feel it necessary to discuss the interpretation of Order XXXVIII, rule 9. I agree with the decisions in *Rama Chand v. Pitam Mal*(1) and *Abdul Rahman v. Amin Sharif*(2) that when a suit is dismissed, the attachment before judgment terminates without an order of the Court. But even if the opposite view is the correct view, I do not think this has any bearing on the construction of Order XXI, rule 57."

WALLACE, J., at page 515 says,

"Taking Order XXXVIII, Civil Procedure Code, as it stands, it seems to me clear from the wording of rule 9 that an attachment before judgment only comes to an end by a formal order of the Court withdrawing it. This is, in my opinion, the correct way of interpreting rule 9, which applies to cases where the security demanded has been furnished, or where the suit has been dismissed. Rule 6 (2) clinches this

(1) (1888) I.L.R., 10 All., 506.

(2) (1918) I.L.R., 45 Calc., 783.

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interpretation. It requires that even in the case of a conditional attachment before judgment, a formal order of withdrawal is necessary to raise the attachment. Much more must it be necessary for raising a final attachment, into which the conditional attachment has been converted. No doubt the rulings in *Rama Chand v. Pitam Mal*(1) and *Abdul Rahman v. Amin Sharif*(2) are contrary to this view, but for reasons given, I must disagree with them."

The other two Judges express no opinion on the point. As regards the argument of WALLACE, J., drawn from rule 6 (2), that rule runs as follows:—

"Where the defendant shows such cause or furnishes the required security and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit."

The question whether, if the Court, while accepting such cause shown by the defendant or accepting the required security, does not make an order withdrawing the attachment, the attachment automatically ceases, is precisely the same question which arises on failure to make such an order under rule 9 and therefore it is difficult to see how rule 6 can help in interpreting the meaning of rule 9. Two facts, however, may be noted which might distinguish it, but in a direction opposed to the argument of WALLACE, J. The initiation of proceedings to get the attachment set aside under rule 6 (2) rests with the defendant and it might perhaps be argued that he is therefore bound to see that the Court passes the proper order withdrawing the attachment. It may further be noticed that the Court has an alternative—"or make such other order as it thinks fit." We have not to decide in the present reference what the effect of the failure of the Court to withdraw an attachment order under rule 6 (2) is. The authority of

(1) (1888) I.L.R., 10 All., 508.

(2) (1918) I.L.R., 45 Calo., 780.

Manackjee v. R.M.N. Chettiyar Firm(1) quoted above is against the view that a mere failure to pass such an order will continue the attachment, but rule 9 lays an obligation on the Court independently of any action by the party and allows the Court an alternative, which distinguishes it from rule 6 (2).

Coming now to *Namagiri Ammal v. Muthu Velappa Goundan*(2) which is the only case in this or any other Court to which we have been referred, which holds that the attachment is not withdrawn unless there is a specific order, we find that that was a case where the suit had been dismissed for default and restored to file. While we doubt whether that could make any difference in the principle, and this seems to be the view of PHILLIPS, J., in that case, the other learned Judge, DEVADOSS, J., appears in his judgment to lay some importance on it. He says,

"In my view the dismissal of a suit does not amount to the withdrawal of the attachment before judgment and, if the order of dismissal is set aside on appeal and a decree is passed in favour of the plaintiff, the attachment before judgment would enure for his benefit. Here in this case, the suit was dismissed for default of plaintiff's appearance and was restored by the Court. The restoration of a suit under Order IX, rule 9, Civil Procedure Code, stands on a slightly different footing from the order of the Appellate Court reversing the dismissal of the suit. A Court may dismiss a suit for default and may restore it to file on proper cause being shown in the course of the same day. It would work great hardship if it be held that in such a case the attachment before judgment ceases to have force because the suit was off the file for a few hours."

In giving the reasons for his decision, the learned Judge says,

"As soon as a suit is dismissed the person against whom an order for attachment was made has simply to apply to the Court for withdrawing the order. The application may be

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oral or in writing and the Court, when such an application is made is bound to grant it unless there are circumstances which would justify postponing the granting of the prayer or refusing it. When a party does not choose to avail himself of a remedy which the law gives him, Courts are not justified in giving him the remedy which owing to his carelessness or negligence, he does not choose to ask. If a garnishee pays the amount due from him into Court, can he withdraw the amount without an order of Court by reason of the dismissal of the suit? If movable properties or negotiable instruments attached are in custody of the Court, the dismissal of the suit in which the attachment was made would not place the person from whom the movables or negotiable instruments were taken in possession of them. Such a person will have to apply to the Court for getting them back. I do not see why a different rule should be held to apply when property attached, whether movable or immovable, is not in the actual custody of the Court."

We are unable to agree with the learned Judge that Order XXXVIII, rule 9, throws any burden upon the defendant whose property is attached to apply to the Court to withdraw the attachment order. The duty is one thrown directly on the Court and no application from a party is necessary. As regards the second argument, it may be noticed that DEVADOSS, J., draws a distinction between attached property which is in the actual custody of the Court and attached property which is not. Before us it has been argued that all property attached, whether movable or immovable, is in the custody of the Court and that therefore it cannot be released from attachment without an order of Court. No doubt in a general sense all property attached is in *custodia legis*, but the nature of the custody may be very different. It is argued for the respondents that Form No. 7, Appendix F—Attachment before judgment on proof of failure to furnish security (Order XXXVIII, rule 6)—runs :

"These are to command you to attach . . . the property of the said . . . and keep the same under safe and secure custody until the further order of the Court."

This form, however, seems clearly to refer to attachment of movable property, for Order XXXVIII, rule 7, says distinctly

"save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree."

Now if we turn to the form of attachment of immovable property in execution of a decree, we find Form No. 24, Appendix E, which says,

"To

(Defendant)

. . . you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be and that they are hereby, prohibited from receiving the same by purchase, gift or otherwise."

In certain respects it is clear that the custody of movable property brought to Court and of immovable property attached under Form No. 24 of Appendix E, is dissimilar. The Court is under no obligation to protect, nor is it responsible for, immovable property attached under Form No. 24 whereas if the property is brought to the Court, it would certainly be responsible for the loss, theft or damage of such property; and whether or not a suit could be brought against Government for such loss, it is certain that the Court officials would be held departmentally responsible. Whether a purely departmental order to hand over movable property, the custody of which has been taken by the Court, would be necessary under Order XXXVIII, rule 9, before the defendant could remove the property, is a question which does not arise in the present case and which we do not feel bound to discuss. Such an order

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might be necessary to protect the Court officers in charge of the property. The attachment would nevertheless, we think, automatically be withdrawn by the dismissal of the suit. In the case of immovable property attached, even this difficulty does not arise. As regards the argument that in the case of a suit dismissed for default and restored in the course of the same day, it would work hardship to hold that the attachment before judgment ceased to have force, it is difficult to see how that can be a hardship which the law commands. There is much that might be said on the other side as to the consequences of holding that an attachment continues in force after a suit is dismissed. As was pointed out by MAHMOOD, J., in 10 Allahabad 506, such an attachment will subsist for ever whether there is or not an appeal until it is expressly withdrawn. As stated above, the reference before us does not deal with a suit dismissed for default and restored to file but with one where the decree dismissing the suit is reversed on appeal. To say that on a suit being decreed in appeal, all the interlocutory orders passed in the course of the suit are at once revived appears to be going too far and might lead to serious difficulties. For instance, a temporary injunction might be granted against the defendant, say, prohibiting the manufacture and sale of certain goods pending the disposal of the suit. If the suit were to be dismissed and on appeal it were decreed, would the defendant be liable to be proceeded against if he had continued to manufacture the articles after the suit had been dismissed in the first Court?

Turning to the judgment of PHILLIPS, J., he has summarized all the arguments that can be used for the contention that an attachment does not cease on the dismissal of the suit unless a specific order is passed by the Court. The first is that the words of the section

contemplate an order being passed and it has been argued before us that there is some distinction in this matter drawn between sections 485 and 488 of the old Code which correspond respectively to Order XXXVIII, rule 6, and Order XXXVIII, rule 9. Section 488 of the old Code says "the Court shall remove the attachment". This is now changed into "the Court shall order the attachment to be withdrawn". We doubt whether there is anything in this distinction. Even when the Court removed an attachment under the old Code, it was bound to pass some order in the matter. Then the next argument noticed by PHILLIPS, J.—and it is perhaps the most serious one advanced before us—is the difference in the language of Order XXI, rule 57, and Order XXXVIII, rule 9. Order XXI, rule 57, says "Upon the dismissal of such application the attachment shall cease." PHILLIPS, J., says,

"The language in this section is very different from that in Order XXXVIII, rule 9, but if the Allahabad and Calcutta decisions are correct the effect of the two sections is exactly the same although the language is so very different."

This is no doubt an argument that deserves very serious consideration but we do not think that it is sufficiently strong to induce us to depart from the consensus of opinion of all the Courts which have taken the latter view. Then the learned Judge says,

"Under Order IX, rule 9, when an application is made to set aside the dismissal of a suit for non-appearance of the plaintiff the Court shall make an order setting aside the dismissal. That order of dismissal having been set aside, the suit remains as it was on the day that it was dismissed and all proceedings taken up to that date must be deemed to be in force, when the dismissal is set aside, and in my opinion all interlocutory orders would be revived on the setting aside of the dismissal. Similarly, an order for attachment of property would also be revived."

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As pointed out above, it is too wide a proposition to say that an appellate decree *per se* restores all the interlocutory orders passed in the original suit and there is ample authority for holding that if the Court does pass as the law directs an order under Order XXXVIII, rule 9, withdrawing the attachment when it dismisses the suit, such an attachment is not revived by a decree passed in plaintiff's favour in appeal (vide 13, Calcutta Law Journal, 243, which has been followed in Calcutta and other Courts). Finally, PHILLIPS, J., observes,

"The question of whether when a suit is dismissed in the lower Court and the dismissal is set aside in appeal the attachment must be deemed to have continued throughout is an aspect of the question which need not be decided now, but *prima facie* the result of the failure of the Court to pass an order withdrawing the attachment would appear to be that the attachment continues in force."

As noted above, the decision of the learned Judges in this case has not been followed in 1928 Madras Weekly Notes, 710. It has been argued for the respondents that though the Court may be bound by law to do an act, the party can take advantage of the breach of this obligation, if the Court does not do it. *Grace v. Olinch*(1), is quoted in support of this view. That was a case where an application for a Grand Jury was verbally granted by the Judge, but he did not sign the order until afterwards. It was held that, as he should have signed the order at once and as he had not in fact done so, it could not be taken that the order had been passed. That case is, however, clearly distinguishable on the ground that the Judge was not bound to comply with the request to certify that the case was one which was proper to be tried by special jury. As he had a discretion, in the matter to grant or refuse

the request, it did not follow that the request had been granted if the order had not been signed in time. It was clearly on the party moving the Judge in such a matter to see that he obtained a proper order. Another case quoted for the respondents, *Raj Raghubar Singh v. Jai Indra Bahadur Singh*(1), is really not relevant. It was sought to be argued as an authority that where security is furnished, it enured even after the suit is dismissed. The decision which is one of the Privy Council does not support this view. Of course the terms of the security bond must determine the legal result following from the bond. In that case the decree-holder furnished security for any order that might be passed by the Judicial Commissioner of Oudh. A decision was given by the Subordinate Judge in favour of the plaintiff. The decision of the Subordinate Judge in favour of the plaintiff was confirmed by the Judicial Commissioner. An appeal being filed to His Majesty in Council, it was referred back to the Court of the Judicial Commissioner to ascertain, if there was any dispute, how much of the property formed part of the taluqa, and how much was the private estate of the deceased which would pass to his widow. On this remand, the Judicial Commissioner decided that all the villages claimed by the widow, except thirty-one, belonged to the taluqa and that the suit of the widow must be dismissed except as to these thirty-one. The question that arose was whether the security enured until the final order of the Commissioner or ceased on his first decree. Their Lordships held that it enured until his final order. They say,

"By this instrument the obligors make themselves liable to the amount of one lakh as security for any order that might be passed by the Court of the Judicial Commissioner, not the first

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(1) (1943) 4 Q.B., 608; 114 E.R., 1026.

(1) (1919) I.L.R., 42 All., 158 (P.C.).

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order, but any order; and the ultimate orders of the Judicial Commissioner were that of the 4th March 1907, decreeing that the claim of the widow be dismissed as to all but a few villages, and that of the 20th of November 1916, by which, *inter alia*, the assessment of the Subordinate Judge finding that the mesne profits amounted to more than three lakhs of rupees was affirmed."

This case, therefore, is no authority for the proposition that security enures even after the suit is dismissed.

On the general principle that the law presumes that to have been done which it orders to be done, it appears reasonable to hold that, when the Court is enjoined on dismissal of a suit to pass an order withdrawing the attachment but fails to do so, that attachment shall be held to have been withdrawn. If the Court had any option in the matter, it would be different. Rule 5, clause 3, says,

"The Court may also in the order (that is the order for security) direct the conditional attachment of the whole or any portion of the property so specified,"

and rule 6 (1) provides,

"Where the Defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached."

The object therefore of the attachment is to satisfy any decree which may be passed in the suit; and if this is read with Order IX, it seems clear that so far as this attachment is concerned, the decree passed in the suit is the decree passed by the trial Court and not the appellate decree. If it were the decree which might be passed in appeal, there would be no reason why the attachment should be withdrawn merely because the suit is dismissed by the trial Court and still less would there be any reason for making it compulsory for the

Court to withdraw such an attachment. Evidently therefore the attachment is for a purpose which depends on the decree of the trial Court. If the Court decrees the suit, the attachment will of course continue, but if the Court dismisses the suit, the fact that it is enjoined to withdraw the attachment shows that the attachment is not made as security for the decree which may be passed in appeal but for the decree which may be passed by the trial Court. We see no reason to depart from the consensus of opinion of all the other Courts which have dealt with this question, especially as it is a matter of procedure. Of the two cases in this Court which have resulted in conflicting decisions, the later is in favour of the view held by the other Courts.

We would therefore answer the question as follows:—

Upon the dismissal of a suit, the attachment before judgment necessarily ceases under Order XXXVIII, rule 9, even though the Court did not pass an order withdrawing it.

KUMARASWAMI SASTRI, J.—I agree.

CURGENVEN, J.—I agree.

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APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.

1929,
November 25.

THE MUNICIPAL COUNCIL, TIRUVARUR
PLAINTIFF), APPELLANT,

v.

P. R. KANNUSWAMI PILLAI AND ANOTHER
(DEFENDANTS), RESPONDENTS.*

Madras District Municipalities Act (V of 1920), s. 69 (1) and (2)—Toll-gate contract not in writing—Suit by municipality for arrears, maintainability of—Decree on basis of quantum meruit.

A contract letting the collection of tolls within a municipality governed by the Madras District Municipalities Act (V of 1920) is invalid and does not bind either party if it does not conform to section 69 of the Act, which requires it to be in writing signed by two councillors. *Raman Chetti v. The Municipal Council of Kumbakonam*, (1907) I.L.R., 30 Mad., 290, followed.

This rule applies not only to executory contracts but to executed contracts also. In spite of such invalidity of the contract, a decree for what will be due on the basis of *quantum meruit* can be given. *Mahamed Ebrahim Molla v. Commissioners for the Port of Chittagong*, (1926) I.L.R., 54 Calc., 189, followed.

APPEAL against the decree of the Court of the Subordinate Judge of Tiruvarur in Original Suit No. 2 of 1924.

The facts are fully given in the Judgment.

Section 69 of the Madras District Municipalities Act (V of 1920) is as follows:—

“(1) Every contract made by, or on behalf of, a council, whereof the value or amount exceeds Rs. 100 shall be in writing and except in the case of contracts made under the provisions of sub-section (3) of section 68 shall be signed by two municipal councillors.

(2) A contract executed or made otherwise than in conformity with the provisions of this and the last preceding section shall not be binding on the municipal council.”

T. R. Venkatarama Sastri for appellant.—There is a difference in wording between section 69 of the District Municipalities Act and the corresponding sections 173 and 174 of 38 and 39 Vict., Ch. 55 (Public Health Act of 1875); vide page 363. Under the former, a contract not in conformity with the section does not bind the municipality, thereby implying that it is binding on the other party. Moreover, it has been held both in India and in England that in the case of such contracts not in proper form, the municipality can enforce it against the other party if the contract had been executed, not *vice versa*. It may be that if the contract had remained wholly executory, it will not be binding on either; *Abaji Sitaram v. Trimbak Municipality*(1), *Srirangam Municipal Council v. Bodi*(2), *Bournemouth Commissioners v. Watts*(3), *Lawford v. Billericay Rural Council*(4), *Douglass v. Rhyl Urban District Council*(5), *Brooks Jenkins & Co., v. Torquay Corporation*(6), *Melbourne Banking Corporation v. Brougham*(7). For the above reasons, the cases in India against this view are wrong. The statutory formalities are required only in the interests of the rate-payers and it is not open to anyone else to take advantage of their non-compliance; *Frend v. Dennett*(8). At any rate, the defendant is bound to pay on the principle of *quantum meruit*; *Mahamed Ebrahim Molla v. Commissioners for the Port of Chittagong*(9).

S. Varadachari and *V. Balasundaram* for respondents.—The difference in wording does not connote any difference in the result. Whenever a statutory body is required to observe certain formalities prescribed by a statute with regard to its contracts, it has invariably been held both in England and India that non-observance of the formalities vitiates the contract altogether and the contract does not bind either party, whether plaintiff or defendant. This rule obtains whether the contract is executed or executory; *Raman Chetti v. The*

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| (1) (1908) I.L.R., 28 Bom., 86. | (2) (1923) 45 M.L.J., 164. |
| (3) (1884) 14 Q.B.D., 87. | (4) [1903] I.K.B., 772. |
| (5) [1918] 2 Ch., 407. | (6) [1902] I.K.B., 601. |
| | (7) (1879) 4 A.C., 156. |
| | (8) (1858) 4 C.B. (N.S.), 576; 140 E.R., 1217. |
| | (9) (1926) I.L.R., 54 Calc., 189. |

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The JUDGMENT of the Court was delivered by
PAKENHAM WALSH, J.—The plaintiff in this case is the Municipal Council of Tiruvarur represented by its Chairman. On the 6th of February 1922 the Municipal Council held an auction of the right to collect tolls in the municipality for the year 1922-23 and to the first defendant was knocked down the right to collect tolls for Rs. 19,925. The printed notice under which the auction was held required the successful bidder, within ten days of the acceptance of his bid, to make a deposit of two months rental as security and pay the amount due in twelve equal instalments, the security deposit being adjusted in the rental of the last two months. The notice further provided that for any amount due, the bidder should pay the interest at the rate of one anna per diem for every hundred rupees or fraction thereof. The first defendant bid for and accepted the lease of the toll-gates subject to the above conditions. On the 28th of February 1922 defendants 1 and 2 jointly put in a petition to the Chairman of the Municipal

(1) (1907) I.L.R., 30 Mad., 290.
(3) (1912) 16 I.C., 890.
(5) (1905) I.L.R., 27 All., 592.
(7) (1878) 4 C.P.D., 48.
(9) [1920] A.C., 208.
(11) (1903) I.L.R., 28 Bom., 66.

(2) (1906) I.L.R., 29 Mad., 360.
(4) (1903) I.L.R., 27 Bom., 618.
(6) (1928) I.L.R., 54 Cal., 189.
(8) (1883) 8 A.C., 517.
(10) [1924] I.K.B., 819.
(12) (1928) 45 M.L.J., 164.

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Council in which they represented that though the bid stood in the name of the first defendant, Kannuswami Pillai, it was really made on behalf of and for the benefit of both petitioners, namely, defendants 1 and 2. They further stated that they made a deposit on that day of Rs. 660-6-8 (by the first defendant) and Rs. 1,660-6-8 (by second defendant) and prayed that a muchilika might be taken from both of them jointly and both might be treated as lessees of the toll-gates. This petition was accepted and ordered by the Chairman accordingly. For some reason or other no muchilika was executed by either of the parties though the tolls were being collected by the defendants and it was not until the close of the official year 1922-23 that a notice was issued to the defendants to execute a muchilika. The defendants in the meantime had been complaining by petitions to the council about certain grievances. The council brings this suit for the balance of the lease amount due, Rs. 4,407-15-8 plus Rs. 105-10-0 balance of interest for irregular payment and Rs. 742-8-0 interest on the balance of the lease amount, making a total of Rs. 5,346-1-8. The first defendant pleaded that there was no completed contract between himself and the municipality, that the plaintiffs were not entitled to appropriate, as they had done, the amount of Rs. 293-12-0 towards interest as it was not paid as such, that the plaintiffs could not claim interest and the rate claimed was penal, that there was no wilful default on the part of the defendants to execute the muchilika and that (for certain reasons which are given) the defendants were subjected to loss on account of the negligence of the municipality and they were further subjected to heavy loss owing to unforeseen heavy rains and high floods in the rivers and the consequent absence of traffic by roads. The second defendant stated that as he did not

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bid at the auction, he had incurred no liability to the municipal council, that he adopted the other defences raised by the first defendant and that, in any event, he could not be made liable for the full amount claimed in the plaint and at the worst he could be made liable only for a moiety of the suit amount.

The following issues were raised:—

1. Whether there has been a completed contract between the parties as set out in the plaint, and, if not, whether the suit is sustainable?
2. Whether the suit is sustainable in the absence of a muchilika as required by section 69 of the Madras District Municipalities Act?
3. What is the exact amount due from the first defendant?
4. Whether plaintiff is entitled for interest, and, if so, to what amount?
5. Whether the appropriation by plaintiff of Rs. 293-12-0 for interest is lawful and warranted?
6. Whether there was a default on the part of the defendants to execute a muchilika as alleged in paragraph 8 of the plaint, or was the default to take the same due to the plaintiff as pleaded in paragraphs 8 and 12 of the written statement?
7. Whether defendants are estopped from pleading non-liability as alleged in paragraph 9 of the plaint?
8. To what equities are plaintiff and defendants entitled?
9. Whether plaintiff is entitled to any and, if so, to what relief?
10. Whether the second defendant who was not a bidder at the auction can in any way be made liable for the suit claim?

The most important issues are issues 1 and 2. Section 69, clause 1, of the Madras District Municipalities Act of 1920 lays down that every contract made by or on behalf of a council shall be in writing and shall be signed by two Municipal Councillors. This admittedly was not done. The lower Court finds that both the parties were to blame for the non-execution of muchilika and that finding has not been canvassed before us. The learned Subordinate Judge held on issue 1 that there

was no completed contract and on issue 2, following the decision in *Raman Chetti v. The Municipal Council of Kumbakonam*(1), that the suit was not sustainable under section 69 of the Act. He gave findings on the other issues also. As regards issue 10, he found that the second defendant was not liable. As regards issues 4 and 5, his finding is as follows:—

“The plaintiff claims interest at one anna per Rs. 100 per diem as laid down in Exhibit A-1. But the Council had accepted the amounts without charging that interest as can be seen from pages 7 and 9 of Exhibit J, and the balance also has been struck as Rs. 4,204-3-8. It is argued that there having been no contract in writing, the plaintiff has no right to ignore some conditions and enforce other conditions. If it is an implied contract, then the plaintiff will only be entitled to charge interest at a reasonable rate, that is at 6 per cent per annum. I find that if plaintiff is entitled to any amount as lease arrears, the first defendant will be liable to pay interest on the arrears at 6 per cent per annum and not for the late payments accepted by the plaintiff without any demur. The plaintiff has no right to appropriate Rs. 293-12-0 subsequently, since the entries in page 7 show that no appropriation for interest for late payment had been intended.”

As regards issue 7, he held that there was no estoppel. As regards issue 8, he appears to hold that the plaintiff introduced a new restriction after the lease was granted by which collection of tolls on cattle was prohibited, that if the defendants are entitled to claim any damages in respect of that and other irregularities, they must do so by a separate suit and they are not entitled to any equities in this suit. As regards issue 3, he says that there is no prayer in the suit for damages for use and occupation and that the plaintiff would be entitled to get only what the defendants had derived from the toll income. As regards issue 9, he held that the plaintiff is not entitled to any relief and dismissed

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the suit directing each party to bear his costs owing to non-execution of the muchilika. The plaintiff-municipal council has appealed.

The important question in this case is, whether the contract is null and void and the suit unsustainable because the terms of section 69 of the District Municipalities Act were not complied with. The matter has come up several times before the Courts in England and India. In India we are governed by the District Municipalities Act, and as the decisions in India on the particular point in question are practically all in favour of the view taken by the learned Subordinate Judge, and as the matter has been very often discussed in various judgments, we do not think it necessary to enter into a very lengthy examination of the authorities here. I shall first take the cases directly on the point where the want of compliance with the statutory obligations has been admitted as a defence to a suit brought by a municipality. We have two cases in Madras, one, *Raman Chetti v. The Municipal Council of Kumbakonam*(1). In that case, the municipality sued to recover damages and arrears from the defendant, a toll-contractor, who had purchased at public auction the right of collecting tolls for three years. The defendant, though he entered on possession and was collecting tolls, did not execute the written agreement which was required by the provisions of section 45 of the District Municipalities Act (IV of 1884). Disputes arose between the plaintiff and the defendant and after about 17 months of enjoyment, the defendant was put out of possession and a re-sale of the remainder of the term resulted in a loss to plaintiff. The plaintiff sued to recover the loss sustained by the re-sale and the arrears due. The defendant

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pleaded, *inter alia*, that, there being no contract fulfilling the requirements of section 45, plaintiff's suit was unsustainable. The Subordinate Judge held that the agreement, though not binding on the municipality, was binding on the defendant and gave a decree for plaintiff. The learned Judges held that the view of the Subordinate Judge that it does not bind the municipal council but does bind the other party is erroneous. They quoted *Ahmedabad Municipality v. Sulemanji*(1). This Madras case, in so far at least as it was a claim for arrears, is exactly on the same footing as the present case. This decision was followed in the *Madura Municipal Council v. Veeranna Kone*(2), another Madras case. The only decision to the contrary in this Presidency is *Srirangam Municipal Council v. Bodi*(3), decided by KRISHNAN, J., sitting alone. In that case the defendant had bought in auction the right to collect fees for slaughtering cattle in the municipal slaughter-house. The suit was for balance of money due and was dismissed by the lower Court on the ground that no written contract was executed as required by section 45 of the old District Municipalities Act (IV of 1884). It was argued that though no claim could be made on the basis of the written contract, a decree should have been given, at any rate, on the footing of executed consideration, the defendant having been found to have enjoyed the right for the whole year. The learned Judge held that the authority quoted, *Lawford v. Billericay Rural Council*(4), was in favour of such a decree being given. He also quotes *Douglass v. Rhyl Urban District Council*(5) as confirming the view taken in *Lawford v. Billericay Rural Council*(4). He says that the decision in *Raman*

(1) (1905) I.L.R., 27 Bom., 618.

(2) (1912) 16 I.C., 890.

(3) (1923) 45 M.L.J., 164.

(4) [1903] I.K.B., 772.

(5) [1913] 2 Ch. 407.

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Chetti v. The Municipal Council of Kumbakonam(1) does not really deal with the question and that the observation in *Ramaswamy Chetty v. The Municipal Council, Tanjore*(2) is based on *Young & Co. v. Mayor, etc. of Royal Leamington Spa*(3). As was pointed out in *Madura Municipal Council v. Veeranna Kone*(4), the learned Judge seems to have failed to note that the cases he relied on were not cases where the contract was governed by any statute. One other Indian case is relied on for the appellant, and that is *Abaji Sitaram v. Trimbak Municipality*(5). The remark in that case is *obiter*. The issue on which the case was tried was whether the remission of a certain sum out of the amount due under a contract with the municipality was valid; and it was found that the meeting which granted the remission not being properly summoned, such remission was invalid. The learned Judges observed:

"This discussion leads us to consider a point, which was raised before us for the first time, and then only as a result of investigations made in the course of the hearing before us. It appears that the contract under which defendant 1 became entitled to levy and collect the tolls was not under seal, and so failed to comply with section 30 (of Bombay Act, II of 1884), to which I have already alluded. The Advocate-General, relying for this purpose on section 23 of the Indian Contract Act, has asked us to hold that there was no contract at all under which the plaintiff-municipality can claim. Apart from the fact that this is travelling outside the pleadings of the parties, we think, there is another reason why we cannot give effect to the contention. It is well recognized law in England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration, an action will lie though this formality has not been observed."

This is really *obiter* as the Judges held that the plea was travelling outside the pleadings of the parties. As

(1) (1907) I.L.R., 30 Mad., 290.

(2) (1906) I.L.R., 29 Mad., 360.

(4) (1912) 18 I.C., 890.

(3) (1883) 8 A.C., 517.

(5) (1908) I.L.R., 28 Bom., 66.

in *Srirangam Municipal Council v. Bodi*(1), the distinction between a contract made under a statute and one not made under a statute appears to have been lost sight of. On the other hand, the most recent case on the point is *Mahamed Ebrahim Molla v. Commissioners for the Port of Chittagong*(2), where it was held that a suit brought by the Port Commissioners of Chittagong on an agreement entered into in contravention of the mandatory provisions of section 29 of the Chittagong Port Act, 1914, must be dismissed as the contract was not enforceable. This judgment contains a very useful and succinct summary of the law on the point to which we will allude presently. In view of the fact, therefore, that the particular matter before us has been decided twice by two Benches of this Court against the appellant's contention and also by the Calcutta High Court, while, on the other side, there are only the decision of a single Judge in 45 M.L.J., 164 and the remark in I.L.R., 28 Bom., 66, a very brief summary of the argument put forward by the learned Advocate for the appellant will be sufficient.

He admits that there is no English case which holds that, where the right to contract is given by a statute, a statutory body can maintain an action on a contract, though the provisions of the statute have not been complied with, while such non-compliance will be a defence to an action brought against them on the contract. What has been held with regard to corporations is that, when such bodies are not contracting under a statute, they can maintain a suit on a partly executed contract, though it has not been given under seal, while they cannot do so as regards an executory contract. The matter has been succinctly put in

(1) (1928) 45 M.L.J., 164.

(2) (1928) I.L.R., 54 Calo., 189.

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Mahamed Ebrahim Molla v. Commissioners for the Port of Chittagong(1). The learned Judges say,

"It is a rule of common law in England that, with certain exceptions, a corporation is bound by those contracts only which are made under the Corporate Seal. The exceptions are (i) where the contract is executed, (ii) in small matters of very frequent occurrence and (iii) where it is impossible to affix the seal, as in cases of great urgency."

It has been clearly laid down in a number of cases, of which the leading cases are *Young & Co. v. Mayor, etc. of Royal Leamington Spa*(2) and *Hunt v. Wimbledon Local Board*(3), that, where a corporation enters into a contract under a statute and the terms of the statute are not observed, the contract cannot be enforced against the corporation. But no English case has been quoted in which it was held that this was not mutual and that the corporation could on their side enforce such a contract. It is unnecessary to discuss the rulings which deal with statutory corporations which do not contract under a statute. The learned Advocate however relied on two cases to show that a corporation could enforce a contract which did not comply with the statutory provisions. These were *Bournemouth Commissioners v. Watts*(4) and *Brooks Jenkins & Co. v. Torquay Corporation*(5). These cases, however, are distinguishable. In 14 Q.B.D., 87, the first case, it was a third party who sought to take advantage of the want of formality in the contract, and it was held that there was nothing to prevent the local authority paying for the work of which it had the benefit, and as regards the fact that the contract was not sealed, this did not excuse the third party who was liable for such work and did not afford a defence to such third party. In the

(1) (1926) L.L.R., 54 Cal., 189 at 208.

(3) (1876) 4 C.P.D., 48.

(2) (1883) 8 A.C., 517.

(4) (1884) 14 Q.B.D., 87.

(5) [1902] 1 K.B., 601.

second case, it was held that the municipal seal had been affixed in time, and hence the requirements of section 174 of the Public Health Act had been complied with, and by reason of this a new contract had been entered into of which the part-execution of the old contract could be taken to be the consideration.

The learned Advocate for the appellant argues that in India the position is peculiar, and that, while a body contracting under a statute cannot enforce an un-executed contract when all the terms of the statute are not complied with, yet, when the contract has been wholly executed, the position is that, while they can urge this as a defence in a suit brought against themselves on the contract, it cannot be urged as a defence to a suit brought by them on the contract. For this he relies on the difference in the wording between section 174, clause 5 of the Public Health Act and section 69 (2) of the District Municipalities Act. While the former runs,

"Every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed"

Section 69-B of the District Municipalities Act puts the matter negatively. It says,

"A contract executed or made otherwise than in conformity with the provisions of this and the last preceding section shall not be binding on the Municipal Council."

It is argued that we should infer from this difference in language that a contract executed otherwise than in conformity with the provisions of the District Municipalities Act, while it will not bind the municipality, will bind the other party to the contract. It is certainly somewhat remarkable that this negative language should have been employed in the Act; but on the other hand, it has been pointed out that though the Act was revised

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after the decisions in 30 Mad., 290 and 16 I.C., 890 had been given, no change was made in the section. If the meaning sought to be attached to it on behalf of the appellant is correct, these decisions are opposed to such interpretation. In view of the fact that all the decided cases on the point excepting 45 M.L.J., 164 are opposed to such an interpretation, we do not think that this argument can be accepted. It is difficult to see if the argument be accepted how an executory contract would differ from one executed.

Another argument adduced is that these formalities are only necessary in the interests of the rate-payers and that it is not open to any one else to take advantage of them. The case of *Frend v. Dennett*(1) is quoted for this purpose. What was held in this case was what has been so frequently decided—that want of formality in making a contract is a defence to a suit brought against the Corporation. The remark of COCKBURN, C.J., which is relied on,

“I think the local board had no power to contract so as to bind the rates, unless they did so in the manner pointed out by the statute”, cannot be held to imply that they can enter into contracts enforceable by themselves but not enforceable by the other party. We therefore agree with the finding of the learned Subordinate Judge that the contract is not enforceable. This settles most of the other issues. But we cannot help observing that we are unable to agree with the remarks of the lower Court on issue eight and with its decision thereon. As the learned Subordinate Judge has made some severe remarks against the municipal manager in this connection, we will on this issue have to see if the Municipal Council introduced restrictions with regard to tolls

(1) (1858) 4 C.B. (N.S.), 576; 140 E.R., 1217.

on cattle which did not appear at the time of the original contract. It is certainly difficult to see why the defendants should not plead such a breach of the contract in this suit, if it is true, and why they should be driven to file a fresh suit. But it seems to us clear that the defendants knew of this restriction at the time of the contract.

[After discussing the evidence on this point, his Lordship continued :—]

As regards the other acts of negligence alleged by the defendants against the municipality, it is unnecessary to discuss them in view of our finding that the contract is not enforceable.

With regard to issue 10, we cannot agree with the finding of the learned Subordinate Judge that even if the contract was enforceable the second defendant is not liable under it. The learned Judge says :

“The bidder was only the first defendant. But the second defendant stated subsequently that he was also a partner with the first defendant and that his name also should be included as a lessee. Exhibit D is that application and even the Chairman did not pass any orders on it accepting the second defendant as a lessee. Even if the Chairman had done so, it would be invalid since there was no resolution of the Council to that effect. The offer by the second defendant not having been accepted and the bidder having no right to transfer or sub-lease without the sanction of the Council, I have to find that the second defendant cannot be made liable as a joint contractor or joint lessee.”

Of course, on the finding that the contract is not enforceable the second defendant is not liable under it, but neither is the first defendant. This is not a case of a transfer or sub-lease as imagined by the lower Court but a case of a party after his bid has been accepted representing to the municipality that he bid on behalf of himself and another person and asking that such other person should be regarded as co-contractor.

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The second party joins in this and pays money on which the Chairman officially accepts the amount tendered by both. Throughout, both have been representing themselves as contractors who have taken a joint lease. The second defendant, we consider, is clearly estopped by his action from disputing liability under the contract and his contract is enforceable. Both the parties are agreed before us—and they are willing too—that if the contract is found invalid they should accept a decree on a “*quantum meruit*” basis. We do not see any reason why this should not be allowed. Similar relief was allowed in *Mahomed Ebrahim Molla v. Commissioners for the Port of Chittagong*(1), where it was held that the Port Commissioners could not sue on the contract. Although accounts have been furnished showing profit and loss, we think that they are not sufficiently complete to enable us to fix the correct figure. We will send the case down for disposal to the lower Court on these lines, while reversing the decree, though agreeing with the lower Court on the second issue. Parties may adduce fresh evidence, oral and documentary, before the lower Court. The appeal having substantially failed in this Court, respondents will recover their costs here from the appellant. Costs in the lower Court will abide the result of the suit. Court fee will be refunded.

N. R.

(1) (1926) I.L.R., 54 Cal., 189.

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Anantakrishna Ayyar.*

SREE VENUGOPALA RICE-MILL AND OTHERS (DEFENDANTS
1, 3, 5, ETC.), APPELLANTS,

1929,
December 13.

v.

RAJAH OF PITTAPURAM AND OTHERS (PLAINTIFF
AND DEFENDANTS 2, 4 and 38), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), ss. 3 (11) and (15), 56,
151 and 189—Sale by ryot of a portion of his holding—
Agreement by purchaser with zamindar to erect buildings
thereon for working a rice-mill, for a higher rent—Tender
of patta to purchaser for higher rent—Refusal to accept such
patta—Suit by zamindar for specific performance of agree-
ment in a Civil Court—Jurisdiction of Civil Court to
entertain suit—Validity of agreement.*

A purchaser from a ryot of a portion of the ryoti lands in his holding, agreed with the zamindar that he should be allowed to erect buildings thereon for the purpose of working a rice-mill, on payment of a higher rent than what was originally payable for such lands as agricultural lands. The zamindar, having accepted the proposal, caused the subdivision of the lands from the main holding and registered the same separately in the purchaser's name. On the latter refusing to accept the patta tendered for the higher rent, the zamindar sued the purchaser in a Civil Court for the specific performance of the agreement. On objection being taken to the jurisdiction of the Civil Court to entertain the suit,

Held, that the defendant was not a ryot within the definition in section 3(15) of the Madras Estates Land Act, as he did not hold ryoti lands for the purpose of agriculture; that the amount agreed to be paid by him was not rent; nor was there any question of enhancement of rent; nor was the suit one for enforcement of patta falling under section 56 of the Act, which did not apply to the case, and consequently the Civil Court had jurisdiction to entertain the suit.

* Second Appeal No. 594 of 1926.

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Anantakrishna Ayyar, J.—There is nothing in the Madras Estates Land Act which prevents the landholder and a tenant from entering into a contract with each other that the land should in future be held or used, not for agricultural but building purposes.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 21 of 1925, preferred against the decree of the Court of the Principal District Munsif of Rajahmundry in Original Suit No. 569 of 1923.

The material facts appear from the judgment.

P. Somasundaram for appellants.

Advocate-General (A. Krishnaswami Ayyar) for first respondent.

JUDGMENT.

WALLACE, J.

WALLACE, J.—The facts necessary for the disposal of this appeal are: The defendants are the proprietors of a rice-mill. They purchased for the purpose of erecting and working a mill 3.26 acres of S. No. 179 in the suit village which lies within the estate of the Zamindar of Pithapuram, who is the plaintiff. The defendants' vendor was the ryot who held S. No. 189 on patta from the zamindar. When the zamindar's *thanedar* informed the defendants that buildings should not be erected on ryoti land, the defendants petitioned the zamindar and came to an agreement with him that they should be left undisturbed promising to pay him three times the ordinary cist. The zamindar accordingly ordered his officials to subdivide the 3.26 acres from the main holding and have that registered as a separate holding in the names of the defendants, and directed that a draft patta and a muchilika should be prepared. When the muchilika was offered to the defendants, they refused to accept it, on the ground, that the zamindar could not charge them more than the ordinary cist. The

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plaintiff has accordingly filed this suit for specific performance of the agreement. Both the lower Courts have decreed the suit and the defendants appeal.

Clearly on the equities they have no case, but they stand on the technical ground that this suit is, in effect, one to enforce a patta and therefore cannot be brought in a Civil Court. The answer to this contention seems to me to be that the defendants are not "ryots" within the definition of that term in the Madras Estates Land Act. They are not persons who ever held or are now holding this ryoti land under the plaintiff for the purpose of agriculture. They never wanted so to hold it. They did not buy the land for that purpose. Their avowed purpose in purchasing the land was for erecting the mill upon it, and their arrangement with the plaintiff was that they should be allowed to retain it for building purposes and they have in fact built upon it. In these circumstances, it seems to me impossible to hold that the defendants are ryots within the definition in the Act. Since they are not ryots, whatever recognition the zamindar has made in the matter of consenting to the subdivision of the land and to its being held under him for rent is not a recognition by him of the defendants as his ryots. It does not advance the case of the defendants that they purchased the land from a ryot. Whether the zamindar chooses to eject that ryot under section 151 because he has impaired the value of his holding for agricultural purposes by sale of 3.26 acres of it to the defendants is a matter entirely between the plaintiff and that ryot and is no concern of the defendants. For a similar reason there is no question here of any enhancement of a ryot's rent. The rent of that ryot who holds patta for the land has not been enhanced, and the rent claimed from the defendants is therefore not an enhancement of the ryot's rent. The

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rent payable by the defendants is the matter of a separate contract between them and the zamindar, and it is not "rent" under the provisions of the Estates Land Act. See *Ramachandra Mardaraja Deo v. Dukka Padhano*(1). The defendants, then, not being ryots, section 55 of the Estates Land Act, which is the section enabling a suit to be brought to enforce a patta on a ryot, has no application. There is no reason, therefore, for holding that the Civil Court has no jurisdiction to enforce the specific performance of the plaint agreement, which is in essence merely a contract between the landlord and those who have bought out the original occupancy-holders. I, therefore, see no reason to interfere with the decree of the lower Appellate Court and dismiss this appeal with costs.

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ANANTAKRISHNA AYYAR, J.—I agree. The defendants (Sree Venugopala Rice-mill, Pandalapaka, and the shareholders thereof) are the appellants in this second appeal. Survey No. 179 was jiroiyati land under wet cultivation of the extent of 56 acres, paying rent at a particular rate per acre to the plaintiff, the Rajah of Pittapuram. The defendants purchased three acres from the ryot who owned Survey No. 179 and wanted to use the same for non-agricultural purposes by constructing buildings thereon for use as a rice-mill. When the defendants proceeded to erect buildings on the three acres purchased by them in 1916, the plaintiff's officials obstructed the defendants from proceeding with the building on the ground that the defendants were not entitled to use the three acres of land, which were actually under wet cultivation, for building purposes unconnected with the agricultural use of the land. The defendants, thereupon, petitioned the plaintiff for permission to use the land for non-agricultural purposes and for using the same for building

purposes, offering to pay three times the rent that was being paid in respect of the land. The plaintiff agreed to the said offer and directed proper house-site patta and muchilika to be executed by both parties. The buildings having been evidently completed in the meantime, the defendants wanted to back out of the agreement; they declined to do anything further in the matter. The plaintiff filed the original suit in the Court of the District Munsif of Rajahmundry for specific performance of the agreement between the parties. The defendants pleaded coercion, misrepresentation, etc.; and both the lower Courts found against the said contentions of the defendants. The defendants also pleaded that the suit was for enhancement of rent and that the Civil Courts had no jurisdiction to entertain the suit. Both the lower Courts disallowed these contentions also, and decreed the suit in plaintiff's favour. The defendants have preferred the present Second Appeal.

Mr. P. Somasundaram, the learned Advocate who appeared for the appellants, argued that the Civil Courts had no jurisdiction to entertain the suit, that the plaintiff's remedy, if any, was only to take ejectment proceedings under section 151 of the Estates Land Act, if the use of 3 acres out of 56 acres for building purposes be considered to be "materially impairing the value of the holding for agricultural purposes," and further that the suit was really for enhancement of rent. He referred to section 189 of the Estates Land Act and also to section 11 as regards the right of the ryot to use the land "in any manner which does not materially impair the value of the holding or render it unfit for agricultural purposes;" he relied also on section 27 as regards the rate of rent payable by the ryot. He also referred to section 56, under which the landholder should proceed in the Revenue Courts to compel the ryot to accept

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patta and to execute muchilika. He also argued that in spite of buildings being raised on the land, the land remained "cultivable" land, and that the landholder was only entitled to recover the mamool rent payable in respect of the lands, and that, if the landholder wanted "enhancement of rent," he was bound to proceed under the provisions of Chapter III of the Estates Land Act.

On behalf of the respondent, the learned Advocate-General argued that the three acres in question were purchased by the defendants under Exhibits II and II-a from the original ryots who owned 56 acres in Survey No. 179, and under section 145 it was open to the landholder to subdivide the original holding and recognize the three acres as a separate holding; that the effect of Exhibits A and B (the application by the defendants and the order by the plaintiff) was to recognize the transfer and to treat the three acres as a separate holding; that no question of the applicability of section 151 of the Estates Land Act arose since the three acres in question should be deemed to be a separate holding after Exhibits A and B, and that the questions whether use of 3 out of 56 acres of wet land for building purposes was reasonable or not, and whether the same materially impaired the value of the holding for agricultural purposes or rendered it substantially unfit for such purposes, did not arise for consideration in this case. He contended that this was a case of the whole of the three acres of wet land included in a holding being built upon, in which case it could not be doubted that such user was not permissible on the part of the ryot, and the landholder could have sued to eject the defendants under section 151 of the Act. The landholder had valuable rights in the land to prevent the use of wet land for building purposes by the defendants; while the defendants also were greatly

benefited by being allowed to use these lands for building purposes. In the circumstances, both parties agreed that the land should not in future be held for agricultural purposes, and they agreed to convert the same into building sites and to have buildings erected thereon. He contended that there was nothing in the Estates Land Act which prevented the parties from agreeing to do so. The amount to be paid in future in respect of such land would not be "rent" within the definition of section 3 (11) of the Act, which defines "rent" as "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture;"—so that, if the land is not held for purposes of agriculture, the payments could not be said to be "rent" within the meaning of the Estates Land Act. He similarly contended that the defendants could not be said to be "ryots" within the definition of section 3 (15), since they did not hold the land for the purpose of agriculture on condition of paying to the landholder the rent which is legally due upon it. The amount to be paid by the defendants is not "rent," and the defendants themselves are not "ryots," after the plaintiff and the defendants agreed that the land should not be used for agricultural purposes but should be used for putting up buildings. He also argued that no provisions of the Estates Land Act prevented the parties from entering into such a contract or from fixing the amount payable by the one party to the other.

We think that the contentions raised by the appellants are not sustainable. We take the result of Exhibits A and B to be that the plaintiff recognized the defendants' purchase, and also agreed to treat the three acres in question as a separate holding. When both the parties agreed to utilize the land for building purposes,

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and not for agricultural purposes, the amount payable by the tenant under the contract could not be called "rent" within the meaning of the Estates Land Act; nor could the defendants be said to be "ryots" within the meaning of the Act. It is only a suit to enforce acceptance of patta by a "ryot" that has to be instituted in Revenue Courts under section 56. For the same reason section 189 also does not apply. The amount not being "rent" within the definition of the Act, no question of "presumption as regards the rate of rent" arises under section 27; nor does any question of "enhancement of rent" arise within the meaning of Chapter III of the Act. We think that it was open to the parties to enter into the contract evidenced by Exhibits A and B. Valuable consideration moved from the landholder to the defendants, and we do not think that the legal objections raised on their behalf by their learned Advocate before us are tenable. The scheme of the Estates Land Act seems to be to protect persons who hold lands "for the purpose of agriculture." When the lands are not held for agricultural purposes, our attention has not been drawn to any provision of the Act which prevents parties from entering into any contract which it would otherwise be open to them to enter into. In *Meera Kasim Rowther v. Foulkes*(1), the Court held that a custom or contract entitling a ryot of agricultural land to erect buildings thereon is not opposed to the provisions of the Madras Estates Land Act, and can be enforced against the landlord, though such erections may impair the value of the holding for agricultural purposes. At page 434, the learned Judges, SUNDARA AYYAR and SADASIVA AYYAR, JJ., observed that

"Section 11 does not deprive the ryot of the benefit of a contract or usage which would entitle him to use it in a manner

(1) (1912) I.L.R., 37 Mad., 432.

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which might impair the value of the land for agricultural purposes. . . . It would, no doubt, probably have the effect, in case of relinquishment of the land by him, of depriving the landlord of the benefit of letting it out again for agricultural purposes. There is, however, nothing in the Act which renders such a contract or custom unenforceable against the landholder."

In *Ramachandra Mardaraja Deo v. Dukko Padhano*(1), ABDUR RAHIM and SPENCER, JJ., held that money due for occupation of land let for the purpose of building houses is not "rent" within the meaning of section 3 of the Madras Estates Land Act, and that a suit to recover the same is cognizable by the Civil and not by the Revenue Court. The reasoning of the learned Judges in that case supports the view we take.

In our view there is nothing in the Estates Land Act to which our attention was drawn which would prevent the parties from entering into a contract with each other that the land should in future be held or used not for agricultural purposes but for building purposes. The consideration for the landlord agreeing to the same may be either a lump payment made to him or annual payments. Such annual payments are not "rent" within the meaning of the Estates Land Act, and a suit for specific performance of such a contract between the parties is not a "suit to enforce acceptance of pattah" within the meaning of section 56 of the Estates Land Act. Such a suit is maintainable in the ordinary Civil Courts, and the objection as to jurisdiction accordingly fails. There is no question of "enhancement of rent" within the meaning of Chapter III of the Estates Land Act in the present suit, as contended for by the appellants.

We may state that we put the learned Advocate for the appellants the question as to what procedure should

(1) (1915) 31 I.O., 852.

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be followed by the landholder and the ryot in case both of them wanted to have such land held and used in future for building purposes, and, having regard to the benefit that would accrue to both the parties, the one agreed to make increased annual payments to the other. The learned Advocate, with his usual candour, answered that the Estates Land Act stood in the way and that such a contract would be invalid under the Act. We naturally were unwilling to accept such a result unless there be anything specific in the Estates Land Act which would necessitate the same. Our attention was not drawn to any such provision by the learned Advocate, and we are not ourselves aware of any.

It has been held that the amounts payable to landholders in respect of grazing fees, and the like, are not "rent" within the meaning of the Act, since the same are not paid for the use or occupation of land for the purpose of agriculture. In Bengal, it has been held that lands held for building, mining, or quarrying purposes are not lands held for agricultural purposes, and are not governed by the provisions of the Bengal Tenancy Act. See *Um Rao Bibi v. Mahomed Rojabi*(1), and *Raniganj Coal Association Limited v. Judoonath Ghose*(2). Sections 7 and 186 of the Estates Land Act refer to mining rights, and in cases, where the ryot has any right in the minerals, the Court is directed to award compensation for such right when the landholder acquires the land under section 186 for the opening and working of mines. Surely the landholder and the ryot, in cases where the ryot has a right in the minerals, could agree, as between themselves, as to the amount to be payable by the one to the other, in cases where minerals are to be worked. They are not bound to go to Court even if they could

agree. This also indicates that it is open to the landholder and the ryot to enter into contracts relating to the user of land for other than agricultural purposes. The result of accepting the appellant's contention would be to make it impossible for the landholder and the ryot to agree to put up buildings unconnected with agricultural purposes on ryoti lands, wet or dry. In many districts, ryoti lands—mostly dry—are often purchased by persons for building houses thereon after paying money to the landholder and to the ryot in possession. In the view presented by the appellants, the title of such purchasers of ryoti land from both the landholder and the ryot, who build houses on such land, would be illusory since the landholder could eject them under section 151 of the Estates Land Act, if—as is alleged—the contract be invalid in law.

It is clear that unless we are driven to such a conclusion, we should avoid such a result; and we have not been referred to any provision of law which compels us to come to such a conclusion.

The general principle "once ryoti, always ryoti" is not violated in such cases, since the incidents of ryoti land would at once attach to such lands, should they subsequently, for any reason, again be held for agricultural purposes.

Chapter XIV of the Estates Land Act relating to restrictions on contracts between landholders and ryots does not in any way invalidate such a contract as the one before the Court.

There is no merit in the appellant's contentions, nor, in our view, any law in their favour.

For the above reasons, I am of opinion that the second appeal fails, and I would dismiss it with costs.

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(1) (1899) I.L.R., 27 Cal., 205.

(2) (1892) I.L.R., 19 Cal., 489.

APPELLATE CIVIL.

Before Mr. Justice Ourgenvven.

1929,
November 7. RAMANATHAN CHETTY (FIFTH RESPONDENT), PETITIONER,

v.

ALAGAPPA CHETTY AND OTHERS (PETITIONERS AND
RESPONDENTS 1 TO 4, 6 TO 13), RESPONDENTS.*

Limitation Act (IX of 1908), art. 181—Suit for dissolution of a partnership and for accounts, etc.—Preliminary decree—Application by party for passing a final decree, more than three years after preliminary decree, whether barred—Suit, whether pending between preliminary and final decrees.

A suit for the dissolution of a partnership and for accounts, in which a preliminary decree has been passed, must be considered to be pending until final decree; hence an application to pass a final decree in such a suit is not subject to any limitation. *Srinivasa Mudaly v. Ramasami Mudaly*, (1915) M.W.N., 725, followed.

PETITION under section 115, Civil Procedure Code, to revise the order of the Court of the Subordinate Judge of Devakottai, in I.A. No. 574 of 1926 in Original Suit No. 31 of 1913 on the file of the Temporary Subordinate Judge of Rāmnād.

The material facts appear from the judgment.

C. S. Venkatachari for appellant.

C. Padmanabha Ayyangar for respondent.

JUDGMENT.

This revision petition is presented against the order of the Principal Subordinate Judge of Devakottai in the following circumstances. The suit out of which it arises was instituted for the dissolution of a partnership and for accounts in the Court of the Subordinate Judge of

Rāmnād. It was transferred to the then existing Temporary Subordinate Judge of Rāmnād and he passed a preliminary decree, on 23rd October 1913, dissolving the partnership from the date of the plaint and appointing a Commissioner to examine and report upon the accounts. The Commissioner presented his report on 14th January 1915 and the Temporary Subordinate Judge passed a final decree on 22nd March 1915. It is with the legal aspect of a passage in this decree that we are now concerned. The decree contains certain provisions such as normally find place in a final decree for the dissolution of a partnership and then occurs the following passage :

“ This Court doth further direct that the first defendant do take the good outstandings due to the firm as found in the Commissioner’s report and that he do account to the other partners for the same.”

This is based upon a passage in the judgment which says :

“ As the first defendant has always been the managing partner and as he has been instituting suits for recovery of all outstandings, etc., the good outstandings due to the firm as found in the Commissioner’s report will be taken by him and he will account to the partners for the same.”

It appears from the Commissioner’s report that the parties failed to assist in the realization of the assets and the settlement of their accounts and accordingly he had to propose to the Court the appointment of a receiver for this purpose, and the Court decided to take the course abovementioned. The first defendant appealed against this decree to the High Court but died before the appeal was disposed of. Nevertheless, the above-quoted passage was reproduced in the appellate decree. So far as we are concerned, it is agreed that we may disregard the appellate decree in this respect and may base ourselves upon the terms of the decree, dated 22nd March 1915. No attempt was made by any of the parties to enforce

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the direction given to the first defendant until 14th October 1925, when the sixth defendant, son of one of the partners, applied to the Additional Subordinate Judge of Rāmnād at Madura to pass a final decree in pursuance of that direction. About a year later the application was returned by the Additional Subordinate Judge on the ground that he had no jurisdiction and it was represented to the Temporary Subordinate Judge of Devakottai.

I will deal first with an objection, which, however, has not been strongly pressed, that the lower Court had no jurisdiction to deal with the suit. I have said that it was originally disposed of by the Temporary Subordinate Judge of Rāmnād. That Court was abolished on 1st January 1926, two Subordinate Judges being attached to the Sub-Court of Rāmnād at Madura from that date. The application now in question had been filed before the change took place and assuming that the suit to which it related was a pending suit, it should have been transferred to the Rāmnād or to the Devakottai Court, since in the case of a pending suit a transfer of territorial jurisdiction will not *per se* result in a transfer of the suit; *Subramanya Iyer v. Swaminatha Chettiar*(1), and *Chokkalinga Pillay v. Velayudha Mudaliar*(2). I infer that what took place was that all suits at the time pending before the Temporary Subordinate Judge of Rāmnād were distributed between Rāmnād and Devakottai, but that, inasmuch as the present suit had to all appearances been disposed of, no such order was made with regard to it. Section 37 of the Code of Civil Procedure would have sufficiently provided for any subsequent proceedings if the suit had already been disposed of; but if, as I propose to hold, the suit was

still pending, a transfer order was technically necessary. Since, however, it has now been dealt with by the Court which has jurisdiction over the place where the cause of action arose, and to whose file it would certainly have been transferred if any transfer had been ordered, I think that the irregularity is no more than technical and does not form a fit subject for revision.

In the order under consideration the learned Subordinate Judge has given reasons for holding that the direction in the final decree is of an interlocutory character, that by force of it the suit is still pending and that the application, which is in its nature an application to pass a final decree, is not subject to the law of limitation. He has, therefore, decided to take the suit on his file and proceed with it. This order has been attacked on two alternative grounds—

(1) the direction given to the first defendant is not in the nature of a preliminary decree, but if it is,

(2) the application is barred under article 181 of the second schedule of the Limitation Act, as having been made more than three years from the date of the decree.

It was in point of fact made about ten and a half years after the trial Court's decree and six years after the High Court's decree.

It is contended in the first place that the Code contemplates only one preliminary decree and one final decree, whereas what we must refer to here as the final decree is in fact a composite decree, part final and part preliminary; so that the preliminary portion would require a further final decree to be passed. This position cannot, I think, be substantiated either by the terms of the Code or by any case-law. The definition of "decree" in section 2 (2) concludes with an explanation which says that a decree may be partly preliminary and partly

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(1) (1928) 28 L.W., 886.

(2) (1924) 47 M.L.J., 448.

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final; and I can find nothing in the Code repugnant to the notion that more than one preliminary or more than one final decree may be passed. There are some observations of KRISHNAN, J., in *Ghulusam Bivi v. Ahamedsa Rowther*(1), which deals with a partition suit, to the effect that the Code does not contemplate more than one preliminary decree and one final decree in one suit, and that to have two final decrees and to call the first one a final decree would be a misnomer. I do not think he intended to say that, where circumstances so require, the Court has no jurisdiction to pass a composite decree. A situation rather similar to the present forms the subject of some observations by MUKHERJEE, J., at page 260, *Raja Peary Mohan v. Manohar*(2). He says,

"It may be conceded that the legislature contemplated that ordinarily there should be one preliminary decree and one final decree in a suit; the preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. But as observed by PIGGOTT, J., in *Bharat Indu v. Yakub Hasan*(3), there may be exceptions and the case before us furnishes an instance. Here the original suit was for the removal of the *shebait*, for cancellation of the judicial sale and for recovery of the trust property. The decree made in the suit has directed the removal of the *shebait* and the cancellation of the sale subject to the investigation of accounts to be rendered by the *shebait* in a supplementary proceeding. The order which has now been made is in essence a preliminary decree in the supplementary proceeding and will lead up to the final decree to be made therein."

There is another Calcutta case, *Jashoda Dasee v. Upendra Nath*(4), where it was found necessary to pass a supplementary final decree dealing with the portion undisposed of in the earlier final decree, that suit being one for partition. I do not think there can be any serious doubt that there is nothing illegal in passing more than

one final decree, and in fact Mr. C. S. Venkatachariar does not go so far as to suggest it. What he does say is that such a course is so unusual that neither the Court nor the parties can be held to have contemplated it, and so far as the Court is concerned he points as an indication of intention to the omission to adjourn to a further date. He supports his argument by reference to Daniell's *Chancery Practice*, 8th edition, Vol. I, page 686, where the test whether a judgment is interlocutory or final is said to consist in whether it adjourns the consideration of the cause or not. Where there is a final judgment, liberty to apply may be given without however altering the final nature of the judgment. I do not think, however, that inferences derived from Chancery practice can be safely applied to procedure in India, and it seems to me that no conclusive inference can be drawn from the mere circumstance that the Court failed to provide for any further hearing. We must, I think, look to the terms of the decree rather than speculate upon the Court's intentions, and ask ourselves what is the nature of this part of the so-called final decree. The plaint was framed in terms customary to a suit of this character and asked for the realization and distribution of the assets. Normally then the final decree should be such as is given in Form 22 of Appendix D to the Code of Civil Procedure, providing for the distribution of the fund in Court which has been realized by the receiver or otherwise. It is quite clear that the suit, when it was disposed of by the decree on 22nd March 1915, had not been brought to its natural end, judged by these tests. In the Privy Council case *Muhammad Abdul Majid v. Muhammad Abdul Aziz*(1), the trial Court had originally passed a decree for a declaration and for possession of immovable property

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(1) (1918) I.L.R., 42 Mad., 296.

(3) (1913) I.L.R., 35 All., 159.

(2) (1923) 38 Cal. L.J., 255.

(4) (1918) 44 I.C., 671.

(1) (1896) I.L.R., 19 All., 155.

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without deciding the question of mesne profits. About the mesne profits, indeed, the decree made no mention. Even so their Lordships held that the inquiry into mesne profits in the suit should proceed; and the following passage deserves quotation:—

“The Subordinate Judge had before him a case consisting of two parts; a question of title and an incidental question of account depending largely on the title. It was for the obvious advantage of the parties, and they proposed, that the first should be decided and the second reserved for decision. In point of fact, the first part has been the subject of successive appeals by the defendant who successfully struggled against the trial of the second part pending these appeals. If the Code forbade the parties and the Court so to arrange the disposal of a law suit, it would be a very startling thing. It is not pretended that the Code contains any such prohibition.”

These remarks I think apply *mutatis mutandis* to the present case. A decree means something which “conclusively determines” (a phrase substituted for “decides” by the Code of 1908) “the rights of the parties”. Here it has left undermined and undisposed of the distribution of assets to be realized by the first defendant, and the duty of the Court has accordingly not been completely discharged. I hold, therefore, that upon this point the learned Subordinate Judge is clearly right. Even were the correctness of his decision less clear, it would scarcely be for this Court in revision to interfere where the Court below has declared its willingness to conduct the matters outstanding between the parties to their final conclusion.

Granting then that the direction to the first defendant amounts to a preliminary decree, it is further contended that where, as here, there is no adjournment order, further application should have been made within the time prescribed, and article 181 is said to prescribe that time. Whether this is so or not depends, I think, on

whether it is to be held that between preliminary and final decrees the suit is pending, because it can hardly be contended that an application in a pending suit, as we ordinarily use that expression, is subject to limitation. Mr. Venkatachariar contends that after a preliminary decree has been passed the suit is not pending in the sense that the rights of the parties have still to be decided. Before going through some of the cases cited for this proposition, I will allude to the special case of mortgage suits. It has no doubt been held that applications for a decree absolute and for a personal decree, under Order XXXIV, rules 5 and 6, respectively, are subject to article 181: the decree-holder must apply within three years. See *Ghulusam Bivi v. Ahamadsa Rowther* (1), *Mummadi Venkatiah v. Boganatham Venkata Subbiah* (2), *Rama Venkatasubba Iyer v. Shanmukam Pillai* (3), and *Pell v. Gregory* (4). I do not think, however, that from these special cases a general proposition can be deduced. The rules under the Code make express provision for such applications and the Court has no duty cast upon it in the absence of them. The view I take in the present case is that the Court should itself have disposed of the suit, and that the Court, rather than the party, was responsible for further action.

On the question of the pendency of the suit, I have been taken through a number of cases under the old Code, mainly originating in Madras and Calcutta. There was under that Code no such device as a preliminary and a final decree for the trial of partnership and partition suits, and different notions arose as to when the single decree should be passed and how much should be left over for execution, difficulties which no doubt gave rise to the introduction of the preliminary and

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(1) (1918) I.L.R., 42 Mad., 296.
(3) (1918) M.W.N., 867.

(2) (1921) 42 M.L.J., 51.
(4) (1925) I.L.R., 52 Cal., 828.

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final decrees. In *Seshan v. Rajagopala*(1) the decree passed for partition was in the nature of what we should now call a preliminary decree and the remainder of the operations had to be done in execution. In *Appadu v. Venkataranga Rau*(2), on the other hand, the view taken was that in a partition suit the decree should ensue upon the actual division. The position was laid down in general terms by BHASHYAM AYYANGAR, J., at page 277 in *Mallikarjunadu Setti v. Lingamurti Pantulu*(3), with regard to partition suits. He had of course to deal with a single decree, and when he said that a suit terminates only when the decree is fully effectuated and that it includes proceedings in execution, it may be conceded that the terms he used were used in a wider sense than we have to employ them here. The difficulties which arose in dealing with partition suits under the old Code are illustrated in *Latchmanan Chetty v. Ramanathan Chetty*(4), where the learned Judges found it impossible to decide what precisely was the decree in the suit. These cases, however, are not of much assistance here. More in point is *Srinivasa Mudaly v. Ramasami Mudali*(5). In that case a compromise decree for partition had been passed, and the question arose whether an application for the appointment of a commissioner to work out the shares recoverable under it was barred by limitation. This depended on whether the application was in execution or in the suit. The learned Judges held that such an order could have been made by the lower Court at any time of its own motion as a step in the disposal of the suit, and that there could be no question of any bar of limitation in connexion with the application for it.

(1) (1889) I.L.R., 13 Mad., 236.

(2) (1907) 18 M.L.J., 23.

(3) (1902) I.L.R., 25 Mad., 244.

(4) (1904) I.L.R., 28 Mad., 127.

(5) (1915) M.W.N., 725.

Turning to the Calcutta cases, *Kedarnath Dutt v. Harra Chand Dutt*(1) related to a partition, and in 1870 a decree was passed directing a commission to issue to effect the partition. For reasons which I need not go into, no effectual steps were taken for over 10 years, when the plaintiff applied for proceedings to continue. He was met by a plea of limitation, but WILSON, J., held that, the application being one in a pending suit, the right to apply was a right which accrues from day to day, and therefore it was not barred by lapse of time. It will be noted that this related to a stage in the cause after the only decree then provided for by the Code had been passed. This case was followed by STEPHEN, J., in *Surendra Keshub Roy v. Khetter Krishto Mitter*(2).

In the Full Bench case *Puran Chand v. Roy Radha Kishen*(3), it was held that where the decree provided that mesne profits should be ascertained in the execution department, no rule of limitation attached to an application to ascertain them. The view taken was that for that purpose the suit was still pending, and that the Court was bound, even without any application, to fix a date for the inquiry. The learned Judges say,

"There is nothing in the Code compelling a person having the conduct of a pending suit to make formal applications from time to time, asking the Court to proceed to judgment."

This case was followed in *Dwarka Nath Misser v. Barinda Nath Misser*(4) in regard to an application to appoint an arbitrator in a partition suit, and printed with the report is a judgment of PRINSEP and GHOSE, JJ., to the same effect. It follows *a fortiori* that, on the principles underlying these decisions, an application for a final decree is an application in the suit and is not subject to any limitation.

(1) (1882) I.L.R., 8 Calc., 420.
(3) (1891) I.L.R., 19 Calc., 182.

(2) (1903) I.L.R., 30 Calc., 609.
(4) (1895) I.L.R., 22 Calc., 425.

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As regards the position under the present Code, the petitioner relied mainly on the Full Bench case *Perumal Pillay v. Perumal Chetty*(1). The question referred for decision was whether Order XXII, rules 3 and 4, of the Code of Civil Procedure, applied to cases of death after the passing of the preliminary decree. The answer given was that the provisions did not apply and that the suit did not abate so as to vacate the preliminary decree. This question does not strictly concern us, but Mr. Venkatachariar has sought to derive from some observations of the learned CHIEF JUSTICE, who delivered the opinion, the principle that a suit for all purposes is concluded by the preliminary decree. I have been unable to discover any such unqualified proposition in the judgment. The principle relied upon was that the right of action had been determined before the death of the defendant by the passing of the preliminary decree and the learned CHIEF JUSTICE went on to say that this was so because

“the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree.”

It is nowhere said that the proceedings which take place between the two decrees are not in the nature of a suit, nor, of course, is it suggested that all the matters in issue between the parties are finally disposed of by the preliminary decree. Indeed it may often happen that most of the contentious work has to be done after a preliminary decree has been passed, and has to be settled by the final decree. It may be observed that the learned referring Judges in that case assumed that the suit was still pending. In the Privy Council case *Lachmi Narain Marwari v. Balmakund Marwari*(2) cited in this judgment, a case which related to a dismissal for

(1) (1928) I.L.R., 51 Mad., 701.

(2) (1924) I.L.R., 4 Pat., 61.

default of a partition suit after the preliminary decree, the simple principle laid down is that

“after a decree has once been made in a suit, the suit can not be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside.”

I do not find therefore, that this case is authority for the proposition for which it is cited.

It is clear to me that the suit continues for some purposes at least until the final decree; it would indeed be an anomaly if any decree could be reached by proceedings other than a suit. That being so, I have been shown no authority for the view that an application in a pending suit desiring the Court to proceed to judgment is governed by any rule of limitation. So far as the examples shown to me go, applications which are so governed will be found not to be of this character. In *Kalyani Pillai v. Thiruvankadaswami Ayyangar*(1), the application was to bring on record the legal representatives of a respondent to a Privy Council appeal. *Man-gamma Nayakuralu v. Ramadasappa Nayaninvaray*(2) related to execution. *Saminatha Pillay v. Rajagopala Mudaliar*(3), was an unusual case where a trustee who had brought a suit died and application was made to transpose a co-trustee defendant as plaintiff. It is difficult to say whether, in the interval between death and transposition, the suit could be held to be pending. The case in *Hindustan Bank v. Mehraj Din*(4), related to the Indian Companies Act. Indeed, the only case in point, *Srinivasa Mudaly v. Ramasami Mudaly*(5), to which I have already referred, appears to me very good authority against the application of the Limitation Act.

(1) (1924) I.L.R., 47 Mad., 618.

(2) (1924) 48 M.L.J., 563.

(3) (1920) 40 M.L.J., 208.

(4) (1920) I.L.R., 1 Lah., 187.

(5) (1915) M.W.N., 725.

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I think, accordingly, that the learned Subordinate Judge is right in his view that no question of limitation arises, as well as in the construction which he has placed upon the disputed passage in the decree. It is unnecessary for me to add therefore that, even had I felt less convinced of these propositions, I should much have doubted the desirableness of interfering in revision. The Civil Revision Petition is dismissed with costs.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

1928,
July 19.

VAPU ROWTHER (DEFENDANT—COUNTER-PETITIONER),
PETITIONER,

v.

SIVAKATAKSHAM PILLAI (PLAINTIFF—PETITIONER),
RESPONDENT.*

*Indian Limitation Act (IX of 1908), art. 182, cl. (5)—
Application by decree-holder for leave to bid and to set off
price against decree amount—Step in aid of execution of a
decree.*

An application for leave to bid and to set off the price against the decree amount, filed by a decree-holder, is a step in aid of execution, falling within article 182 (5) of the Limitation Act, 1908.

Nabadip Chandra Maiti v. Bepin Chandra Pal, (1908) 12 C.W.N., 621, followed.

PETITION under section 115, Civil Procedure Code, to revise the order of the District Court of East Tanjore in A.S. No. 278 of 1926, preferred against the order of

the District Munsif of Mayavaram in E.P. No. 387 of 1926 in Small Cause Suit No. 1907 of 1914, Sub-Court, Mayavaram.

The material facts appear from the judgment.

V. K. John and S. Panchapagesa Sastri for petitioner.

Respondent was not represented.

JUDGMENT.

VENKATASUBBA RAO, J.—The point to decide is, is the execution application in time? That would depend upon, whether the previous application was for taking some step in aid of execution. The present application was within three years of the previous one and we are therefore to determine whether the latter was an application to take some step within the meaning of article 182 of the Limitation Act.

The lower Courts have held in favour of the decree-holder. He is not here represented, but Dr. V. K. John, who appears for the judgment-debtor, has drawn our attention to numerous authorities on the point. I may mention that it was in a pending execution petition that the previous application was made. That application was for leave to bid and to set off the price against the decree amount. The question is, does such an application fall within article 182 (5) of the Limitation Act?

On this point, there is no decided case of the Madras High Court. The test in such cases has been laid down in *Kuppuswami Chettiar v. Rajagopala Aiyar*(1), and it has been approved in the subsequent decisions, *Krishna Pattar v. Seetharama Pattar*(2) and *Hamidudin Sahib v. Ghose Sahib*(3). The article says that the application must be to the proper Court to take some step in aid of

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(1) (1921) I.L.R., 45 Mad., 466.

(2) (1926) 24 L.W., 488.

(3) (1926) 24 L.W., 498.

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execution. First, is the step in furtherance of execution, in other words, does it advance execution? Secondly, is the Court asked to take that step? In applying this test, there has been great difficulty and divergence of opinion. Let us examine if an application for mere leave to bid is a step within the meaning of the article. Our attention has not been drawn to any Madras case on the point: but it has been held by the Allahabad and Bombay High Courts that an application of that kind is such a step; see *Bansi v. Sikree Mal*(1), *Dalel Singh v. Umrao Singh*(2) and *Vinayakrao Gopal Deshmukh v. Vinayak Krishna*(3). In the second of these cases, the learned Judges observe thus:—

“The fact that a decree-holder is prepared to bid for property and is anxious to purchase . . . brings the decree within nearer distance of complete execution and satisfaction. . . . There are indeed three steps. There is the step of the application which the decree-holder makes; there is the step taken by the Court of granting permission, and there is the further step which the decree-holder again takes of availing himself of such permission by bidding at the sale.”

This view is also shared by some Judges of the Calcutta High Court. In *Troyloky Nath Bose v. Jyoti Prokash Nandi*(4), BANERJEE, J., thus states his reason for that view:—

“An application to the Court by the decree-holder to give him leave to bid is to my mind an application to the Court to take some step, that is, to do something which would aid execution, that is, make it effective by securing a higher price for the property to be sold.”

In *Hira Lal Bose v. Dwija Charan Bose*(5), MOOKERJEE, J., while also being of the opinion, that such an application may be a step in aid, observes that the rule

(1) (1890) I.L.R., 18 All., 211.

(3) (1895) I.L.R., 21 Bom., 381.

(2) (1900) I.L.R., 22 All., 399.

(4) (1908) I.L.R., 30 Calc., 761.

(5) (1905) 10 O.W.N., 209.

is not an inflexible one, and it may depend upon circumstances whether an application for leave to bid is or is not a step, within the meaning of the article. While I am disposed to agree with the decision in *Dalel Singh v. Umrao Singh*(1), the point does not now really arise in that form. In the present case, the application for leave to bid is coupled with that for leave to set off. Such an application, it has been held in *Nabadip Chandra Maiti v. Bepin Chandra Pal*(2), fulfils the requirements of the article. This is the only decided case on the precise point involved in this petition and I see no reason to dissent from it. Dr. John contends that the Court in such cases is merely invited to make an order and not to take some step. In one sense, this is perfectly true. The learned Counsel contends that the step which the Court is asked to take must be something like attaching or selling property. I am not prepared to place this restricted view upon the words. In *Desireddy Yellamandar v. Sikakolli Chinna Pitchayya*(3), OLDFIELD and NAPIER, JJ., have held, that a wide construction must be placed on the words “step in aid of execution” in article 182. Indeed, to accept Dr. John’s contention would be against the *ratio decidendi* adopted in several cases including those of our own High Court. The Civil Revision Petition fails and is dismissed.

Before closing, I may remark that the decided cases on the subject reveal an extreme conflict of view, while they fail to disclose even a principle of general or uniform application. The wording is so uncertain that it leads to the spending of efforts in barren and fruitless discussion, and a good deal of time of the Court is thus wasted. Such a large body of case-law has now

(1) (1900) I.L.R., 22 All., 399.

(2) (1908) 12 C.W.N., 621.

(3) (1914) 16 M.L.T., 103.

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grown up on the point, that the Legislature may well, with the aid of the decided cases, catalogue the applications which, in its opinion, ought to serve as steps in aid of execution. This is a suggestion I venture to make with a view to make the law more certain, for certainty, especially in the law relating to execution, is essential.

MADHAVAN
NAIR, J.

MADHAVAN NAIR, J.—I do not desire in this case to express any opinion on the question whether an application for leave to bid at an auction will be a step in aid of execution within the meaning of article 182 (5) of the Limitation Act. It may be possible to argue on the strength of the decisions of this Court and according to the principles mentioned in *Kuppuswami Chettiar v. Rajagopala Aiyar*(1), *Krishna Pattar v. Seetharama Pattar*(2), and *Hamidudin Sahib v. Ghose Sahib*(3), that such an application is not an application asking the Court to take a definite step in furtherance of execution. In this case, whatever view we may hold about the nature of such an application, it is clear that the execution application contained a request that the decree-holder should be permitted to set off the purchase money against the decree amount. This, in my opinion, is a request to the Court to take a step effectively furthering the execution of the decree. The precise point had not been decided in this Court, but it has been decided in *Nabadip Chandra Maiti v. Bepin Chandra Pal*(4), that such an application is a step in aid of execution. I am prepared to follow this decision. I would therefore agree with the opinion of the lower Courts that the application in question is a step in aid of execution and dismiss this Civil Revision Petition.

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(1) (1931) I.L.R., 45 Mad., 466.
(3) (1926) 24 L.W., 498.

(2) (1926) 24 L.W., 488.
(4) (1908) 12 C.W.N., 621.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice
Madhavan Nair.

YAGAMMAL (PLAINTIFF), PETITIONER,

v.

ARULAYEE AMMAL AND OTHERS (DEFENDANTS),
RESPONDENTS.*

1929,
October 30.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. IX, r. 9, and O. XLIII, r. 1 (c)—Preliminary decree in a mortgage suit—Default of plaintiff to appear on date of hearing after such decree—Jurisdiction of Court to dismiss suit for default—Application by plaintiff to set aside dismissal of suit, whether competent under O. IX, r. 9 or under sec. 151, Civil Procedure Code—Petition to set aside, purporting to be under O. IX, deemed to be under sec. 151—Order dismissing suit, and order dismissing petition, deemed to be under sec. 151—Latter order, if appealable under O. XLIII, r. 1 (c)—Revision, competency of.

After a preliminary decree was passed in a suit for partition, the Court has no jurisdiction to dismiss the suit for default of appearance of the plaintiff on a date fixed for the further hearing of the case.

Lachmi Narain Marwari v. Balmakund Marwari, (1924) I.L.R., 4 Pat., 61 (P.C.), relied on.

The order dismissing the suit in such circumstances cannot be treated as one passed under Order IX of the Code of Civil Procedure; and an application for restoration of the suit cannot be made under Order IX, rule 9 of the Code; but an application, purporting to be made under Order IX, rule 9, must be deemed to be made under section 151 of the Code for the exercise of the Court's inherent powers.

The order dismissing the application for restoration of the suit, not being under Order IX, rule 9, is not appealable under

* Civil Revision Petition No. 663 of 1926.

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ARULAYEE. Order XLIII, rule 1 (c); consequently, a civil revision petition against the order dismissing the suit is maintainable.

PETITION under sections 115 and 151, Civil Procedure Code, to revise the order of the Court of the District Munsif of Paramakudi, dismissing Original Suit No. 744 of 1921.

In this case, the District Munsif dismissed a suit for partition after the preliminary decree had been passed on the ground of default of appearance of the plaintiff and the defendant on the date fixed for the further hearing of the suit. An application by the plaintiff to restore the suit was also dismissed. The plaintiff did not appeal against the latter order, but filed a civil revision petition to the High Court against the order dismissing the suit. The respondent took a preliminary objection that the revision petition was not competent, as the petitioner had not appealed against the order, dated 16th March 1926, dismissing the plaintiff's petition in the lower Court to restore the suit, as he should have appealed under Order XLIII, rule 1 (c), Civil Procedure Code.

A. V. Narayanasamy Ayyar for petitioner.—The order dismissing the suit for default was incompetent. The Court cannot dismiss a suit after preliminary decree, on the ground of default of appearance at the further hearing; Order IX, Civil Procedure Code, does not apply to such cases. The application to restore the suit is not under Order IX, rule 9, Civil Procedure Code. So there is no appeal under Order XLIII, rule 1 (c). The Civil Revision Petition is competent.

R. Narasimhachari (with K. Muthuswami Chetti) for respondent.—The order of dismissal of the suit was passed under Order IX; the petition to set aside dismissal of suit purports to have been under Order IX, rule 9. So an appeal lies under Order XLIII, rule 1 (c) against the latter order. Hence no revision petition lies against the first order.

The JUDGMENT of the Court was delivered by VENKATASUBBA RAO, J.—The main question in the civil revision petition is, is a suit liable to be dismissed

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for default after the passing of the preliminary decree? The plaintiff filed this suit for partition and in 1923 obtained a decree directing certain items to be partitioned. From this judgment, she filed an appeal and the Appellate Court varied the decree in her favour, by directing partition of some additional items. When the case went back to the trial Court, it fixed a date for the appearance of parties. Neither the plaintiff nor the defendant having appeared on the day fixed, the Court made an order, on the 9th of May 1925, dismissing the suit for default. It is this order that is impeached in the revision petition before us. On the merits, there can be no question that this order cannot be supported. As pointed out by the Privy Council,

“After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree, acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside.” *Lachmi Narain Marwari v. Balmakund Marwari*(1).

A similar view was taken by the Allahabad High Court in an earlier case. See *Maseem-un-nissa v. Iatifan*(2).

But then a preliminary objection is raised that this revision petition does not lie. The argument may be thus stated. The plaintiff applied to the lower Court for the restoration of the suit under Order IX, rule 9, Civil Procedure Code. That application was dismissed by an order, dated 16th March 1926. The respondent contends that an appeal lies from the last mentioned order under Order XLIII, rule 1 (c), and that the High Court ought not to exercise its revisional powers when the party aggrieved has a remedy by way of appeal. The answer is simple. The order dismissing the suit cannot be treated as one made under the provisions of

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(1) (1924) I.L.R., 4 Pat., 61.

(2) (1910) I.L.R., 32 All., 319.

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Order IX, Civil Procedure Code. That is the effect of the decision of the Privy Council to which we have referred. It follows necessarily that, although the plaintiff's application to restore the suit purports to have been made under Order IX, it is not in fact governed by the provisions of that order at all. It must be deemed to be an application under section 151 for the exercise of the Court's inherent powers. The preliminary objection thus fails.

In the result, we allow the civil revision petition and set aside the order of the lower Court, dated the 9th May 1925. The District Munsif will restore the case to his file and allow the plaintiff to take further proceedings in the suit.

In the circumstances, we direct each party to bear his costs.

K.R.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and Mr. Justice
Madhavan Nair.*

1929,
November 6.

**NARAYANASWAMI MUDALI AND OTHERS (DEFENDANTS),
APPELLANTS,**

v.

**THE PRESIDENT OF THE BOARD OF COMMISSIONERS
FOR THE HINDU RELIGIOUS ENDOWMENTS
AND ANOTHER (PLAINTIFF AND FOURTH DEFENDANT),
RESPONDENTS.***

*Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Suit
relating to public trust—Compromise of suit—Duty of the
Court—Power and duty of Court to see that interest of
public trust should not be sacrificed by the compromise.*

When a compromise in a suit relating to a public trust is submitted to a Court, it not only has the power, but is under

a duty, to scrutinise its terms, with a view to make sure that the interests of the trust are properly safe-guarded; and if the Court finds that a compromise is not in the interest of the public trust, the Court should not accept the compromise; while, in the case of private individuals, the only question the Court has to consider is whether there has been in fact a compromise and, if so, whether the adjustment is a lawful one.

Further, in the case of a public trust, no compromise can be said to be lawful which sacrifices the interests of the trust; consequently, a compromise entered into without due regard to such interests is not a lawful agreement within Order XXIII, rule 3 of the Civil Procedure Code, and cannot be accepted by the Court.

Sundarambal Ammal v. Yogavana Gurukkal, (1914) 1.L.R., 38 Mad., 850; and *Sankaralinga Nadan v. Rajeswara Dorai*, (1908) 1.L.R., 31 Mad., 236 (P.C.), referred to.

APPEAL against the order of the District Court of South Arcot in I.A. No. 70 of 1929 in Original Suit No. 16 of 1928.

The material facts appear from the judgment.

M. Patanjali Sastri for appellants.—The lower Court was wrong in not accepting the compromise. The Court was bound to accept the compromise between the parties, if it is true in fact and not unlawful. The mere fact that the compromise is not beneficial to the public trust, does not make it an unlawful agreement or compromise within Order XXIII, rule 3, of the Civil Procedure Code. Under the above provision of the Code (Order XXIII, rule 3), before a compromise can be rejected by the Court, the Court must find not merely that the compromise was not beneficial to the trust, but also that it was unlawful; see *Sankaralinga Nadan v. Rajeswara Dorai*(1).

P. Venkataramana Rao for respondents.—In the case of a public trust, the Court has the power and a duty to see that the interests of the trust are not sacrificed by the compromise. The power and duty of the Court are larger in cases of compromises in suits relating to public trusts than in suits relating to private rights of parties. A compromise, which is not beneficial to the public trust and in disregard of its interests is an "unlawful compromise" within the meaning of Order XXIII,

(1) (1908) 1.L.R., 31 Mad., 236 at 249 (P.C.).

* Civil Miscellaneous Appeal No. 108 of 1929.

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rule 2, Civil Procedure Code. Reference was made to the following cases:—

Gyanananda Asram v. Kristo Chandra Mukherji(1), *Abdul Karim Abu Ahmed Khan v. Abdus Sobhan Choudry*(2), *Kumaraswami Asari v. Latchmana Goundan*(3); *Sundarambal Ammal v. Yogavana Gurukkal*(4).

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The JUDGMENT of the Court was delivered by VENKATASUBBA RAO, J.—This suit has been brought by the Board of Commissioners for the modification of a scheme under the Madras Religious Endowments Act. The plaintiff compromised the suit with certain of the defendants and asked the Court to recognize the compromise and pass a decree accordingly. The learned District Judge refused to comply with the request on the ground that the compromise was not in the interests of the temple in question. The reasons for the step taken by the learned Judge are to be gathered from two orders made by him on the same date.

This appeal is filed by defendants 1, 2, 5, 6 and 7. The present attitude of the Board is different from what it was in the lower Court. It now says that the compromise was entered into under a certain misapprehension and ought not therefore to be recognized. In the plaint, serious charges were made against defendants 1 and 2, who were alleged to have misappropriated sums amounting to about Rupees 60 to 70 thousands. There is one very definite allegation with which we are directly concerned. It is asserted that the first defendant sold his own property worth about Rs. 2,500 to the trust for about Rs. 10,000 and received the purchase money from the funds of the temple. It is similarly asserted that the second defendant selling his own

property worth about Rs. 3,000 to the institution for Rs. 12,000 received that sum. In the last mentioned case, it is also alleged that the property is subject to a usufructuary mortgage which was never disclosed.

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That the trustees sold their own properties to the trust is not denied. Nor is it disputed that there is a mortgage outstanding in respect of the property sold by the second defendant. In the circumstances, the learned District Judge observes thus:—

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“Unless the defendants 1 and 2 are prepared to take back their lands and pay to the plaint temple Rs. 10,000 and Rs. 12,000, respectively, I find it impossible to give leave to the plaintiff to enter into any compromise.”

This brings us to the question, what are the terms of the compromise? It is unnecessary to state them in detail, but their effect may be shortly stated. The two sales mentioned above are adopted. The charges against defendants 1 and 2 are wholly withdrawn. The scheme under the compromise provides for the appointment of new trustees defendants 6 and 7 (alleged to be the partisans of defendants 1 and 2) being among the first trustees to be so appointed.

One Venkatachala, before the compromise was actually effected, presented to the Court an application asking that he should be made a party plaintiff. He alleged that the Board was intending to compromise the suit on terms not favourable to the trust, that he was himself interested in the temple, that it was, *inter alia*, at his instance that the suit was filed and that, therefore, it was just that he should be added as a party. In spite of this warning, the Board entered into the compromise. It now recognizes that it was not prudent on its part to have entered into it and the District Judge says that it was due to an error of judgment that it compromised the suit. As a matter of fact, when the Judge refused

(1) (1901) 8 C.W.N., 404.
(3) (1927) 54 M.L.J., 629.

(2) (1913) 18 C.W.N., 1264.
(4) (1914) I.L.R., 38 Mad., 850.

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to recognize the compromise, defendants 1 and 2 by their pleader offered, if sufficient time was granted, to bring into Court, the entire sum of Rs. 22,000. Incidentally we may mention that it was by suppressing this fact, they obtained an interim order from a learned Judge of this Court staying the trial of the suit. The temple gets no advantage from the compromise, on the contrary, the defaulting trustees obtain every possible benefit. We may also remark that some of the defendants were not parties to the compromise. The fourth defendant is opposed to it. We do not wish to pre-judge the case, but it is obvious that the right of none of the defendants to represent the temple is admitted. How, then, can the objection of the fourth defendant be ignored, if it is well founded?

Mr. Patanjali Sastri for the appellants, contends that it is incumbent upon a Court under Order XXIII, rule 3, to pass a decree in terms of the compromise, unless it comes to the conclusion that it is not a lawful agreement. He, in effect, argues that in suits relating to public institutions (for example, in what are known as suits by relators) the powers of a Court in this respect are exactly those as in suits between private individuals. With this proposition we are unable to agree. When a compromise in a suit like the present is submitted to a Court, it not only has the power, but is under a duty, to scrutinize its terms with a view to make sure, that the interests of the public trust are properly safeguarded. In the case of private individuals, the only question the Court asks itself is, has there been in fact a compromise and if so, is the adjustment a lawful one? Even if it sees reason to think that one of the parties was foolish in agreeing to certain terms, it has no option but to recognize and give effect to the compromise voluntarily made. But does this rule apply to the case of public or

charitable trusts? The Court cannot shirk its duty by simply saying that the agreement is lawful in the narrow sense of the term. Cases of collusion between the relators filing the suit and the defaulting trustees, are not infrequent. Then, owing to gross negligence, the interests of the trust may be sacrificed. We are somewhat surprised that Mr. Patanjali Sastri has contended with persistence that in such cases the Court is powerless. There is nothing to prevent cases of this kind from being compromised like other cases; but it seems to us plain, that the Court has plenary power to subject the terms to scrutiny and reject the compromise for valid reasons. We would go further and say that if any party opposes a compromise from sordid motives or on improper grounds, the Court, even then, has a right to take suitable action. These, in our opinion, are the principles that should guide the Courts. But we may rest our judgment on narrower grounds. In the case of a public trust, no compromise can be said to be lawful which sacrifices its interests: on the ground, therefore, that a compromise entered into without due regard to the trust, is under Order XXIII, rule 3, an unlawful agreement our conclusion may be supported. It matters little how the question is viewed; the same result follows.

This seems to rest on principle and reason. Apart from that, the cases on the point clearly show that Mr. Patanjali Sastri's contention is entirely untenable.

In *Sundarambal Ammal v. Yogavana Gurukkal*(1) the suit was in respect of a half share in the archaka miras in a Saivite temple. The parties entered into a compromise by which one of them alienated a portion of his right to the office for a pecuniary benefit. The learned Judges refused to pass a decree in accordance with the

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compromise. Mr. Justice SADASIYA AYYAR points out that the primary right is that of the deity to have certain services performed, and the right of the office holder to receive emoluments is but subsidiary. The observations made by him seem to be very pertinent to this case.

"The Court itself has certain duties in connexion with a case in which a judgment *in rem* has to be pronounced, or in a case which involves the right of the public or the right to a religious and charitable office, or the right of a minor or other incapacitated person."

It is noteworthy that the learned Judge treats for this purpose a public trust as on the same footing as a minor or other incapacitated person. In *Gyanananda Asram v. Kristo Chandra Mukherji*(1) a compromise was refused to be recognized which affected prejudicially the interests of a Hindu temple. The judgment of MACLEAN, C.J., furnishes a conclusive answer to the contention urged in this case for the appellant. The learned CHIEF JUSTICE points out that section 375 of the Code of 1882 (corresponding to Order XXIII, rule 3) does not apply to the case of a religious endowment at all: he then adds, that even if it does, an agreement made in disregard of its interests is an unlawful one within the section. In *Abdul Karim Abu Ahmed Khan v. Abdus Sobhan Ohoudry*(2) the principle enunciated in this case was referred to as being in accordance with common sense.

In *Muthukrishna Naicken v. Ramachandra Naicken*(3), it is assumed, without discussion, that the Court can reject a compromise detrimental to a trust. (See page 492.) In the well known Kamudi case, *Sankaralinga Nadan v. Rajeswara Dorai*(4), the Judicial Committee

(1) (1901) 8 C.W.N., 404.
(3) (1918) 37 M.L.J., 489.

(2) (1918) 18 C.W.N., 1264.
(4) (1908) 1 L.R., 31 Mad., 236 (P.C.).

acted on the same principle. Admitting Nadars and Shanars into a Hindu temple is, of course, not strictly illegal; the rejection of the compromise recognizing such a right, could be only on the ground that the trustee betrayed his trust and was not acting in its interests.

The point is clear beyond doubt and the Courts ought not to give countenance to the doctrine so strenuously contended for in this case, that their duty consists in merely registering a compromise, however detrimental it may be to a public trust.

It only remains to add that there is no substance in the argument that the lower Court's finding is not borne out by evidence. It is idle to contend that a Court cannot act upon affidavits in a case of this kind and that it is bound to call on the parties to adduce oral evidence. The order of the lower Court is confirmed and the appeal is dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar.

BULLIRAJU alias ACHAYAMMA (PLAINTIFF),
APPELLANT,

v.

SATYANARAYANAMURTI (DEFENDANT), RESPONDENT.*

Letters Patent, cl. 15—Decision of a single Judge of High Court—Leave to appeal—Test to be applied in granting leave.

Under clause 15 of the amended Letters Patent, the Judge of the High Court, who decides a second appeal, has a discretion

* Second Appeal No. 1315 of 1927.

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BULLIRAJU in granting leave to appeal from his judgment, and must be
SATYANARA- satisfied that the case is a fit one for further appeal.
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Considerations in granting leave discussed.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 60 of 1925, preferred against the decree of the Principal District Munsif of Rajahmundry in Original Suit No. 184 of 1923.

On dismissal of the second appeal, an application was made for leave to appeal under clause 15 of the Letters Patent.

G. Lakshmanma for appellant.

B. Somayya for respondent.

JUDGMENT.

Under section 15 of the amended Letters Patent, an appeal would lie from the decision of a single Judge of the High Court passed in a second appeal, where the Judge who passed the judgment declares that the case is a fit one for appeal. In *Ramanayya v. Kotayya*(1) a Bench of this Court held that no appeal lay from the refusal of such leave by the Judge.

The question has been raised before me as to the grounds on which leave to appeal should be granted or refused in such cases. The section only enacts, that the Judge concerned should declare "that the case is a fit one for appeal." The principles that should guide him in dealing with such applications are not specified in the section.

It was argued that, if there was any question of law, leave must be granted. It was further argued, that if a second appeal was allowed, and the decision of the lower Appellate Court reversed, or modified, leave must be given since the single Judge had no jurisdiction to interfere with the judgment of the lower Appellate Court

in a second appeal except on a question of law, and his interference with the lower Appellate Court's decision was proof positive that there was a question of law.

It was also argued that when the valuation of the second appeal was not insignificant, leave should similarly be granted.

I am of opinion that the considerations mentioned above are by themselves not conclusive for the grant of such leave. A second appeal would lie to the High Court under section 100 of the Code of Civil Procedure only on a question of law, or on one of the grounds specified in section 100, Civil Procedure Code. When a second appeal is admitted and notice is issued to the respondents, it may generally be taken that the second appeal is assumed to involve a question of law. If the petitioner's contention be correct, then from every decision passed by a single Judge after notice is issued to the respondent, leave to appeal should be granted, even though the second appeal is dismissed. The same reasoning would also apply when a second appeal is rejected under Order XLI, rule 11, Civil Procedure Code, on the ground that the decision of the lower Appellate Court was right and in accordance with law, though a question of law might be involved in the case. Section 100, Civil Procedure Code, makes it clear that it is only when the decision of the lower Appellate Court is contrary to law, etc., that a second appeal would be successfully entertained. The wording of section 15 of the amended Letters Patent makes it abundantly clear that the circumstance that the decision was passed in a second appeal is not enough to entitle the unsuccessful party to leave to appeal; but the Judge must be satisfied that the case is a "fit one" for further appeal and should "declare" accordingly. The circumstance, therefore, that the decision of the lower Appellate Court was

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reversed by the High Court does not by itself entitle the petitioner to leave to appeal. Nor does the valuation of the appeal by itself so entitle him.

Similar questions have arisen in England and the English Courts have held that the object of such a provision is to prevent frivolous and needless appeals. For example, in *Lane v. Esdaile*(1), Lord HALSBURY observed: "It is intended as a check to unnecessary or frivolous appeals." FRY, L.J., in *re Housing of the Working Classes Act, 1890, Ex parte Stevenson*(2) remarked:

"The object was to prevent frivolous and needless appeals."

See also remarks of LOPES, L.J., at page 613. In the English Bankruptcy Act of 1849 (12 and 13 Vic., Ch. 106), section 18 provided as follows:—

"If it was deemed that any matter of law or equity brought before Court to be of sufficient difficulty, or importance, to require the decision of the House of Lords, leave to appeal might be given."

The provision was not re-enacted in the subsequent Bankruptcy Acts. Yet, the Court of Appeal in England, held that the same principles apply, and that the test to be applied before leave to appeal is granted was to see whether the question before the Court was of sufficient difficulty or importance. See *In re Calthrop*(3) and *Ex parte Jackson, In re Bowes*(4). As observed by Lord CAIRNS, L.J., in *In re Calthrop*(3).

"Of course it would always be very much more agreeable to the Court to find no impediment in the way of its decision being reviewed by a Court of Appeal; but the Legislature has thought fit to impose upon this Court the duty of determining whether in any case any matter of law or equity is of sufficient difficulty or importance to require the decision of the House of Lords, and that duty the Court must discharge like any other duty which is put upon it. . . . But I cannot say that I

(1) [1891] A.C., 210 at 212.

(3) [1868] L.R., 3 Ch. App., 252.

(2) [1892] 1 Q.B., 609 at 612.

(4) [1880] 14 Ch.D., 725.

think this a matter of sufficient difficulty to require the decision of the House of Lords. I may be wrong, but I am bound to express my opinion."

His Lordship, held, that simply because there was a "fragment of law" it did not follow that he should grant leave. In *Ex parte Jackson, In re Bowes*(1), it was argued that the amount at stake was large and that the point in the case was important but the Court of Appeal refused leave. BAGGALLAY, L.J., remarked at page 747.

"Though the same limitations and requisites are not to be found in the present Bankruptcy Act as existed under the Act of 1849, we think we ought to act upon similar principles. And, speaking for myself, I am bound to say that I do not entertain the slightest doubt as to the correctness of the decision at which we have arrived."

COTTON and THESIGER, L.JJ., concurred. In *Ex parte Pillers, In re Curtoys*(2) LUSH, L.J., stated

"None of us entertains the least doubt of the correctness of our decision."

Leave was therefore refused. Similarly COTTON, L.J., held in *Ex parte Edwards, In re Tollemache*(3).

"In my opinion leave to appeal ought not to be given. There is not any doubtful question of law raised."

Similarly BRETT, M.R., observed that

"Leave to appeal should not be given when the judgment is so clearly right."

No doubt the single Judge may find that the questions that arose for decision were difficult and that he was not himself quite sure whether his decision was right. A Judge is bound to give judgment in every case that comes before him, including cases where the question raised is difficult or complicated; but if he felt any reasonable doubt as to the correctness of his judgment, it is appropriate that he should "declare

(1) (1880) 14 Ch. D., 725.

(2) (1881) 17 Ch. D., 653.

(3) (1884) 14 Q.B., 415.

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that the case is a fit one for further appeal". It may also happen that after the argument in an appeal had progressed to a considerable extent, he may feel some doubt about the correctness of a decision, to which he is referred and which is binding on him, and in the circumstances he may consider it proper that he should record his judgment. In such cases, leave to appeal should be given, so that the matter might be re-agitated before the proper Court. Further, in such cases, if the circumstances were exactly known to him at the opening of the case, it would even be open to him to have the matter referred to the decision of a Bench of two judges. In considering applications for leave to appeal, it is also relevant to consider whether the question raised is one of private or public importance; whether the same will ordinarily govern other pending cases between the parties, and whether the dispute relates to a recurring right. The Court may also take into consideration the circumstance that under section 111 of the Code of Civil Procedure, the only further right of the unsuccessful party would be to apply to the Privy Council for special leave to appeal. In proper cases, the Judge may consider it more appropriate that the matter should be considered by a Bench of two Judges, before the same is taken up before the Privy Council. At the same time I should like to point out that leave to appeal should not be refused simply because the Judge was of opinion that his decision was correct. Most often learned Judges do think so; but if the question is one of principle and a novel one, ordinarily, leave to appeal should be granted. In *Ex parte Gilchrist, In re Armstrong*(1) Lord ESHER, M.R., said

"Merely to say that they are satisfied that their decisions is right is not, I venture to suggest, a sufficient reason for

refusing leave to appeal, when the question involved is one of principle, and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case."

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As put in section 504 of Halsbury's Laws of England, Volume II, page 303, that

"leave as a rule should be given if the question is one of principle and novel."

When an unrestricted right of appeal is conferred by statute, an appeal would lie even on a "technical point". How the Court of appeal would eventually deal with the "technical point" is a question for that Court to consider. But the circumstances that "a technical point" arises in a second appeal is by itself not a sufficient ground which would entitle the appellant to leave to appeal. Substantial justice should not altogether be lost sight of in considering the finality of the decision, in cases where the Legislature has thrown the duty of deciding whether the litigation should be continued further on the Judge who decided the second appeal.

If the question raised be one of frequent occurrence in which there is no authoritative decision, that would be a circumstance in favour of granting leave.

Cases where the appeal was remanded to the lower Appellate Court for fresh disposal, on the ground that the existing judgment of the Appellate Court was not satisfactory, either because it did not satisfy the requirements of Order XLI, rule 31, Civil Procedure Code, or because it omitted to consider important items of evidence, or because the judgment proceeded under some misapprehension of fact,—are ordinarily not cases for grant of leave. So also are cases where a similar procedure is adopted on the ground that parties had not a proper opportunity to put forward their cases before the lower Appellate Court, and the judgment accordingly

(1) (1886) 17 Q.B.D., 521 at 528,

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proceeded in the absence of one of the parties or in the absence of evidence on the side of one of the parties. Similarly, when it is found in second appeal that an important question arising in the case was not properly dealt with by the lower Courts, and the Judge is of opinion that the attention of the parties had not been properly directed to it in the absence of specific issue on the point, and the appeal is accordingly remanded for fresh disposal, after the framing of a proper issue, and after giving the parties an opportunity to adduce evidence on the same, leave to appeal should not ordinarily be given.

If, in any of the above cases, a question of principle, either of pleading or of practice of frequent occurrence, be raised, on which there is no authoritative ruling, then that would *prima facie* be a ground for granting leave.

In cases arising under new statutes, where "ambiguous expressions" are construed by the Court for the first time, leave to appeal may be given, having regard to the importance of the question, till the construction put on the words of the statute has become so well known and have been followed in transactions of every day occurrence that in public interest it may be considered not proper to have these matters unsettled.

In *Ex parte Wolverhampton Banking, In re Campbell*(1), STEPHEN, J., held "We cannot give leave. The case is not one of any magnitude or of any general importance." CAVE, J., said: "I agree. There is not a large sum at stake, and the principle involved is one about which I do not entertain any doubt".

Some of these are probably considerations which should weigh with the final appellate authorities: but

it seems to me that they would also be relevant, though by no means conclusive, in considering the question of grant of leave. BULLIRAJU
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It may be possible to give a few more instances of cases where ordinarily leave to appeal should or should not be given.

In cases where the question relates only to the exercise of a discretion (not to a point of law), leave should generally be refused. See *Ex parte East and West India Dock Company, In re Clarke*(1).

Leave to appeal should be asked for under rule 95 of the Appellate Side Rules, orally and immediately after the judgment has been delivered. This is also the English practice (Halsbury's Laws of England, Vol. II, page 303, section 504). No elaborate arguments on the point are contemplated as the facts and the circumstances of the case would be present to the mind of the Judge at the time.

It follows that where a single Judge only followed a ruling of an authority binding upon him, or applied it to cases clearly within the purview of the principles so laid down, no leave should be granted except in cases already mentioned where he himself felt a doubt about the correctness of such ruling or thought that a reconsideration of the same was necessary.

In cases relating to construction of ordinary documents, the Judge has got a greater discretion in declining to grant leave to appeal, for it very rarely happens that two private documents are generally exactly similar in terms. The circumstance that the decision of the lower Appellate Court was reversed is not conclusive for grant of leave, any more than the circumstance that the decision of the lower Appellate

(1) (1881) 17 Ch.D., 759 at 766.

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Court was confirmed conclusive for its refusal; the circumstance that the second appeal is allowed or dismissed is by itself not a circumstance conclusive either way.

Provisions of the Civil Procedure Code relating to appeals to the Privy Council, impose a stricter test for granting leave to appeal than under section 15 of the Letters Patent. I am inclined to think that the Judge should not insist on such a strict test. Leave to appeal against the decisions of County Court Judges is granted, if it is reasonable and proper that such appeal should be allowed. The circumstance that leave to appeal to the Privy Council would not be granted in a case is not conclusive that leave to appeal should not be granted under section 15 of the Letters Patent.

Three decisions of Indian Courts were brought to my notice which contain some indications of the principles which should guide me in deciding the question under section 15 of the Letters Patent of 1927; a similar provision already existed in the Letters Patent of the Rangoon High Court, as seen from clause 13 of the Letters Patent issued to the Rangoon High Court in 1922.

In *Madhana Aiyar v. Muthia Chettiar*(1), AYLING and SESHAGIRI AYYAR, JJ., remarked that under the provisions of the Provincial Insolvency Act, "no leave to appeal could be claimed against an order which did not decide any substantial question of law or which did not directly or indirectly enunciate any proposition on which a pronouncement of a Court of Appeal is desirable". In *Radha Mohan v. M. C. White*(2), leave was given under the Provincial Insolvency Act, "as the case was argued on principle and appeared to require a

careful consideration in view of certain existing decisions". In *Panachand v. Dobson*(1) it was held that in cases arising under the Presidency Towns Insolvency Act, an Appellate Court can grant leave to appeal, if a question of principle be involved.

It is not possible to lay down definite rules applicable to all cases. As has been remarked with reference to the exercise of the power of revision by the High Court, it is not advisable to crystalize into definite propositions the principles that should govern the Court in the exercise of its revisional jurisdiction. Similar remarks would apply to the exercise of the jurisdiction vested in a single Judge under section 15 of the Letters Patent. The jurisdiction should not be exercised capriciously or arbitrarily, but in a judicial manner and in the exercise of sound discretion, having regard to all the circumstances of the case.

The Legislature has entrusted the duty of declaring whether he considers the case a fit one for further appeal to the Judge himself. Before the amendment of the Letters Patent in 1927, there was a right of further appeal to two Judges as a matter of course in such cases. It is clear that the object was to restrict such an unlimited right of appeal which existed before. Right of appeal does not exist apart from statute. The statute has substituted a limited right of appeal in the place of an unlimited right of appeal which existed before. Obviously, the Judge should be satisfied from all the circumstances that a further right of appeal should be sanctioned. He is the sole authority charged with the duty of deciding the same, and in him full discretion has been vested in that respect. What I have stated above covers only certain aspects of the matter which

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(1) (1916) 5 L.W., 168 at 170.

(2) (1923) I.L.R., 45 All., 364 at 365.

(1) (1922) 25 Bom. L.R., 161.

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have come before Courts and which would be useful in coming to a conclusion whether leave should be granted or not.

From the very nature of the case, no hard and fast rule could be laid down. It has also been said that "leave to appeal may be limited to certain points". (See Halsbury's Laws of England, Vol. VIII, page 604, paragraph 1452.) In *Jones v. Beirnsstein*(1) A. L. SMITH, L.J., addressing the appellant's counsel, Mr. SCHWABE, said, "You have obtained leave to appeal on one point and only one, and you are confined to that point." COLLINS, L.J., in his judgment at page 102, stated: "We have no jurisdiction in this case except as to the point on which leave to appeal has been given by the Divisional Court." VAUGHAN WILLIAMS, L.J., agreed. See also *Sanderson v. Blyth Theatre Company*(2), per ROMER, L.J.

In the cases before me (Second Appeals Nos. 1315 and 1316 of 1927), I had to construe a deed of adoption executed in 1920, which contained certain peculiar provisions. I do not think, I should be justified in declaring that these cases are fit for further appeal.

K.R.

(1) [1900] 1 Q.B., 100 at 101.

(2) [1908] 2 K.B., 533 at 540.

APPELLATE CIVIL.

Before Mr. Justice Cargenven.

SIVARAMAYYA (PLAINTIFF), APPELLANT,

v.

KAPA VENKATA SUBBAMMA AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Partition Act (IV of 1893), sec. 4—Hindu family, divided in status but occupying family property in common—Suit by a purchaser of a share of dwelling house from one of the members of the family—Right of another member for benefit of sec. 4 of the Act—"Undivided family" in sec. 4, meaning of.

Where a purchaser of a share in a dwelling house from a member of a Hindu family, whose members although divided in status occupy the house in common, sues for partition of the house against the members of the family, a member of the family, who is a defendant in the suit, is competent to apply for the benefit of section 4 of the Partition Act.

Sultan Begam v. Debi Prasad (1908), I.L.R., 30 All., 324, followed.

SECOND APPEAL against the decree of the District Court of West Gōdāvari in Appeal Suit No. 76 of 1926, preferred against the decree of the Court of the District Munsif of Ellore in Original Suit No. 318 of 1924.

The material facts appear from the judgment.

A. Satyanarayana and P. Satyanarayana Rao for appellant.

P. Somasundaram for respondents.

JUDGMENT.

The plaintiff bought a third share in a dwelling house and he sued for partition of it. The members of the family occupying the house were the first defendant and the plaintiff's vendor, the third defendant, who were brothers, and the second defendant, son of a deceased brother. The first defendant died during suit

* Second Appeal No. 1353 of 1926.

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"It is contended on the one hand that the words 'undivided family' as used in this section mean a joint family and are confined to Hindus or to Muhammadans who have adopted the Hindu rule as to joint family property. On the other hand the contention is that the expression is of general application and means a family, whether Hindu, Muhammadan, Christian, etc., possessed of a dwelling house which has not been divided or partitioned among the members of the family."

(1) (1908) I.L.R., 30 All., 324.

(2) (1907) I.L.R., 29 All., 308.

(3) (1890) I.L.R., 13 All., 282.

They then allude to the occurrence of the same phrase "undivided family" in section 44 of the Transfer of Property Act, whence it appears to have been borrowed for the purposes of the Partition Act, and point out that the provision in the former statute is clearly of general application. It has been suggested here that the portion of section 44 of the Transfer of Property Act alluding to an undivided family would, if it merely meant a joint family, be superfluous in view of the proviso to section 2 of the Act that nothing in it shall be deemed to affect any rule of Hindu, Muhammadan, or Buddhist law. The Full Bench observes that the purpose of section 4 appears to be "to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling house in which other members of his transferor's family have a right to live", an intention which would of course cover circumstances such as those of the present case, and they conclude by construing "undivided family" as "undivided *qua* the dwelling house in question, and to be a family which owns the house but has not divided it." There are several decisions of the Calcutta High Court to the same effect. I need only allude to the earliest one, *Kshirode Chunder Ghosal v. Saroda Prasad Mitra*(1). The learned Judges cite *Sultan Begam v. Debi Prasad*(2), with approval and explain how the law stood previous to the enactment of the Partition Act and the inconveniences which it was designed to avoid. There being no authority in conflict with these cases and it appearing to me that the phrase "undivided family" is sufficiently ambiguous to justify me in adopting the construction most in consonance with what appears to be the intention of the Act, I follow them, and agreeing, therefore, with the view taken by the lower Courts, I dismiss the second appeal with costs.

K.R.

(1) (1910) 12 Cal. L.J., 525.

(2) (1908) I.L.R., 30 All., 324.

SPECIAL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Curgenven and Mr. Justice Pakenham Walsh.

1929,
October 23.

T. M. M. SANKARALINGA NADAR AND BROTHERS,
PETITIONERS,

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

*Income-tax Act (XI of 1922), ss. 22, 24 and 37—Income-tax
Officer, making an enquiry for assessment, if a Court—
Decision of, if res judicata or an estoppel by record—
Decision, when can be re-opened—Accounts for more than
three years from year of account, right to call for, in what
cases—Effect of non-production—Presumption under section
114, Indian Evidence Act (I of 1872).*

An Income-tax Officer, making an enquiry as contemplated by the Income-tax Act, 1922, for the purpose of assessing a person, is not a Court, and the rule of *res judicata*, applicable to the decisions of Civil Courts, does not apply to the decisions of the Income-tax officers; nor do the decisions of such officers in assessing the income constitute an estoppel by record against the Income-tax officials.

Though an Income-tax Officer is not bound by the rule of *res judicata* or estoppel by record, yet he can re-open the matter of assessment only if fresh facts come to light, which, on investigation, would entitle the officer to come to a conclusion different from that of his predecessor.

The power of an Income-tax Officer to call for accounts is limited under the proviso to section 22 (4) to a period of three years, only when he acts under section 22, and, in default, proceeds to assess to the best of his judgment under section 23 (4). But he can call for accounts for more than three years when he is enquiring under section 23 (2) into the truth of the allegations in the return of income made by an assessee, and on non-produ-

tion of such accounts, may draw the presumption laid down in section 114 of the Evidence Act.

CASE referred to the High Court under section 66 (3) of the Indian Income-tax Act (XI of 1922) in the matter of the assessment of T. M. M. Sankaralinga Nadar and Brothers.

K. S. Krishnaswami Ayyangar (with K. Rajah Ayyar and S. Nataraja Nadar) for the petitioner.—The question is whether a certain amount is stridhanam which ought to be deducted from the income of the joint family of the assessee. The assessment in question was for the year 1926–27; the Income-tax Officer called for accounts of the assessee from 1917–20; such accounts were not produced. There was a decision by an Income-tax Officer in a previous year, which held the amount in question to be stridhanam of the women of the family, which was lent to the joint family. For a later year the officer issued summons to the assessee to produce accounts prior to 1920. On the assessee's omission to produce them, an adverse inference was drawn by the officer against the assessee. There is no presumption to be raised on account of non-production of such accounts beyond three years, unless the officer directing it to be done has power under law to do so. He has no such power under the Income-tax Act, except where the officer acts under section 23 (4). Section 37 of the Act does not enlarge the powers given under section 22 (4) and section 23 (3). The previous decision of the Income-tax Officer is *res judicata*; even if it is not strictly *res judicata*, it is binding as estoppel by record. An Income-tax Officer is a Court; he is acting judicially in dealing with assessment matters under the Income-tax Act. He records evidence and gives a judgment under section 23. Under section 27, he cancels the assessment for sufficient cause, which is a judicial act. He is a judicial officer, and the rule of *res judicata* applies to his decisions: see *Aylmer v. Mahaffy* (1). Section 3 of the Evidence Act defines a Court as including persons legally authorized to take evidence: see *In re Nataraja Ayyar* (2) and *Hoystead v. Commissioner of Taxation* (3). In *Hill v. Clifford* (4), the judgment of a Medical Council as to the misconduct of a medical man, was held binding as *res judicata* or as evidence, which must be overcome by a party contending against it. In *Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras* (5), it was

(1) (1925) 10 Tax. Cas., 594.

(2) (1912) I.L.R., 36 Mad., 72.

(3) [1926] A.C., 155.

(4) [1907] 2 Ch., 236.

(5) (1928) 56 M.L.J., 451.

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held that it was not *res judicata*, but the point was not argued and no reasons are given in the judgment. Even if the decision is not *res judicata*, it is strong prima facie evidence and the onus is on the Income-tax Officer to displace it: see *In re Bishnu Priya Chowdhurani*(1). Even if the Income-tax Officer is not a Court, his decision amounts to an admission, and to an estoppel by record. *Res judicata* applies to applications as well as to suits: see *Hook v. Administrator General of Bengal*(2).

M. Patanjali Sastri for the Commissioner of Income-tax.—The Income-tax Officer is not a Court: see *In re Harmukhrai Dulichand*(3) and *Lal Mohan Poddar v. Emperor*(4). Section 37 of the Act makes proceedings of an Income-tax Officer judicial proceedings only for the purposes specified in that section. Where a department of the executive is entrusted with judicial functions, it does not become a Court: see *Local Government Board v. Arlidge*(5), per HALDANE, L.C. Section 22, sub-section (4), provides for the assessee being required to produce accounts only for three years prior to the previous year. It applies only in cases where he is empowered to act under section 23 (4) and assess at an estimated value. Section 37 empowers the officer to call for accounts for more than three years in the ordinary cases of enquiry into assessment under sections 22 and 23, and, on the non-production of such accounts, the presumptions under the Evidence Act, Section 114, Illustrations *g* & *h* can be raised by him. The ordinary law of evidence is not affected by the provisions of the Income-tax Act. On the question of *res judicata*, reference was also made to *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(6), *Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(7).

K. S. Krishnaswami Ayyangar replied.

JUDGMENT.

The assessee is a Hindu joint family and were sought to be assessed for the year 1926-27 as members of a joint family. They claimed an allowance for interest which they said was paid on sums of money

(1) (1923) I.L.R., 50 Cal., 907.

(3) (1928) I.L.R., 56 Cal., 39 at 48.

(5) [1915] A.C., 120 at 132.

(2) (1921) I.L.R., 48 Cal., 499.

(4) (1927) I.L.R., 55 Cal., 423.

(6) [1926] A.C., 94.

(7) (1928) 56 M.L.J., 451.

standing in the books as borrowings from the wives of the male members. These sums according to the assesses have been standing for several years in their books as moneys which belonged to the ladies and which they lent to the firm and on which interest has been paid to them. So far as the female members are concerned, it is not disputed that they were being taxed separately as if the interest paid to them was income which they derived from moneys which they lent to the firm. This was going on till 1923, when the Income-tax Officer instituted an enquiry as to whether these sums were really loans to the trade made by the female members. Notice was given, enquiry was held, affidavits were filed and the Income-tax Officer came to the conclusion that these were loans and the allowance was made for interest which was paid to the female members of the family. This went on, according to the petitioners, till the accounting year 1925-26. In 1926-27 enquiry was again opened on this question. The Income-tax Officer wanted to re-open the question and he asked the assessee to produce the accounts from 1917-20. A combined notice was issued under sections 22 (4) and 23 (2). The accounts from 1917-20 were not produced, it being alleged that the books were not available as they were lost. Upon that the Income-tax Officer of Sattur disallowed the claim made for reduction on account of interest paid to the female members and his note is "Interest payments to the assessee's female relations have been disallowed as the assessee has withheld the production of earlier books which alone will show whether the amounts standing to their credit are their own stridhanam amounts or not". He evidently acted on the mere fact of non-production of the account books. An appeal was made to the Assistant Commissioner of Income-tax who after setting

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out all the facts in paragraph 2 of his order held that the Income-tax Officer was not precluded from re-opening the question. He made further enquiries, examined the parents and relations of the ladies, and came to the conclusion, for the reasons given by him, that these amounts were not proved to be the stridhanam moneys of the ladies lent to the firm. He upheld the Income-tax Officer's decision. Then there was an appeal to the Commissioner and he upheld the order of the Assistant Commissioner and refused to refer the questions asked on the ground that no questions of law arose. On a petition to the High Court he was ordered to refer the following questions:—

(a) Whether, when in a previous year of assessment a decision was arrived at after investigation and enquiry that certain amounts standing in the name of certain ladies in the petitioners' accounts were the stridhanam amounts belonging to them, and as such the interest paid in respect of the said amounts was held to be a valid deduction, it is open to the Income-tax authorities to re-open the question of the ownership of the amounts in a subsequent year of assessment, and whether the authorities are not barred, by the principle of *res judicata* or otherwise, from re-opening the said question.

(b) Whether, when amounts are shown in the assessee's account books as the amounts belonging to certain ladies of the family, and the Income-tax authorities have treated the said amounts for several years as such, and when they have assessed the ladies separately in respect of the said amount on that basis, it is competent for the authorities to levy assessment in respect of the very same amount on the petitioners, the assessment on the ladies having become final not having been set aside by appropriate proceedings.

(c) Whether, in the absence of any affirmative evidence on the part of the Crown, it is open to the authorities to presume that the amounts standing *prima facie* in the name of the ladies belonged to the petitioners.

(d) Whether there was any legal evidence before the Income-tax Officer and the Assistant Commissioner in support of their finding as to the ownership of the said amounts.

(e) Whether there is any jurisdiction for the Income-tax authorities purporting to act under section 37 of the Act to call upon an assessee to produce accounts relating to a period prior to three years of assessment and whether any inference can be drawn against the assessee by reason of non-production thereof of such accounts.

(f) Whether, when goods are sent to an assessee for the purpose of sale on commission and a certain small amount is charged on the consignor for each bag sent as and for mahimai which is paid over by the assessee either immediately or subsequently to the trustees of the mahimai found in fact, the said amount is liable to be assessed for income-tax.

(g) Whether, when debts are actually written off by the assessee as an irrecoverable bad debt, it is open to the authorities to disallow a deduction in respect of the same on the ground that the origin of the debt has not been proved.

It is argued before us that, where an Income-tax Officer holds an enquiry and comes to a decision, that decision has the force of *res judicata* and precludes the question being re-opened subsequently, and that, even if not *res judicata* it operates as an estoppel; secondly, that the Income-tax Officer was not entitled to call for accounts relating to a period more than three years

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prior to the previous year, as he is prohibited from doing so by the proviso to section 22(4), that the requisition for the production of the account books for the years 1917—20 was therefore illegal and consequently no adverse inference can be drawn from the non-production of the account books, nor can the non-production be made the basis of an assessment, and that, in the present case the Income-tax Officer having proceeded mainly on that ground alone, the assessment levied by him on that footing is illegal.

As regards the question of *res judicata*, we do not think the contention can be accepted. The argument for the petitioners is that where an authority is constituted by a statute for determining judicially the legal rights and obligations of parties, whether *inter se* or between themselves and the Crown, and where that authority has to determine not only whether an obligation exists but also the measure of that obligation, that authority is a Court and the decisions of that authority are final and conclusive subject to such remedies by way of appeal or otherwise as are conferred by law. For this broad proposition there is no authority.

So far as the Income-tax Act is concerned, there is nothing in the Act which states that an Income-tax Officer proceeding to assess the income of an assessee and to determine the amount of such assessment is a Court. On the contrary the provisions of section 37 suggest that except for certain purposes the Income-tax Officer is not a Court.

Section 37 states that the Income-tax Officers specified therein shall for the purposes of Chapter IV have the same powers as are vested in a Court under the Civil Procedure Code when trying a suit in respect of the following matters, namely:—(a) enforcing the

attendance of any person and examining him on oath or affirmation; (b) compelling the production of accounts and (c) issuing commissions for the examination of witnesses; and that any proceedings before an Income-tax Officer, Assistant Commissioner or Commissioner under this chapter shall be deemed to be a "judicial proceeding" within the meaning of sections 193 and 228 of the Indian Penal Code.

If an Income-tax Officer in making an investigation was a Court, there is no necessity for the provisions of section 37. It is only for the purposes stated in that section that he is to be deemed a Court.

In *Lal Mohan Poddar v. Emperor*(1), it was held that a proceeding before an Income-tax Officer on the production of account books pursuant to a notice under section 23 (2) of the Income-tax Act is a judicial proceeding only for the purposes of sections 193 and 228 but not of section 196 of the Penal Code, and that a conviction under section 196 for the production of false accounts is bad in law. The learned Judges (C. C. GHOSH and CAMMIADÉ, JJ.) observed:

"As we read section 37, it seems to us to be clear that the Legislature has for the purpose of punishing offences under sections 193 and 228 of the Penal Code (and under no others) converted proceedings before the officers mentioned therein, which are not judicial proceedings ordinarily, into "judicial proceedings."

In *In re Harmukhrai Dulichand*(2), the question arose whether an Income-tax Officer is a Court. RANKIN, C.J., observed:

"It has been said that the Income-tax Officer must proceed in a judicial manner and section 37 has been mentioned in this connexion. Fundamentally, no doubt, the Income-tax Officer must proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts; though I would point out that

(1) (1927) I.L.R., 55 Cal., 423.

(2) (1928) I.L.R., 56 Cal., 39.

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the Income-tax Officer is not a Court, he has not the procedure of a Court, and he is to some extent a party or Judge in his own case."

In *Mahadev Ganesh v. Secretary of State for India*(1), the question was whether an officer acting under the Sea Customs Act, 1878, and adjudicating on the question whether a certain property was to be confiscated, was a Court, and it was held that he was not a Court. Sir NORMAN MACLEOD, C.J., observed:

"I have no doubt that the Collector, who is not bound to adjudge on confiscation and penalty as if the matter was proceeding in a Court of law according to the provisions of the Civil or Criminal Procedure Code, dealt with the various statements before him in a careful and judicial manner."

The question again arose for decision on a reference in *Commissioner of Income-tax, Madras v. Messrs. Massey & Co., Ltd., Madras*(2), where the question referred was whether the decision of an Income-tax Officer in a previous enquiry constituted the matter *res judicata* and the Full Bench answered the question in the negative, though there is no discussion in the judgment of this question as the Judges evidently thought it was not arguable. It cannot be said that, because no reasons are given in the judgment, the opinion is not binding on us. It was an answer to a question referred and not merely obiter.

Reference has been made to *In re Nataraja Ayyar*(3), where the question was as regards the power of the High Court to issue a writ of *certiorari* against an Income-tax Officer who instituted criminal proceedings under section 476 of the Criminal Procedure Code. SUNDARA AYYAR, J., was of opinion that the High Court had no jurisdiction. SADASIVA AYYAR, J., was of opinion that the High Court had jurisdiction. There are some

(1) (1921) I.L.R., 46 Bom., 732.
(2) (1928) 56 M.L.J., 451. (3) (1912) I.L.R., 36 Mad., 72.

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observations in the judgment of both the learned Judges which, it is argued, support the contention of the petitioners that the Income-tax Officer is a Court. The facts were that the Income-tax Officer issued a notice under section 476 of the Criminal Procedure Code to show cause why the petitioner should not be prosecuted for making a false statement.

Section 37 of the Income-tax Act states that the proceedings under Chapter IV which refer to assessment should be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code. So that where proceedings are sought to be taken for perjury it may well be contended that, so far as the proceedings are concerned, the Income-tax Officer should be deemed to be a Court attracting the provisions of the Code as regards revision and appeal to the High Court. So far as we can see, the question was not raised nor was it necessary to be raised as to whether an Income-tax Officer was a Court when he assessed parties to income-tax. The contention of the petitioner was that the Income-tax Officer in determining the appeal did not act as a Court, that he had no jurisdiction to pass an order under section 476 of the Criminal Procedure Code, and that, even if he was a Court, he had no jurisdiction to pass the order long after the proceedings terminated. The Public Prosecutor stated that there was no power in the High Court to issue a writ of *certiorari* for various reasons. It was unnecessary for the purpose of that case to decide whether an Income-tax Officer proceeding to assess an assessee was a Court. And if the observations of the learned Judges can be said to lay down any such broad proposition we would respectfully dissent from it.

In this connexion we may state that the Income-tax Department has been held in England to be only a

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department of the Executive and not to be a Court of Justice.

In *Local Government Board v. Arlidge*(1), Viscount HALDANE observed:

"My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of Law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal . . . When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

Lord SHAW observed:

"The words 'natural justice' occur in arguments and some times in judicial pronouncements in such cases. My Lords, when a central administrative board deals with an appeal from a local authority it must do its best to act justly, and to reach just ends by just means. If a statute prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are ex necessitate those of Courts of Justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. In so far as the term 'natural justice' means that a result or process should be just, it is a harmless though it may be a high-sounding expression."

(1) [1915] A.C., 120.

There can be little doubt that Income-tax Officers in conducting enquiries have to act judicially and to exercise their discretion, not capriciously, but on recognized judicial principles, but that would not constitute the officer making the enquiry a Court.

Reference has been made to *Hill v. Clifford*(1). In this case, the General Medical Council acting under the powers of the Dentists Act, 1878, made an order directing that the name of one Clifford should be struck off the Register of Dentists, on the ground that he had been guilty of professional misconduct. Thereupon his partner gave notice determining the partnership. Suits were filed to determine the validity of the notice and the order of the Medical Council was tendered in evidence. WARRINGTON, J., rejected it and decreed the action of the plaintiff. It was held by COZENS HARDY, M.R., and BUCKLEY, L.J., that the order was admissible as *prima facie* evidence of the fact that Clifford was guilty of acts infamous or disgraceful in a professional sense. The President, Sir GOEBELL BARNES, was of opinion that the order was admissible as evidence, and conclusive evidence, of the fact that the defendant's name had been erased from the register by order of the Council against the defendant for some purposes, other than the truth of the fact of misconduct, to show the grounds upon which it was made. All that this case decides is that the order of the Medical Council is relevant evidence. It does not support the contention that the Council was a Court. As regards statutory bodies exercising quasi-judicial functions, the law is thus stated in Halsbury's Laws of England, Vol. XIII, page 362:

"The doctrine of estoppel by record has been extended by analogy to the decisions of all tribunals which have

(1) [1907] 2 Ch., 226.

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jurisdiction, whether by the law of this country, or by the consent of parties, or, by the law of the country to whose tribunals the parties have, or may be presumed from their conduct to have, submitted themselves."

In paragraph 507 it is observed :

"The principle of conclusiveness has been applied to decisions not of record in numerous cases, of which the following are examples : A sentence of expulsion passed by a college ; of deprivation by a College visitor ; of trustees dismissing a schoolmaster ; an order of the General Medical Council ; the award of an arbitrator. So orders of Commissioners of sewers (not made between the parties litigant) have been held admissible as evidence of reputation, on the express ground that they were adjudications of a Court of competent jurisdiction over the subject matter."

We are of opinion that an Income-tax Officer proceeding to assess an assessee after making an enquiry as contemplated by the Income-tax Act is not a Court and that it cannot be said that the doctrine of *res judicata* applicable to the decisions of Civil Courts applies.

In this connexion, we may refer to two cases, one cited on behalf of the petitioners and the other on behalf of the respondent.

Reference has been made by Mr. Krishnaswami Ayyangar for the petitioners to *Hoystead v. Commissioner of Taxation*(1). The question there was whether the beneficiaries were joint owners. The High Court in a previous assessment proceeding had held that six deductions of £5,000 should be made on that footing. In the subsequent year the Commissioner allowed only one deduction contending that the beneficiaries were not joint owners within the meaning of the Act. Upon a case stated, the Court in Australia upheld the contention that only one deduction of £5,000 ought to be made. But their Lordships of the Privy Council reversed the decision on the ground that the previous proceedings

(1) [1926] A.C., 155.

estopped the Commissioner from contending that only one and not six deductions should be made. Reliance was placed on the following passage in the judgment of Lord SAUNDERS :—

"Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact ; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken."

For the Commissioner of Income-tax, reference has been made to *Broken Hill Proprietary Co. v. Broken Hill Municipal Council*(1). The question there related to the valuation under the Local Government Act, 1919, of New South Wales. There was an adjudication as to valuation for a previous year and the question arose as to the valuation for the subsequent year. The point of *res judicata* was raised on the ground that the adjudication by the Court for the previous year would be conclusive as regards the subsequent years. Lord CARSON in rejecting this contention stated :

"It was also contended before this Board on behalf of the respondents that, having regard to the said decision of the High Court of Australia, the question raised by this appeal is

(1) [1926] A.C., 94.

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res judicata as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the District Court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question, namely, the valuation for a different year and the liability for that year. It is not *eadem questio*, and therefore the principle of *res judicata* cannot apply."

The principle to be deduced from these two cases is that, where the question relating to assessment does not vary with the income every year but depends on the nature of the property or any other question on which the rights of the parties to be taxed are based, e.g., whether a certain property is trust property or not, it has nothing to do with the fluctuations in the income, such questions, if decided by a Court on a reference made to it, would be *res judicata* in that the same question cannot be subsequently agitated. But if the question is decided by a Court on a reference which depends upon considerations which may vary from year to year, e.g., the case in 1926 A.C., 94 in which the average valuation had to be taken, there could be no question of *res judicata*.

The next question is whether even assuming that the matter is not *res judicata*, it would not create an estoppel by record against the income-tax officials.

In this connexion the argument of Mr. Krishnaswami Ayyangar is that even treating the income-tax officials as a quasi-judicial body and not a Court, the principles of natural justice and expediency ought to prevent income-tax officers from going back on their previous decisions. Reference has been made to the

passage in Halsbury's Laws of England which I have already quoted.

It seems to us that where income-tax officials have, after enquiry, proceeded to assess the assessee on a certain basis, though they may be entitled to reopen the enquiry, they cannot arbitrarily change the assessment simply on the ground that the succeeding officer does not agree with the preceding officer's finding. The position is just like the position of any two parties who have proceeded on a certain basis in their relations. It may be open to one party to reopen the matter. But if he wants to do so, there should be facts which would entitle him to do it. If fresh facts come to light which on an investigation would entitle the Income-tax Officer to come to a different conclusion from that of his predecessor we think he is entitled to reopen the question. But if there are no fresh facts, it is difficult to see how he can arbitrarily go behind the finding of his predecessor. The same principles of natural justice or judicial dealing, which Courts impose upon Income-tax Officers, would prevent them capriciously setting aside the orders of their predecessors based on enquiry. In the present case if there were no fresh facts, we do not think the Income-tax Officer can simply say that he would not be bound by the order of his predecessor affecting a question like the present, namely, whether a certain sum is the capital of the firm or a loan. But if, on investigation, any additional facts come to his notice which he considers sufficient, he would be entitled to act upon that additional information and we do not think Courts of Justice can interfere. If there is evidence on which he could have acted, it is not for the Court to constitute itself into a Court of appeal and see whether that evidence is sufficient or insufficient.

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As regards the question as to the power of the Income-tax Officer to demand the production of accounts beyond three preceding years, the provisions of sections 22, 23 and 37 have to be considered. The contention for the petitioners is that in no case can accounts for over three years be called for, whatever may be the nature of the enquiry. For the Commissioner of Income-tax it is contended that the limitation as to three years applies to a case where the officer proceeds to assess under section 23 (4) and that in other cases the Income-tax Officer is not precluded from calling for evidence.

Sections 22 and 23 deal with the return of the income furnished by the assessee for the purpose of being assessed. Sub-section (2) empowers the Income-tax Officer to serve a notice upon the assessee requiring him to furnish within the period specified therein a return in the prescribed form of his total income during the previous year. Sub-section (4) enables the officer to require the assessee to produce such accounts or documents as the officer may require. So far as the accounts are concerned, the proviso says that the Income-tax Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

Section 23, sub-section (4), deals with cases where the Income-tax Officer is empowered to make an assessment to the best of his judgment and it says that he can do so if the assessee fails to make his return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of the notice issued under sub-section (4) of the same section, or having made a return fails to comply with all the terms of the notice issued under sub-section (2) of section 23, which refers to the appearance of the person submitting the return at the office of the Income-tax

Officer and the production of any evidence on which such person may rely. Under sub-section (2) of section 23, it is the evidence which the assessee has to rely on that is required to be produced.

Section 37 refers to the power to take evidence and empowers the officer to enforce the attendance of any person, and to examine him on oath or affirmation, to compel the production of documents and to issue commissions for the examination of witnesses.

Reading these sections together, we think that the proviso to sub-section (4) of section 22 when read with section 23, sub-section (4), only limits the power to call for accounts for more than three years prior to the previous year when the Income-tax Officer has to make the assessment to the best of his judgment where the conditions mentioned in sub-section (4) of section 23 exist. Where, however, during the course of an enquiry the Income-tax Officer is not going to make the assessment to the best of his judgment owing to want of material but proceeds to make an enquiry as regards the truth or otherwise of the allegations made by the assessee in his return in order to determine whether the assessee has made out his allegations, there is nothing to prevent the Income-tax Officer from requiring the assessee to produce any evidence including accounts. It will be unreasonable to suppose that where, for example, an assessee claims certain deductions and the Income-tax Officer wants to make an enquiry into the truth or otherwise of the allegations, it is open to the assessee to refuse to produce any accounts beyond the three years fixed in the proviso to sub-section (4) of section 22, and require the Income-tax Officer to come to a decision on the materials afforded by the three years' accounts.

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As regards the presumption to be drawn from the non-production of the account books, we think the case will be governed by section 114 of the Evidence Act. Illustrations (g) and (h) refer to cases of non-production of accounts and documents and refusal to answer questions.

Where an assessment is made under section 23 (4), it is difficult to see how an Income-tax Officer can call for the production of books beyond the period specified in the proviso to section 22 and then draw an adverse inference for the purpose of penal assessment. It will really be defeating the protection given by section 22 (4). But where the accounts are called for otherwise than for that purpose, there is no reason why the presumption should not be drawn as in any ordinary case.

In this case the accounts were called for during the course of the enquiry as to whether the deduction claimed by the assessee should be granted or not, and we think that the Income-tax Officer was entitled to draw an adverse inference owing to the non-production of the account books. It is a question of fact whether the books were available or not. The assessee says they were lost or destroyed, but the Income-tax Officer does not believe it. It is not for us to say whether the Income-tax Officer was justified or not in his conclusion.

This disposes of all the points argued before us.

The petitioners will pay the respondent Rs. 250 for costs.

K.R.

APPELLATE CRIMINAL.

1929,
October 17.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Pandalai.*

SHROFF VEERAPPA AND ANOTHER
(ACCUSED IN CRIMINAL REVISION CASE No. 336
OF 1929), PETITIONERS

and

NAWAB SHIYA-UL-MULK AND ANOTHER
(ACCUSED IN CRIMINAL REVISION CASE No. 337
OF 1929), PETITIONERS.*

Madras Local Boards Act (XIV of 1920), sec. 166—Bus picks up passengers within one Municipality—Carries them at separate fares to another Municipality—In course of journey travels over District Board road—Liability to take out licence under second part of sec. 166 (1).

Where a bus picked up passengers within the limits of a Municipality, and carried them at "separate fares" to another place in another Municipality, but travelled in the course of the journey over a road belonging to a District Board; *held*, that a licence from the President of the District Board, under the second part of section 166 (1) of the Madras Local Boards Act (XIV of 1920), was necessary for the bus being so run, although a licence may not be necessary under the first part of the section. *Local Fund Overseer, Mayavaram v. Pakkriswami Thevan*, (1927) I.L.R., 51 Mad., 527, distinguished.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of Session of the Kurnool Division in Criminal Revision Petition Nos. 1 and 2, dated 25th March 1929, preferred against the orders of the Stationary Sub-Magistrate of Kurnool in Calendar Cases Nos. 440 and 441 of 1928.

* Criminal Revision Case Nos. 336 and 337 of 1929.

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L. S. Veeraraghava Ayyar for petitioners in both cases.

Public Prosecutor (L. H. Bewes) for the Crown in both cases.

JUDGMENT.

The Assistant Engineer, Kurnool, under the authority of the President, District Board, Kurnool, filed a complaint against the owner and driver, respectively, of bus No. K.U. 62, alleging that they had committed an offence by using that bus on the 15th October 1928 for carrying passengers at separate fares on the Chittoor-Kurnool road without the District Board's licence, an offence coming within the purview of section 166 (1) of the Madras Local Boards Act of 1920 and punishable under section 207 of that Act. The complaint was presented to the Stationary Sub-Magistrate, Kurnool. He recorded the complainant's sworn statement, and holding that the act complained of was not "plying a bus for hire" and that the contracts with the passengers had been entered into within the limits of the Kurnool Municipality and not within the limits of the jurisdiction of the District Board, decided that, upon the allegations made, there had been no contravention of section 166 (1) of the Local Boards Act. He therefore dismissed the complaint. A petition for revision was presented to the Sessions Court, Kurnool Division, by the complainant against that order, and the Sessions Judges set aside the order of the Sub-Magistrate and directed the District Magistrate to take the complaint on the file and make such further enquiry into it as was necessary under the law. Against that order the petitioners have presented this Criminal Revision Petition.

According to the sworn statement of the Local Fund Assistant Engineer, on the date in question, the bus

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was carrying passengers at "separate fares" from Kurnool to Nandyal, and the owner of the bus had not obtained the licence from the District Board required by section 166 (1) of the Madras Local Boards Act. The facts seem to be that the passengers were picked up within the municipal limits of Kurnool and carried in the bus to Nandyal, going over, in the course of the journey, one of the roads belonging to the District Board of Kurnool. For the purposes of the argument before us and in the Court below, it was not suggested that any passengers were picked up by the petitioners at any place within the limits of the District Board.

The short point for consideration by us is whether this motor bus under the circumstances must obtain a licence from the District Board of Kurnool. Section 166 (1) of the Madras Local Boards Act is as follows: "No person shall, on any public road in a district, ply any motor vehicle for hire, or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a licence obtained from the President of the District Board." The Stationary Sub-Magistrate held that the second part of clause (1) of section 166, namely, "use any such vehicle for carrying passengers or goods" must have the same interpretation placed upon it as that applicable to the first part, namely, "plying for hire," and that, as there had been no plying for hire within the limits of the District Board's area, no licence was necessary and no offence had been committed. Before the learned Sessions Judge, the petitioners relied on a decision reported in *Local Fund Overseer, Mayavaram v. Fakkriswami Thevan* (1). In that case MADHAVAN NAIR and CURGENVEN, JJ., held that a person, who lets out his car for hire within a

(1) (1927) I.L.R., 51 Mad., 527.

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Municipality, need not obtain a licence from a District Board, if the car travels beyond the municipal limits and traverses any of the District Board roads, and that the "plying of a motor vehicle for hire" means the act of waiting for or soliciting custom, and, therefore, so soon as any person has hired it, the act of plying for hire is complete, and that it cannot be said that a vehicle plies for hire on a public road merely because it is made use of as a hired vehicle on that road, and that a vehicle cannot be said to ply for hire on a road unless the actual hiring takes place on that road. The facts are set out on page 529 as follows:—"The case was tried as a summons case and he was asked to show cause, why he should not be convicted upon a complaint that he had plied his motor car for hire from Mayavaram to Tranquebar on the 27th, 28th and 29th March 1925 without obtaining a licence. Although, however, the terms of the complaint were not supported by the prosecution evidence, a defence witness was examined who deposed that the accused was in the habit of letting out his car for hire to vakils, mirasidars and others wishing to engage a car for a trip from Mayavaram. It may be taken, therefore, that the accused in this case admitted hiring out his car for journeys from Mayavaram. In the other case (Calendar Case No. 200) the question put to the accused was in similar terms and the evidence was in consonance with it. In both the cases, only the first portion of section 166 (1) would apply, because, admittedly, there is no proof that the vehicles were used for carrying passengers or goods at separate fares or rates." The statement of the facts, in our view, makes this case clearly distinguishable from that, because, according to the sworn statement of the Local Fund Assistant Engineer, the passengers in this case were carried at separate fares, whereas in *Local Fund Overseer*,

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Mayavaram v. Pakkriswami Thevan(1) the whole bus had been engaged for the trip from Mayavaram. Therefore, the only thing that that Bench had to consider was the first part of section 166 (1) and not the latter part of it; and the argument on behalf of the Board in that case was that a vehicle plies for hire on a public road if it is made use of as a hired vehicle on that road, so that it is not a necessary condition that the actual hiring should take place upon that road. That argument, however, did not find favour with that Bench, and we think quite rightly. We are in entire agreement with the decision in that case. But here the facts are different. Before us on behalf of the petitioners, it is argued that the latter words of clause (1) of the section, namely, "use any such vehicle for carrying passengers at separate fares" on a District Board road mean plying for hire on a District Board road. If this is so, then the latter part of the clause is redundant. We cannot accept that argument. We think that that section is intended to make persons, who use the road of a District Board for making money by using motor vehicles upon it pay for that privilege. The first part is intended to make persons who ply a motor vehicle for hire within the limits of the District Board pay for it by taking out a licence, and the latter part of it is, in our view, intended to make persons who pick up passengers at separate fares outside the area of the District Board, and who carry those passengers over a road of the District Board also take out a licence. What is meant by "separate fares" is individual fares as distinguished from a fixed amount for the whole vehicle, and it was, as we read the facts in the 51 Mad. case, the latter case that was there being considered.

(1) (1927) I.L.R., 51 Mad., 527.

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We were referred to several English cases, but except where the definitions are given of what is "plying for hire" they do not assist us, because we are here dealing with the words of a section, which, in our view, clearly express the intention of the Legislature.

Under these circumstances, we are satisfied that the order of the learned Sessions Judge was quite proper and we agree with the reasons he has given for that order. This Criminal Revision Case is, therefore, dismissed. For the reasons given above, Criminal Revision Case No. 337 of 1929 is also dismissed.

B.C.S.

APPELLATE CRIMINAL.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Pandalai.*

1929,
October 30.

PANTAM VENKAYYA (ACCUSED), PETITIONER.*

*Indian Penal Code, sec. 171-D—Personation—Ingredients—
Proof of corrupt motive.*

To constitute the offence of personation under section 171-D of the Indian Penal Code it is necessary to prove that the accused in doing the act with which he is charged was actuated by a corrupt motive.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment, dated 14th March 1929, of the Court of the Subdivisional Magistrate of Rajahmundry in Calendar Case No. 181 of 1923.

* Criminal Revision Case No. 375 of 1929.

*Nugent Grant (V. Satyanarayana with him) for VENKAYYA,
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petitioner.

K. N. Ganpati for Public Prosecutor (L. H. Bewes)
for the Crown.

The JUDGMENT of the Court was delivered by
BEASLEY, C.J.—The petitioner was convicted by the
Subdivisional Magistrate of Rajahmundry and sentenced
under section 171-F, Indian Penal Code, to a fine of
Rs. 50 and in default to suffer simple imprisonment for
a month.

The offence of which he was convicted was that of
personation at an election. Briefly, the facts of the case
are that on the 16th April 1928, there was an election
to fill vacancies on the Peddapur Taluk Board. There
were two vacant seats for Peddapur *firka* and eight
candidates and eight polling stations. The petitioner's
name was by mistake on the roll of two different villages,
namely, Geddanapalli and Bhupalapatnam. The peti-
tioner voted once in the morning in the polling station
for Geddanapalli, and in the afternoon for a second time
in the polling station for Bhupalapatnam.

The offence of personation at elections is defined in
section 171-D of the Indian Penal Code as follows:—

"Whoever at an election applies for a voting paper or
votes in the name of any other person, whether living or dead,
or in a fictitious name, or who having voted once at such election
applies at the same election for a voting paper in his own name;
and whoever abets, procures or attempts to procure the voting
by any person in any such way commits the offence of person-
ation at an election."

In the Subdivisional Magistrate's Court, evidence
was given in support of the complaint against the peti-
tioner by certain witnesses, proving that the accused
voted twice, which is not disputed by the petitioner, and
that he did so, although this conduct was objected to by
P.Ws. 1 and 2. The petitioner filed a written statement

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denying the offence. He, however, admitted that he voted a second time, but stated that he had done so in the *bona fide* belief that he could do so as his name was included in two lists. He also disputed the evidence of the prosecution witnesses as to the objection raised by them at the time of his second voting. Two witnesses were called by the petitioner, who were the Polling Officers, and they deposed that no objection, oral or in writing, was raised at any time to the petitioner voting on the second occasion. On behalf of the petitioner three contentions were raised, namely, (1) that the accused did not specifically apply for the ballot paper and that the second voting was not an offence in the strict letter of the section, (2) that the accused had a right to vote a second time as his name appeared twice in two polling areas in the voters' list, and (3) that *mens rea* is an essential ingredient in this offence and no *mens rea* was proved. The Subdivisional Magistrate decided all the three points against the petitioner, and, since no argument was addressed to us by Mr. Grant, on behalf of the petitioner, that his findings on the first two points are wrong, we have only to consider his finding on the third point, namely, whether *mens rea* is an essential ingredient in this offence. The Subdivisional Magistrate thought that all that it was necessary to prove was the fact that the petitioner had voted twice, and that his motive for doing so, whether corrupt or otherwise, was immaterial. He, therefore, did not come to any finding as to the petitioner's motive or guilty knowledge. He thinks that, however genuine the belief of a person may be that he is entitled to vote twice if his name appears twice upon the electoral roll, he none the less commits an offence under section 171-D, Indian Penal Code. We have been referred by Mr. Grant to the section corresponding to 171-D of the Indian Penal Code in the

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English Act, namely, the Ballot Act (35 and 36, Vic., Chapter XXXIII). Section 24 of that Act is section 171-D of the Indian Penal Code. We have compared the two sections and they are clearly the same. That being so, we were referred to an English decision on that section reported in 4 O'Malley and Hardcastle, page 34, namely, the *Stepney Case*. There, in discussing the offence of personation, DENMAN, J., stated on page 46 as follows:—

"It is thoroughly understood election law that, unless there be corruption, and a bad mind and intention in personating, it is not an offence. If it is done under an honest belief that the man is properly there for the purpose of voting, it is held in these cases and in other cases analogous that no offence has been committed . . . They are enactments which can be really only applicable to an intentionally bad act, because if a man is guilty at all he is guilty of felony, and may be imprisoned as a felon for a considerable time. To suppose that the Legislature ever intended to enact that a man, who with perfect honesty, but from a mere blunder as to his rights, gives a vote, and then (believing that he has a right to do so), gives a second vote he being on the register, on the same day, is to be deemed guilty of felony, is to impute an intention to the Legislature which is absurd, though if it had said so in absolutely plain words, we must have carried it out. I do not think that that is the intention of the Act; I think there is still to be added to the offence of personation a corrupt intention, and where the corrupt intention is absent, the offence of personation cannot have been committed."

The facts in that case were that the man's name had been wrongly included in the register of two divisions. He voted twice, and it was admitted that he was ignorant of the law and had acted conscientiously by mistake, that he had no corrupt intention and that he had not been corruptly influenced.

It was argued by the Public Prosecutor that there is no such thing as *mens rea* in India, that, unless an accused person can bring himself within any of the

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exceptions in the Indian Penal Code, the offence is committed as soon as the acts set out in the section in the Code which defines the offence have been committed, that it is not stated in section 171-D that the personation must be with a corrupt or any other intention and that therefore intention is immaterial. It was contended that the petitioner's plea amounts to nothing more than the plea that he was ignorant of the law which plea could be of no avail to him. But we find ourselves quite unable to agree with that argument. It does not follow that the petitioner's plea was merely one that he was ignorant of the law. His plea apparently is that, as his name was twice upon the electoral roll, he believed by a mistake of fact, that he was on that account entitled to vote twice. His plea is not that he thought that a voter could vote more than once at an election. We have no doubt whatever that the Subdivisional Magistrate was wrong in not applying his mind to that aspect of the case. He should have seen whether, upon the evidence, the petitioner was able to bring himself within any of the exceptions in the Indian Penal Code. This he has not done. Quite apart from this, we are unable to say that the intention of an offender in the commission of this crime is any different in India to what it is in England. There can be no question whatever that the Legislature in introducing the new chapter, Chapter IX (a), into the Code exactly copied the English Statute Law with regard to offences relating to elections, and we see no reason for saying that, whereas in England the corrupt intention of the voter is to be considered, here it is immaterial. We, therefore, set aside the conviction of the petitioner, order the fine inflicted upon him to be refunded, and direct that this complaint be reheard by the District Magistrate, Rajahmundry, or some other Magistrate whom he may direct,

other than this Subdivisional Magistrate. We ourselves are not prepared to decide this matter on the evidence, and we think it is essential that the case should be decided by the Court before which the evidence is presented.

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APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.*

SRI RAJAH VYRICHERLA NARAYANA
GAJAPATIRAJU BAHADUR GARU (FIRST DEFENDANT),
APPELLANT

1929,
November
28.

v.

SRI RANI JANAKI RATNAYAMMAJI GARU
(PLAINTIFF), RESPONDENT.*

Indian Easements Act (V of 1882), ss. 5 and 13 (f)—Right of way over a well-formed and metalled road, not a continuous easement—Contrary English rule not applicable where the Act is in force—Easement of necessity—meaning of.

The decisions in England prior to 1881 were not uniform on the question whether a right of way was a continuous easement or not; but the Indian Easements Act (V of 1882) adopted in section 5 the view that it was not. Hence on a partition of two tenements, a right of way even over a well-formed and metalled road does not pass to the grantee as a continuous easement under section 13 (f) of the Act. It is this view, as enacted in the Act, that must govern wherever the Act is in force, in preference to the now well-established view to the contrary in England. The way may, however, pass to the grantee if it is an easement of necessity; but an easement of way cannot be

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termed "necessary" though the way was used as a way before the partition or even though it may be the most convenient or reasonable means of access, if in fact there is another way. *Krishnamarazu v. Marraju*, (1905) I.L.R., 28 Mad., 495 and *Esa Abba Sait v. Jacob Haroon Sait*, (1909) I.L.R., 33 Mad., 327, followed.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in O.S. No. 55 of 1924.

The facts are fully given in the Judgment.

S. Varadachari, P. Somasundaram and K. Umamaheswaran for appellant.—The right of way now claimed is not an easement of necessity as there is another means of access. "Necessity" must be, and has been, strictly construed. A way cannot be classed as "necessary" even if it is the most convenient or most reasonable means of access. A right of way is a discontinuous easement according to the definition in section 5 and illustration (b) to section 5 of the Indian Easements Act, and cannot therefore pass on a severance of tenements as an "apparent and continuous easement" under section 13 (f) of the Easements Act; see *Krishnamarazu v. Marraju*(1), *Esa Abbas Sait v. Jacob Haroon Sait*(2), *Sukhdei v. Kedar Nath*(3), *Daroga Lal v. Devi Lal*(4), *Gale on Easements*, 10th Edn., page 139. *Charu Surnokar v. Dokouri Chunder Thakoor*(5), which sounds to the contrary has been later on disapproved even in Calcutta; see *Ram Narain Shaha v. Kamala Kanta Shaha*(6), and *Peacock on Easements*, pages 326, 327, 360 to 363.

Advocate-General (A. Krishnaswami Ayyar) for respondent.—The Indian Easements Act has been based on the decisions in England prior to 1882. The balance of English authority prior to that date and all the decided cases after that date are in favour of holding that a right of way over a well-formed and metalled road, as the road in the present case is, is a "continuous easement" though other rights of way may be discontinuous. This is how we should understand the definition of continuous easement and illustration (b) in section 5; see *Mama v. Sassoon*(7), *Jamshed Khodaram v. Burjorji Dhunjibhai*(8). The

(1) (1905) I.L.R., 28 Mad., 495.

(3) (1911) I.L.R., 33 All., 467.

(5) (1892) I.L.R., 8 Cal., 956.

(7) (1928) 55 I.A., 360.

(2) (1909) I.L.R., 33 Mad., 327.

(4) (1918) 48 I.C., 670.

(6) (1899) I.L.R., 26 Cal., 311.

(8) (1915) I.L.R., 40 Bom., 289 (P.C.).

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definition of "continuous" easement in section 5 does not accord with illustration (b) which cannot govern or control the section. Decisions in England before 1882 are *Pyer v. Carter*(1), *Watts v. Kelson*(2), *Wheeldon v. Burrows*(3), *Pearson v. Spencer*(4), affirmed in *Pearson v. Spencer*(5), *Glave v. Harding*(6), *Polden v. Bastard*(7), *Langley v. Hammond*(8). Decisions in England after 1882 are *Ford v. Metropolitan and Metropolitan District Railway Co.*(9), *Thomas v. Owen*(10), *Bayley v. Great Western Railway Co.*(11), *Brown v. Alabaster*(12), *Nicholls v. Nicholls*(13), *Aldridge v. Wright*(14), *Head v. Meara*(15). Of the Indian cases quoted some have misunderstood the English law and others do not deal with a well-formed and metalled road; see also *Gale on Easements* (1916) Edn., page 29. *Peacock on Easements*, page 14. The Indian decisions in favour of the respondent are *Charu Surnokar v. Dokouri Chunder Thakoor*(16), *Kadambini Debi v. Kali Kumar Haldar*(17), *Purnendu Narain Roy v. Dwijendra Narain Roy*(18), *Ranchordass Amthabhai v. Maneklal Gordhandass*(19), *Chunnilal Mancharam v. Manishankar Atmaram*(20). "Necessary" does not mean "absolutely necessary" but means only "reasonably necessary"; *Morris v. Edgington*(21), *Buckby v. Coles*(22), *Watts v. Kelson*(2). The rule must be, as held in the above English decisions, that a grant must be construed strictly against the grantor and in favour of the grantee except in cases of necessity, unless there has been a reservation in favour of the grantor.

S. Varadachari in reply.—The decisions in England prior to 1882 were never uniform and the Easements Act preferred to enact the rule in *Pyer v. Carter*(1), in preference to *Wheeldon v. Burrows*(3). Whatever be the English Law, the law as codified in

(1) (1857) 1 H. & N., 916; 156 E.R., 1472.

(2) (1870) 6 Ch. App., 166.

(4) (1861) 1 B. & S., 571; 121 E.R., 827.

(5) (1863) 3 B. & S., 761; 122 E.R., 285.

(6) (1868) 27 L.J. Ex., 286, 292.

(7) (1865) 1 Q.B., 156.

(8) (1868) 3 Ex. Cas., 161, 171.

(9) (1886) 17 Q.B.D., 12.

(10) (1887) 20 Q.B.D., 225.

(11) (1884) 26 Ch. D., 434 at 457.

(12) (1887) 37 Ch. D., 490.

(13) (1899) 81 L.T., 811.

(14) [1929] 2 K.B., 117.

(15) (1912) 1 Ir. Rep., 262.

(16) (1882) I.L.R., 8 Cal., 956.

(17) (1899) I.L.R., 26 Cal., 516.

(18) (1907) 8 C.L.J., 289.

(19) (1890) I.L.R., 17 Bom., 648.

(20) (1893) I.L.R., 18 Bom., 616, 627.

(21) (1810) 3 Taunt., 24, 31; 121 E.R., 10.

(22) (1814) 5 Taunt., 311; 128 E.R., 709.

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India must be followed; *Norendar Nath Sircra v. Kamalbasini Dasi*(1), *Ramanandi Kuer v. Kalawati Kuer*(2), *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*(3). All the later English cases with reference to a well-formed and metalled road must be understood as holding that such roads are appurtenant to the grantee's tenement and not as passing to him by way of continuous easement. There is no definition of "continuous easement" in English Law. The Indian Easements Act has not yet been applied to Bengal and hence the decisions there and the decisions in Bombay and Allahabad Presidencies prior to the introduction of the Act therein, only lay down a rule of justice, equity and good conscience and do not deal with the wording of the Act, and hence they are no guides for construing the Act.

JUDGMENT.

This appeal arises out of a suit filed by the plaintiff for a declaration that she has a right of way over a road, called the "Circular Road" leading to the premises known as the "Uplands House" in Waltair. The Rajah of Kuruppam, who was the owner of this property, died leaving the plaintiff, his daughter, the defendant and the Zamindar of Kuruppam, his sons. After his death the property was partitioned between the plaintiff, the defendant and his brother. The plaintiff got the block marked A in the plan annexed to the plaint. The property is a very extensive one. According to the plan, there is what is called a Circular Road leading from the Beach Road to the main building which, according to the evidence, was being used as a means of access to the building during the lifetime of the Rajah of Kuruppam. On the north, there is a Municipal Road and the suit property abuts that road. According to the evidence, there was a way leading from that road to this building which was used for the purpose of carrying materials,

(1) (1896) I.L.R., 23 Cal., 568.

(2) (1927) I.L.R., 7 Pat., 221; 55 I.A., 18, 23, 24.

(3) (1916) 43 I.A., 256.

when the temple in the compound was built about the year 1902. This road was not subsequently used except as servants' entrance. It is, however, clear from the plan that so far as the plaintiff's portion is concerned, there is a mode of access to it from the northern side and it cannot be said that the right to use the road, known as the Circular Road, from the beach side is an easement of necessity in the sense that there could be no reasonable mode of access to the portion which fell to the share of the plaintiff except through the road now in dispute. The plaintiff's claim is that the road of which she claims easement is a continuous, well-formed, gravelled and metalled road leading from the Beach Road into the bungalow compound, partly through the defendant's and partly through her share, and that this road has always been the only road by which access was had from the Beach Road into the bungalow and was used and enjoyed for this purpose from the time of construction of the house by the owners of the 'Uplands House,' the predecessors-in-title and interest of the plaintiff and the defendant and the Zamindar of Kuruppam, and by them also until the date of partition in the year 1920.

In paragraph III (d) the plaintiff says:

"By virtue of the partition and even otherwise by implication of law and common sense, the plaintiff is entitled to the free and uninterrupted user of the said road by her and her representatives, servants, etc., in the same manner in which it was being enjoyed prior to the partition and same is reasonable, necessary and essential for the proper enjoyment of the portion of the house and grounds which fell to the plaintiff's share as it was being enjoyed prior to the partition."

She says that the defendant obstructed her use of the road.

In paragraph (f) the plaintiff says:

"The Beach Road is the most important road in the whole town, and the usual, customary and constant approach, ingress to and egress from the 'Uplands House' has always been from the

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said road and the value of the plaintiff's share of the house depends substantially upon the existence of such right of user of the road leading from the Beach Road into the 'Uplands House.' The denial of such right, or interference therewith will not only highly inconvenience the plaintiff and prejudice the reasonable and proper enjoyment of the house and grounds by her but will as well affect seriously their value."

In paragraph (g) she states :

"The plaintiff is also entitled to the said right as an easement of necessity."

The defendant denied the plaintiff's right to use the road either by virtue of the partition or on any of the other grounds alleged in the plaint. According to him, a portion of the property marked in the plan and measuring about 44 cents which did not originally fall to the plaintiff's share was under the direction of the arbitrators given to the plaintiff on partition in order to allow her means of access to her portion from the North Road because the defendant refused to allow her access over the road now in question. He denied that the use of this road was necessary or passed to the plaintiff by implication of law. He says that any user of this road after partition was by his consent. He says that the plaintiff has access to her bungalow from the Municipal road on the north.

The Subordinate Judge found that the right to use the Circular Road which the plaintiff claims in the suit was neither recognized nor specifically prohibited at the partition. He also found that the plaintiff's claim to use Circular Road as an easement of necessity could not exist, because there is another means by which she can have access to the property, viz., the Northern Road, which abuts the share which fell to the plaintiff. Referring to the plaintiff's claim as an easement of necessity, the Subordinate Judge observes :

"This aspect of the case was not pressed before me very much by the plaintiff's vakil, as there is evidence on record to show that the portion of the plaintiff's share in 'Uplands House' can be reached from the Municipal Road on the northern side of the plaintiff's share of the building through her ground. Plaintiff's vakil only relied upon clause (f) to section 13 of the Indian Easements Act and claimed the right to use the Circular Road as an easement, 'apparent and continuous and necessary' for enjoying the share of the plaintiff's portion of the 'Uplands House' as it was enjoyed before the partition took effect, inasmuch as there was no different intention expressed or necessarily implied when the partition took place."

So far as the claim as an easement of necessity is concerned, it is difficult to find, on the evidence and the plan, that the easement is one of necessity.

As regards easements of necessity the law is clear.

In *Krishnamarazu v. Marraju*(1), the learned Judges in dealing with clause (e) to section 13 of the Easements Act observed :

"We think the word 'necessary' must be construed in its ordinary sense. If A has a means of access to his property without going over B's land, A cannot claim a right of way over B's land on the ground that it is the most convenient means of access."

In *Sukhdei v. Kedar Nath*(2), it was held that the easement of necessity was an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. A similar view was taken in *Chunnilal Mancharam v. Manishanker Atmaram*(3), as to the meaning of "easement of necessity." In that case the Easement Act was held not applicable, as it was not extended to the Bombay Presidency till Act VIII of 1891 was passed.

As regards the claim of the defendant that at the partition it was expressly agreed that there should be no right of way, we agree with the Subordinate Judge in

(1) (1905) I.L.R., 28 Mad., 495. (2) (1911) I.L.R., 33 All., 467.
(3) (1893) I.L.R., 18 Bom., 616, 627.

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thinking that it is not made out. The main ground on which the argument for the defendant is based is that the plot of land measuring 44 cents was not originally included in the division as falling to the plaintiff's share, that without it she could not enter the portion of the main building which was allotted to her, although she could enter the other portions by the Northern Road and that this piece of land was given for that purpose to avoid any right she may claim to enter the main building from the Circular Road.

In this case unfortunately the partition is not by any deed. It was effected by two arbitrators, Mr Forbes who was then the District Judge of Vizagapatam and defendant's second witness, Mr. Appa Rao who was Chairman of the Vizagapatam Municipality. As the 44 cents would have allowed the plaintiff direct access from the out-houses to the portion that fell to her share without her making any structural alteration, it is probable that these 44 cents were granted to her for that purpose. We are not satisfied on the evidence that this was due to the defendant's refusal to allow her access by the main road at the time of the partition and this refusal being accepted by the arbitrators and an altered arrangement being made to give the plaintiff another means of access.

The position, therefore, is as put by the Subordinate Judge that it was neither allowed nor prohibited. The question has, therefore, to be dealt with as a question of law as to the rights of parties under the Easements Act.

Section 13 of the Easements Act (V of 1882) refers to easements of necessity and quasi-easements in cases where a person transfers or bequeaths property to another and in cases where a partition is made of the joint property of several persons. The portion of the

section which is relevant to the present case, which is one of partition, runs as follows :—

“Where a partition is made of the joint property of several persons—

(e) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

The easements mentioned in clauses (a), (c) and (e) of this section are called easements of necessity.”

Section 5 defines continuous easements and apparent easements and it runs as follows :—

“Easements are either continuous or discontinuous, apparent or non-apparent. A continuous easement is one whose enjoyment is or may be continual without the act of man.

A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him. A non-apparent easement is one that has no such sign.”

Illustration (b) to this section is this —

“A right of way annexed to A's house over B's land. This is a discontinuous easement.”

It is therefore clear from the Easements Act that a right like the present is a discontinuous easement although it is apparent. The effect of section 13 is this :—that in cases of partition, if an easement is one of necessity, a person, to whose share certain property falls, is entitled to the easement apart from any question of its being apparent or continuous; but that if the easement is not one of necessity but is merely one necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, then such an easement

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should be apparent and continuous. A distinction is clearly drawn between what was actually necessary and what, though not actually necessary in the sense of there being no other mode of enjoying the property, is required for the purpose of enjoying it as it was enjoyed when the partition took place.

The Easements Act was passed in 1882, and when it was passed it only extended to the territories administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg. It was subsequently extended to Bombay and the United Provinces in 1891 but has not been extended to Bengal. It is important to bear this in mind in dealing with the decisions of the Calcutta High Court, where the learned Judges are not trammelled with the provisions of the Easements Act and the definitions contained therein, and the decisions of the Bombay and Allahabad High Courts before the Act was in force there (1891).

So far as the Madras High Court is concerned, the authorities are to the effect that a right of way over a road is not an apparent and continuous easement and that unless it is an easement of necessity it will not pass merely on the ground of its being necessary for the use of the house as conveniently as it was before the partition.

In *Krishnamarazu v. Marraju*(1), it was held that where a person had a means of access to his property without going over another's land, he could not claim a right of way over the other's land on the ground that it was the most convenient means of access and that the law under section 13, clause (e) of the Easements Act is the same as the law in England. In dealing with clause (f) of section 13 of the Easements Act, Sir ARNOLD WHITE, C.J. and DAVIES, J., observed :

(1) (1906) I.L.R., 28 Mad., 495.

"It is admitted that the respondent has a means of access to his property without going over the appellants' land and we must accordingly hold that he has no easement of necessity. He is not entitled to an easement under clause (f) of the section, since the easement which he claims is not apparent and continuous. The respondent failed to establish any right by agreement."

This was a case where the plaintiff and the defendant who were brothers effected a partition by which amongst other things they divided certain houses and open sites.

In *Esa Abbas Sait v. Jacob Haroon Sait*(1), it was held by Sir RALPH BENSON, Offg. C.J., and KRISHNASWAMI AYYAR, J., that a right of way is not an apparent and continuous easement within the meaning of section 13 of the Easements Act. This was a case where there was a lane running to the east of the plaintiff's house and west of the defendant's house from north to south which was enjoyed in common by the plaintiff and the defendants and their predecessors-in-title and the plaintiff claimed it as an easement. As regards the right of way claimed, the learned Judges observed :

"A right of way is not a continuous easement (see illustration (b) to section 5 of the Indian Easements Act, V of 1882). And, therefore, even assuming that it was used as a passage for scavengers at the time when Lazaro owned both the premises there would be no apparent and continuous easement within the meaning of section 13 of the Indian Easements Act."

In *Wutzler v. Sharpe*(2), the property owned by the plaintiffs and the defendant were at one time united and there was a road which led from one portion of the property which belonged to the plaintiffs to another portion which belonged to the defendant. The plaintiffs claimed the road to the defendant's property for the purpose of getting water and the defendant refused permission. The plaintiffs sued the defendant for a

(1) (1909) I.L.R., 33 Mad., 327.

(2) (1893) I.L.R., 15 All., 270.

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declaration of their right of way over the road. As the plaintiffs did not produce the deed under which they became the owners of the property, the learned Judges held that no title by grant could be proved to have passed, and that their only claim could be to claim the easement as an easement of necessity, or an easement, the intention to grant which, should be inferred from the circumstances. It appears from the judgment that the Easements Act was made applicable to the United Provinces on the 6th of March 1891 and this suit was filed before the Easements Act was made applicable. After dealing with the English cases on the subject and expressing their dissent from the decision of the Calcutta High Court in *Charu Surnokar v. Dokouri Chunder Thakoor*(1) the learned Judges held that the right of way did not pass.

In *Sukhdei v. Kedar Nath*(2), which was a decision after the Easements Act was made applicable to the United Provinces, it was held that an easement of necessity was an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. This case arose out of a partition of immovable property and the question was as regards a passage in the property which fell to the share of the defendant. The learned Judges referred to the English cases as to what would be an easement of necessity. There was no suggestion in that case that, where the Easements Act applied, a right of way which was not an apparent and continuous easement would pass under clause (f) of the Easements Act in case of partition of properties, but it is open to the remark that in this decision the applicability of clause (f) has not been considered.

In *Daroga Lal v. Devi Lal*(3), it was held that an easement of necessity could only arise when the property

(1) (1882) I.L.R., 8 Calc., 956. (2) (1911) I.L.R., 33 All., 467.
(3) (1918) 48 I.C., 670.

could not be used at all without the easement, and not where the easement was merely necessary to the reasonable enjoyment of the property.

Reference has been made by the learned Advocate-General for the respondent to the decision in *Charu Surnokar v. Dokouri Chunder Thakoor*(1), *Kadambini Debi v. Kali Kumar Haldar*(2) and *Purnendu Narain Roy v. Dwijendra Narain Roy*(3). As the Easements Act is not applicable to Calcutta, the learned Judges of the Calcutta High Court were not bound by any statutory definition or any statutory provisions and they were at liberty to follow the trend of the English decisions which, as we shall point out later, practically gave a right of way, though not of absolute necessity, in respect of contiguous properties in the case of well-formed and metalled roads.

In *Charu Surnokar v. Dokouri Chunder Thakoor*(1) the land held by the plaintiff and the defendant originally belonged to the same owner. A path had been made by the original owner. The District Judge was of opinion that the case fell under section 26 of the Limitation Act and that the defendant had not proved 20 years' peaceable, open and uninterrupted exercise of the right of way. The High Court was of opinion that the easement might be acquired not only under section 26 of the Limitation Act but by virtue of the presumed grant. In their view, the right of way might pass as a quasi-easement. The learned Judges observed :

" This implied grant might arise in one of two ways :—
(i) to use the path and ghat might be absolutely necessary to the enjoyment of the defendant's tenement in which case, there would be an easement of necessity ; (ii) the use of the path and

(1) (1882) I.L.R., 8 Calc., 956. (2) (1899) I.L.R., 26 Calc., 516.
(3) (1907) 8 C.L.J., 289 to 292.

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ghat, though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance; and in this case, if the easement were apparent and continuous, there would be a presumption that it passed with the defendant's tenement. This latter case is discussed in the books under the principle of the disposition of the owner of two tenements (*Destination du pere de famille*). See Gale on Easements, 5th edition, pp. 96, 97 and following pages; and as to right of way, p. 103 note, p. 124 note and *Pyer v. Carter*(1). This principle is just and fair and accords with common sense. It is in consonance with the rule of justice, equity, and good conscience, which must guide the Courts in the absence of positive direction by the Legislature."

So far as the passage in Gale cited is concerned, the passing of easements on the analogy of the principle of *destination du pere de famille* was disapproved of by Lord WESTBURY in the case of *Suffield v. Brown*(2) which was decided in 1864. After referring to Gale on Easements, the learned Lord observes:

"But this comparison of the disposition of the owner of two tenements to the *destination du pere de famille* is a mere fanciful analogy, from which rules of law ought not to be derived."

Moreover in the 8 Calcutta case the learned Judges themselves point out that the principle of justice, equity and good conscience on which they purported to act could only be applied in the absence of positive direction by the Legislature. And under section 5 of the Easements Act it is clear that a right of way is not an apparent and continuous easement.

In *Ram Narain Shaha v. Kamala Kanta Shaha*(3) the suit related to a right of way. There were two properties which originally belonged to the same owner but subsequently there was a severance, the plaintiff

(1) (1857) 1 H. & N., 916 at 922; 156 E.R., 1472.

(2) (1864) 4 De. G.J. and S., 185; 46 E.R., 898.

(3) (1899) I.L.R., 26 Cal., 311.

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being entitled to one portion and the defendant to another portion. It was held that implication of a grant of easement upon the severance of a tenement might extend to a way but that it would do so only where there had been some permanence in the adaptation of the tenement from which continuity could be inferred. The learned Judges in dealing with the contention based on the decision in the 8 Calcutta case observed:

"We are, however, of opinion that the contention is not sound, and that the case cited is distinguishable from the present. The presumption in favour of the grant of an easement upon the severance of a heritage by its owner into two or more parts arises primarily with reference only to continuous and apparent easements: and a "way" is evidently neither a "continuous" nor always an "apparent" easement.

It is true that in certain cases referred to in text books on the subject—See Gale on Easements, 6th edition, pp. 108 to 123 and Goddard on Easements, 5th edition, pp. 174 to 186, implication of a grant of an easement, upon the severance of a tenement, has been held to extend, under certain circumstances, to a "way", but that is so only where there has been some permanence in the adaptation of the tenement, from which continuity could be inferred. In other words the extension of the rule can hold good, if at all, only in the case of 'a formed road' to use the language of Lord Justice FRY in *Thomas v. Owen*(1), 'made over an alleged servient tenement, to and for the apparent use of the dominant tenement'."

Then the learned Judges say that in that case not only was there no finding of fact that there had been any such permanence of adaptation, any such formed road, but there was no case of an implied grant suggested in the plaint or issues. We may point out that the learned Judges refer to Gale on Easements and are guarded in stating that the rule can hold good, if at all, only in the case of "a formed road." They do not decide that in the case of "a formed road" the

(1) (1887) 20 Q.B.D., 225 at 231.

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easement can be said to be an apparent and continuous easement.

There is another case at page 516 in the same volume, *Kadambini Debi v. Kali Kumar Haldar*(1). But that relates to a right of passage of light and air on partition of a family dwelling house. The learned Judges there point out that, there being no enactment of the Legislature applicable to the case in question, the question will have to be decided and answered with reference to the principles of justice, equity, and good conscience and they think that the rule of English Law of an implied grant of easement on severance of tenements is in accordance with the principles of justice, equity and good conscience and should be followed. Here again we may point out that if the Easements Act were applicable there could be no question of contravening its provisions by the application of the principles of justice, equity and good conscience.

In *Purnendu Narain Roy v. Dwijendra Narain Roy* (2), a dispute arose as to a right of way on a partition of property between brothers. The District Munsif decided against the right of way inasmuch as it was not an easement of necessity. This judgment was confirmed by the District Judge. In dealing with the right of way, MOOKERJEE, J., after stating that the respondent's vakil was not prepared to contend that there was an implied reservation at the time of the exchange, observed :

"In the first place, it is doubtful, according to the finding of the learned District Judge, whether there was at the time of the partition and exchange, an existing right of way; at any rate, there was none which had been used for any length of time; and clearly, as the Munsif finds (which finding does not appear to have been challenged before the District Judge),

(1) (1899) I.L.R., 26 Cal., 516.

(2) (1907) 8 C.L.J., 289 at 292.

whatever way there might have been, was not a formed or metalled road but an undefined track."

It is argued from these observations that if there was a formed and metalled way that would pass as an easement. We do not think that this case takes us any farther than *Kadambini Debi v. Kali Kumar Haldar*(1).

Reference has been made to *Ranchordass Amthabhai v. Maneklal Gordhandass*(2). We may point out that this case was before the Easements Act was made applicable to the Bombay Presidency.

It is argued by the learned Advocate-General for the respondent that the distinction between apparent and continuous and non-apparent and discontinuous easements is one which is known to the English as well as the Indian Law, that in determining whether an easement would pass under the Easements Act as regards a right of way, the English Law before the passing of the Act was that in the case of a formed road it was treated as a continuous easement, that the subsequent development of the English Law made it clear that an easement was held to exist when there was a formed road though it was not strictly a continuous easement, and that in interpreting the Easements Act it would be relevant to refer to the English decisions on the subject and to apply those decisions to cases where such a right is claimed in India. It is pointed out that in the case of an easement of necessity it has been held that the law in India and England is the same and English decisions have been referred to.

It seems to us that where the law has been codified we are bound by the Code and it is not permissible for us to refer to the English Law on the subject, where the provisions of the Code are clear, for the purpose of not

(1) (1899) I.L.R., 26 Cal., 516.

(2) (1890) I.L.R., 17 Bom., 648.

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giving the words of the Code their plain meaning. We may in this connexion refer to the decision of their Lordships of the Privy Council in *Norendra Nath Sircar v. Kamalbasini Dasi*(1), where their Lordships condemned the course taken by the Subordinate Judge who first of all on a consideration of the English case-law and the opinion of the text-writers determined what the law in England was at the date of the Succession Act and then construed the Succession Act on those lines, that it was not intended by the Legislature to alter the law in India by departing from the law of England. Their Lordships refer to the observations of Lord HERSCHELL in the *Bank of England v. Vagliano Brothers*(2) with approval.

We may also in this connexion refer to *Rama Nandi Kuer v. Kalawati Kuer*(3), and *Mahomed Syedol Ariffin v. Yeoh Ooi Gark*(4).

In *Rama Nandi v. Kalawati Kuer*(3), their Lordships of the Privy Council, after referring to the divergence of opinion in the Courts in India as regards the law and procedure governing cases for revocation of probate, owing in part to the introduction into Indian practice of the difference in English law between the grant of probate in common form and probate in solemn form, observed :

"It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian Law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that Statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded".

(1) (1896) I.L.R., 23 Cal., 563. (2) [1891] A.C., 107.
(3) (1927) I.L.R., 7 Pat., 221; 55 I.A., 18.
(4) (1916) 43 I.A., 256.

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In *Mahomed Syedol Ariffin v. Yeoh Ooi Gark* (1), the question turned on the construction of section 32, sub-section (5) of the Straits Settlements Ordinance III of 1892 which corresponds to the Indian Evidence Act I of 1872. The Courts below excluded evidence of an entry made as regards the date of defendant's birth by his deceased father in a book in which he made similar entries with regard to the family. Their Lordships of the Privy Council after referring to the decisions under the Indian Evidence Act and the fact that such evidence was admissible observed :

"The Courts below have however declined to accept this principle. They proceed upon two grounds. In the first place they think that the rule with regard to hearsay evidence adopted in the English case of *Haines v. Guthrie*(2), should be followed in the Straits Settlements, and that that rule is not varied by the clause just cited from the Evidence Ordinance. And in the second place they hold that the illustration given in the statute does not in fact illustrate the section. On the first point, the view of their Lordships is that the rule and principle of the colony must be accepted as it is found on its own Evidence Ordinance, and that the acceptance of a rule or principle adopted in or derived from English Law is not permissible if thereby the true and actual meaning of the Statute under construction be varied, or denied effect."

Their Lordships hold that illustrations appended to sections of a statute should be accepted as being of relevance and value in construing the text: and should be rejected as repugnant to the section only as the last resort of construction.

Where the provisions of an Indian enactment follow the provisions of an English enactment or a well-settled rule of English Law or where the meaning of certain expressions and their legal import are not clear, no doubt reference to English authorities becomes useful and often necessary.

(1) (1916) 43 I.A., 256.

(2) (1884) 13 Q.B.D., 818.

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Rash Behary Shaha v. Nrittya Gopal Nundy(1) applies to this class of cases. In that case the question was as to the meaning of the word "refusal" in section 39 of the Contract Act and it was held that though the English Law did not govern the case, the views of eminent English Judges on the meaning of the word "refusal" may well be considered.

Reference has been made to the English decisions on the subject of right of way. In this connection we may refer to the case law in England as it stood in 1882 when the Indian Easements Act was passed.

In *Glave v. Harding*(2), which was decided in 1857 the facts so far as they are material for the purpose of this appeal were these:—A land which originally belonged to the Crown was leased to one Merrick for building purposes on certain terms as to the nature of the building. One of the terms was that when he built the houses according to the plan, a separate lease of each house was to be granted to him or to his assigns for 80 years at such rent as the Commissioners of Woods and Forests would agree upon. Merrick built houses in Bainbridge Street, and New Oxford Street and there was a way connecting the two blocks of houses. Merrick mortgaged his interest in the whole of the premises to certain parties and assigned them to the defendant. He then blocked up both the entrances. The question was whether the plaintiff was entitled to the right of way. BRAMWELL, B. in dealing with the right of way claimed, observed:

"The plaintiff's title was derived from the lease and unless the lease granted the right of way it did not exist. It did not grant the right in terms, and the only way in which it could grant it was, that the condition of the premises at the time when the lease was granted, showed, that it was intended that

the right of way should be exercised upon the principle of law I have adverted to, that by the devolution of the tenements originally held in one ownership, a right of way to a particular door or gate would, as an apparent and continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question was not a continuous and apparent easement within that principle of law; and therefore I arrive at the conclusion that there was no evidence of the right of way alleged in this case."

In *Worthington v. Gimson*(1), which was decided in 1860, the plaintiff claimed a right of way over the land of the defendant. The facts as set out in the report are that a certain land lying partly in one parish and partly in another parish belonged in 1820 to two persons each being entitled to an undivided half. A right of way existed from a farm, part of this property, across certain lands to another farm on the said property. The right of way had for many years been used by the occupiers of both the farms. In 1820 one of the co-owners conveyed his undivided half in one parish with all the rights, members, easements and appurtenances. The other co-owner also conveyed his undivided moiety. The deed contained no express reservation of the right of way to either party. Then the plaintiff in this action and the previous occupiers of the farm used the right of way from 1820 to 1859 but were obstructed by the defendant who was then the occupier of the other farm. It was held that the plaintiff could not recover, the right of way not passing under the deed of partition, and not being an apparent and continuous easement necessarily passing upon the severance of the property, as incident to the separate enjoyment of the portion severed. At the trial WILLIAMS, J. non-suited the plaintiff even though the jury found that the occupiers of the farm claimed by the plaintiff had enjoyed the way as of

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(1) (1860) 2 El. & El., 618; 121 E.R., 232.

(1) (1906) I.L.R., 33 Cal., 477.

(2) (1858) 27 L.J.Ex., 286.

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fact up to and before the deed of partition and that the way had been enjoyed for 20 years since the partition deed up to the time of the obstruction.

A rule was obtained. It was argued that the way had been constantly and regularly used up to the time of the partition, that it was known and apparent to both the parties to the partition and that complete enjoyment of the portion of the property in the occupation of the plaintiff could not then, and cannot now, be had without it. WIGHTMAN, J. was of opinion that it was not an easement of necessity. CROMPTON, J. agreed with WIGHTMAN, J. and observed:

"In the present case the parties have not used apt words in the deed to express an intention to pass the way in dispute, and the general words which follow the description of the property intended to be conveyed do not add to or alter the previous words of conveyance. It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say, from the nature of a road, whether the parties intended the right of using it to pass. It may, besides, be very naturally supposed to have been the intention of the parties that, on the partition of the property, all ways not incident to the separate enjoyment of each of the severed portions should cease."

In *Langley v. Hammond*(1), which was decided in 1868, a question arose as to a right of way. In that case, a lessee surrendered to his lessor a part of the demised premises "together with all ways, etc., therewith now used, occupied and enjoyed" with a proviso that the defendant should fence off the premises surrendered from those still occupied by the lessee. There had been always unity of seisin and occupation of the

whole farmyard and the road way had been made and used by former occupiers of the yard and by the present lessee for the convenience of carting heavy loads to and from the yard and the farm buildings. There was, however, no existing approach to the premises surrendered from the defendant's land. The question arose as to the right of the road way as a means of access to the surrendered premises. It was held that no right to use the roadway as a means of access to the surrendered premises passed to the defendant. KELLY, C.B. was of opinion that by a grant of hereditaments with all "ways therewith now used and occupied and enjoyed" those ways only passed which had at some former period been used as of right therewith. In connection with the roadway, BRAMWELL, B observed:

"Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road not being a way of necessity, would not pass under such words as these. The ground on which I think this rule ought to be discharged is that there is here really no definite road."

In *Watts v. Kelson*(1), which was decided in 1871, the easement claimed was an easement to the use of a drain. It appears from the facts that the plaintiff and the defendant were the owners and occupiers of two adjoining properties which up to 1863 belonged to a single owner. In that year the owner conveyed to the plaintiff the premises in respect of which the easements were claimed. The premises were conveyed, together with "all roads, ways, waters, watercourses, rights, privileges, advantages, and appurtenances whatsoever to the same hereditaments and premises belonging or

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(1) (1870) 6 Ch. App., 166.

(1) (1868) 3 Ex. Cas., 161.

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appertaining, or with the same or any part thereof, held, used, enjoyed or reputed as part thereof or appurtenant thereto". Some months after the first conveyance the owner conveyed to the predecessor of the defendant the property over which the easements were claimed. There was an artificial watercourse which was originally made for the express purpose of supplying the cattle-sheds with water and was made by the owner of both properties. There was also a carriage way between two points a few yards from each other and this was used as a way for bringing carts from point A to point B. The defendant obstructed the way alleging that the right of way was only a right of footway. The Master of the Rolls held that the plaintiff proved the right to the carriage way but dismissed the bill so far as it related to the right of water.

In the course of the argument MELLISH, L.J. and JAMES, L.J. were of opinion that *Pyer v. Carter*(1) was good law in spite of Lord WESTBURY's disapproval of it.

During the course of the argument MELLISH, L.J. remarked :

"When a man walks over his own land in a particular direction he is not using anything, he is merely going where he pleases on his own property; but when there is a structure, erected for a purpose connected with a certain part of his property, the case is quite different. I am not satisfied that if a man construct a paved road over one of his fields to his house solely with a view to the convenient occupation of the house a right to use that road would not pass if he sold the house, separately from the field."

This was an observation made by MELLISH, L.J., in the course of the argument and reliance is placed upon it by the learned Advocate-General for the respondent as being a decision that a paved road although it

is not continuous would still pass even though it is not an easement of necessity.

In his judgment, MELLISH L.J., referred with approval to *Polden v. Bastard*(1) and observed :

"In *Polden v. Bastard*(1) Chief Justice ERLE delivering the unanimous judgment of the Exchequer Chamber says: There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass."

Then the learned Lord Justice observes that in that case the easement was in its nature continuous so far as the watercourse was concerned, that the watercourse was necessary for the use of the tenement conveyed, and that no other supply of water equally convenient or equally pure could have been obtained.

We do not think that this case can be said to be a decision on the question that a paved road was a continuous easement.

It thus appears that when the Easements Act was passed, the English decisions had not established clearly that a formed and metalled road was or may be treated as a continuous easement and it cannot be said that the Easements Act simply codified what was the law in England. It is no doubt true as contended for by the Advocate-General for the respondent that the framers of the Easements Act preferred to follow the ruling in *Pyer v. Carter*(2) which was referred to with approval

(1) (1865) 1 Q.B., 156, 161.

(2) (1857) 1 H. & N., 916; 156 E.R., 1472.

(1) (1857) I.H. & N., 916; 156 E.R., 1472.

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by MELLISH, L.J., in *Watts v. Kelson*(1) to the ruling in *Wheeldon v. Burrows*(2):

In *Pyer v. Carter*(3), it was held that where the owner of two or more adjoining houses sells one of them to a purchaser, such a house was entitled to the benefit and was subject to the burden of all existing drains communicating with the other house without any express reservation by the grantor for that purpose.

In *Wheeldon v. Burrows*(2), it was held that in the case of a grantor, express reservation was necessary with certain exceptions, as in the case of ways of necessity, while in the case of a grantee of part of a tenement, all those continuous and apparent easements over the other part of the tenement which are necessary for the enjoyment of the part granted and have been hitherto used therewith would pass as a general rule.

Aldridge v. Wright(4) affirmed *Wheeldon v. Burrows* (2) and the exceptions in the case of a grantor are given by GREER, L.J., in his judgment.

This departure from the English Law, however, does not in our opinion lead to the conclusion that a departure should be made as regards apparent and continuous easements in dealing with section 13 of the Easements Act.

So far as the case law in England subsequent to the passing of the Easements Act is concerned, the trend of the authorities is to treat a formed and metalled road as a kind of apparent and continuous easement. We may refer to *Brown v. Alabaster*(5), *Heal v. Meara*(6) and *Aldridge v. Wright*(4). But we are of opinion that having regard to the provisions of the Easements Act it is not open to us to follow the English decisions

(1) (1870) 6 Ch. App., 168.

(2) (1879) 12 Ch.D., 31.

(3) (1857) 1 H. & N., 216; 156 E.R., 1472.

(4) [1929] 2 K.B., 117.

(5) (1887) 37 Ch.D., 490.

(6) (1912) 1 Ir. Rep., 262.

subsequent to the Easements Act and to hold that a formed and metalled path-way would be an apparent and continuous easement for the purpose of determining the rights of parties under section 13, clause (f) of the Easements Act.

We are of opinion that the plaintiff is not entitled to the right of way claimed as an easement of necessity and not being an apparent and continuous easement it would not pass under the provisions of section 13, clause (f) of the Easements Act.

We reverse the decree of the lower Court and dismiss the plaintiff's suit with costs throughout.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Pakenham Walsh.

VELLIYAPPA CHETTI (MINOR) BY MOTHER AND GUARDIAN
LAKSHMI ACHI (6TH DEFENDANT), APPELLANT

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VELLAYAPPA CHETTI AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XX, r. 16—Suit for accounts—Passing final decree, without preliminary decree, when allowable.

Though the general rule is that in suits for an account, a preliminary decree directing accounts to be taken should be passed before passing a final decree, yet in cases where the facts are so simple, either by admission or proof, as to afford a ready decision, so that the taking of accounts will be unnecessarily lengthening the proceedings, without any benefit to the parties, a final decree may be passed, without any preliminary decree.

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Order XX, rule 16, Civil Procedure Code, is consistent with this view. Dictum in *Hurrinath Rai v. Krishna Kumar Bakshi*, (1886) I.L.R., 14 Cal., 147 at 158 (P.C.), followed.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga in Original Suit No. 26 of 1921.

The necessary facts are given in the judgment.

C. Padmanabha Ayyangar, S. Ramanuja Ayyangar and T. E. Ramabhadra Achariyar for appellant.—In all suits for account, as soon as the Court holds that the defendant is liable to account, it should pass a preliminary decree directing an account to be taken as to the amount due and a final decree can be passed only as the result of such taking of accounts. In no case can a final decree be passed without a preliminary decree; See Order XX, rule 16, Civil Procedure Code and rules 120 to 136 of the Civil Rules of Practice (Mufassal). Reference was also made to *Hurrinath Rai v. Krishna Kumar Bakshi*(1) and other cases following it which are all quoted in the judgment. Credit must be given to the expenses incurred by the defendant.

M. Patanjali Sastri and C. Rama Rao Sahib for the respondents.—The Court is not bound to pass a preliminary decree in all cases. Where, as in this case, the amount due is impliedly admitted in the written statement and proved in Court and credit for expenses alleged to have been incurred was not claimed at any time, the Court can pass a final decree without ordering a preliminary decree; see the observations of the Privy Council at page 158 in the case quoted above. Order XX, rule 16, enjoins a preliminary decree only if necessary.

The JUDGMENT of the Court was delivered by

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KUMARASWAMI SASTRI, J.—These appeals arise out of a suit filed by the plaintiffs, the first plaintiff claiming to be the legatee under the will of his grandfather, for an account of the estate and for possession. He also wanted damages for misfeasance and malfeasance of the executors. The executors are defendants 1 and 5. The lower Court passed a decree in plaintiffs' favour. The first defendant's case was that the fifth defendant was managing the estate till his disappearance in 1915 and

that his management was merely formal, i.e., he merely signed in the deposit account and the receipts, Exhibits IV and IV (a). The fifth defendant was admittedly not heard of for 5 or 6 years before the suit, and he is not heard of even now. His son has been impleaded as being a member of the undivided family. The fifth defendant is *ex parte*. The sixth defendant's mother and guardian, in her written statement, denied that the fifth defendant (her husband) ever took part in the management of the estate. Upon this, issues were raised and the case went to trial. It was found that the fifth defendant did take part in the management of the estate, that he put in monies and collected monies and that he also sold an item of property in which the testator had a third share. Out of the monies which belonged to the estate and which were invested, there was a claim in the plaint for Rs. 40,000 against the seventh defendant. This represented monies belonging to the estate which had been invested. The Subordinate Judge passed a decree for Rs. 40,000 with interest at 6 per cent per annum. In Appeal No. 120 of 1925 we held that the amount in deposit with seventh defendant was not Rs. 40,000 but Rs. 37,100 on the date of the plaint, and we modified the decree by allowing Rs. 37,100 with interest, as stated above. That money has been paid into Court and there is no question of any loss to the estate so far as that money is concerned except as regards interest which is the subject-matter of the Appeal No. 257. The Subordinate Judge found that there was one more item for which the defendants were accountable and this was a sum of Rs. 3,000 proved to have been collected by the fifth defendant. He allowed that sum with interest at 9 per cent per annum. As regards that sum, it is not disputed before us that that sum was collected by the fifth defendant, as that is proved beyond all doubt

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(1) (1886) I.L.R., 14 Cal., 147 (P.C.).

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by the account books filed. What is argued is that the Court should not have allowed Rs. 3,000 and interest, but that an account should have been directed to be taken and the fifth defendant given an opportunity of proving certain expenses, which he had incurred for the estate and which he was entitled to credit for. When the case was closed, the sixth defendant put in a petition saying that certain accounts which showed dealings by fifth defendant with the estate were found behind some vessels in the house and wanted admission of these books. The Subordinate Judge, in our opinion, rightly rejected the petition. The question raised in Appeal No. 407 by Mr. Padmanbha Ayyangar is that the Judge ought to have passed a preliminary decree and then sent the case for taking accounts; and he refers to the Privy Council decision in *Hurrinath Rai v. Krishna Kumar Bakshi*(1), and to *Mohesh Chunder Bose v. Radha Kishen Bhattacharjee*(2), *Degambar Mozumdar v. Kallynath Roy*(3), *Rajhunnath v. Ganpatji*(4), *Ayeshabai v. Ebrahim*(5), *Thirukumaresan Chetti v. Subbaraya Chetti*(6) and *Ram Dass v. Bhagwat Dass*(7) in support of his view. He also refers in this connection to Order XX, rule 16, schedule I of the Civil Procedure Code and rules 120 to 136 of the Civil Rules of Practice (Mufussal). There can be little doubt on these authorities that, ordinarily in a case for an account, even though the defendant may deny his accountability, the proper course is to pass a preliminary decree and send the case for taking accounts. But, we do not think that it follows that in every case, irrespective of other considerations, the Court is bound to send the case for taking accounts.

Their Lordships of the Privy Council, in dealing with this point, make a reservation. At page 158 they state:

“Their Lordships are not expressing an opinion that in a suit for account it may not appear at the hearing that the issue is so simple and so clearly raised and met by evidence, as to be ready for decision at that time. But the general rule is the other way.”

Order XX, rule 16, also does not make it imperative to pass a preliminary decree apart from any other consideration. All that rule 16 says is that a preliminary decree may be passed, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken. In the present case we have the fact that so far as the liability of the defendants is concerned it is Rs. 40,000 which was claimed and ultimately decreed, not having been disputed by the seventh defendant except as to Rs. 3,000 and odd which he says was not deposited. His solvency was not disputed and he has paid the sum due into Court. The only question between the executors and the plaintiff was whether the Rs. 3,000 was collected. As regards a sum of about Rs. 780 which was got by the sale of the village, that there was a sale deed and that the amount was received is not disputed. The plaintiff will be entitled to a half of that amount. As regards the Rs. 3,000 as we have said before, it is proved beyond all doubt, and it is not denied before us, that that sum was collected by the fifth defendant. Therefore, when the case came up for disposal, there was the Rs. 3,000 proved to have been collected and no denial in the written statement that the amount was ever collected. No statement was made that any expenses were incurred, nor did the sixth defendant ask the Judge at that stage to allow the expenses he had incurred in connection with that item. The petition to file account books said to have been discovered behind some brass vessels was rightly rejected. It

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(1) (1886) I.L.R., 14 Cal., 147 (P.C.). (2) (1907) 8 C.L.J., 580 at 591.
(3) (1881) I.L.R., 7 Cal., 654. (4) (1904) I.L.R., 27 All., 874.
(5) (1908) I.L.R., 32 Bom., 384. (6) (1897) I.L.R., 20 Mad., 313.
(7) (1904) 1 A.L.J., 347.

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therefore comes, in our opinion, in the category of cases which the Privy Council describes as cases, where the facts are so simple that the taking of accounts will be unnecessarily lengthening the proceedings without any benefit to the parties. It may be more complicated, if, in Appeal No. 257 the appellants insist on the usual procedure being adopted by reason of other items being charged. But their Counsel does not want the case to be sent back for a preliminary decree being passed. In these circumstances, we do not think it is necessary to send the case back for a preliminary decree being passed, which will only mean unnecessary lengthening of the proceedings without any material benefit to anybody. . . . The result is that appeal No. 407 will be dismissed with costs.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1929,
October 9.

RAJA RAM (PLAINTIFF), APPELLANT

v.

FAKRUDDIN SAHIB AND FOUR OTHERS (DEFENDANTS),
RESPONDENTS.*

Letters of administration to estate of deceased person—Petition for — Acknowledgment of liability in petition by heir— Saving of limitation—Validity of acknowledgment by heir against persons whose position as heirs was disputed at the time of presentation of petition.

An acknowledgment, by an heir, of liability for a debt owing by the deceased and payable out of the estate of such deceased person, in a petition for letters of administration to the

estate saves limitation, but only as against him who made the acknowledgment and the other heirs who authorized such acknowledgment, and not as against those persons whose position as heirs was disputed at the time of the presentation of the petition and was not determined till some time subsequently.

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ON APPEAL from the decree of WALLER, J., dated 16th September 1925, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 628 of 1923.

M. S. Venkatarama Ayyar for appellant.

No one appeared for the respondents.

The JUDGMENT of the Court was delivered by

CORNISH, J.—This appeal raises the question, whether a suit to recover money due on promissory notes against the defendants, who are the sons, widows and a daughter of the deceased executant of the notes, is barred by limitation.

It appears that the two notes in question were executed by one Hajee Imam-ud-din on the 10th January 1917 and on the 21st February 1918 for Rs. 1,600 and Rs. 300 respectively. Imam-ud-din died in 1919. The plaintiff filed his suit against the defendants on the 4th September 1923 to recover the amount due on the notes. The suit was, therefore, out of time, unless in the meanwhile there had been an effectual acknowledgment of the liability so as to give a fresh starting point for limitation. It is alleged by the plaintiff, who is the appellant before us, that such an acknowledgment is to be found in a petition filed in this Court on the 9th October 1919, for a grant of letters of administration, by defendants 1, 2 and 3, of whom defendants 1 and 2 are sons and defendant 3 a widow of the deceased executant of the notes. It is material to observe that section 278, Indian Succession Act of 1925, requires that a petitioner for letters of administration shall state in his application

* Original Side Appeal No. 52 of 1926.

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inter alia, the right in which the petitioner claims; and section 218 (1), Indian Succession Act, provides that:

"If the deceased has died intestate and was a . . . Muhaminadan . . . administration of his estate may be granted to any person who, according to the rules for 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."

The petitioners here, being the sons and widow of the deceased, were the persons entitled by Muhammadan law to the estate, or at least a part of the deceased's estate, and were in consequence entitled to the grant, and a joint grant of administration was in due course made to them. They, as required by the Court Fees Act, filed with their petition for a grant the form of valuation prescribed by Schedule III of the Act, stating in Annexure A the assets of which the deceased was possessed or to which he was entitled at the time of his death, and in Annexure B the "debts owing from the deceased and payable by law out of the estate." Among these debts were shewn the amounts due on the two promissory notes above referred to. This valuation form or affidavit of assets is required for the purpose of assessing the Court-fee payable in respect of the grant of letters of administration, and until the appropriate fee has been paid, no grant can be issued. The question before us is whether the inclusion of the debts in Annexure B amounts to an acknowledgment of liability in respect of the debt, so as to extend the period of limitation for the plaintiff's suit.

There can, we think, be no doubt that, when an executor in his petition for probate includes a debt owing by his testator in Annexure B, he must be deemed to acknowledge liability for that debt in his capacity of legal representative of the deceased. This arises from his position of executor. The executor derives his title

from the will. Immediately upon the testator's death, his property vests in the executor, for the law knows no interval between the testator's death and the vesting of the property (*Whitehead v. Taylor*)(1). It follows that before and without obtaining probate the executor may do most things which appertain to his office: thus, he may take possession of the testator's property; he may pay, or take releases of, debts owing from the estate; and he may receive or release debts which are owing to it (*Williams on Executors*, Vol. I, page 220, 10th Edition). The grant of probate does not give him his title: it makes his title certain, *Hewson v. Shelley*(2). An executor, therefore, having the power as legal representative to admit and dispose of claims against the testator's estate, when he includes such a claim in Annexure B as owing from the testator and payable from his estate, may be assumed to acknowledge liability of the estate for the debt. But the position of an administrator is very different. He derives his title wholly from the Court. He has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant, *Woolley v. Clark*(3). Upon the issue of the grant the administrator's title has relation back to the date of the deceased's death. Section 220 of the Indian Succession Act provides—

"Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment of his death."

But, an act done by a party, who afterwards becomes administrator, to the prejudice of the estate is not made good by the subsequent administration; for it is only in those cases where the act is for the benefit of the estate

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(1) (1839) 10 A. & E., 210.

(2) [1914] 2 Ch., 13 at 33.

(3) (1822) 5 B. & Ald., 744; 103 E.R., 136 3.

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that the relation back exists: see *Morgan v. Thomas*(1). And this principle is embodied in section 221, Indian Succession Act, which states:—"Letters of administration do not render valid any intermediate acts of the administrator tending to the diminution or damage of the intestate's estate."

In our opinion, an acknowledgment of liability professed to be made on behalf of a deceased's estate by a person, whose power to make the acknowledgment solely depends upon his being the administrator of the deceased, is not made effectual by his subsequently obtaining letters of administration. Such an intermediate act as the admission that a debt was due from the deceased's estate would certainly tend to the diminution of the estate. This was the ground upon which the learned trial Judge decided the case when dismissing the plaintiff's suit as barred by limitation, and we entirely agree with him upon this ground.

But, on appeal, a new ground has been taken, namely, that the acknowledgment of liability here was made by the petitioners for administration in their character of heirs of the deceased, and the argument is that this acknowledgment has the effect of preventing limitation. After judgment in the suit, the plaintiff obtained leave from the appellate Court to amend his plaint so that he might have an opportunity of putting forward his real case, which, in the opinion of the appellate Court, he had not done before the learned trial Judge. We have, therefore, to deal with the appellant's case as presented in his amended plaint. It is clear from the language of section 218 (1), Indian Succession Act, already referred to, that the right to a grant of administration follows the right of succession, and that in order to establish the right to a grant the petitioner must show that he is,

as an heir, entitled to a share on the distribution of the deceased intestate's estate. It follows, that, this being the purpose of the description of the petitioners (defendants 1, 2 and 3) as the sons and the widow of the deceased in their application for the grant, they must be taken to have made the acknowledgment of the liability for the debts set out in Annexure B in their character of heirs. It is not suggested that any other character was open to them; so we are not here confronted with any complicated question of an acknowledgment made by an individual filling more than one character. The petition therefore contained not only an admission of assets, but the admission that the debts were payable out of those assets. As heirs the defendants could have been sued by the plaintiff, and they would be liable for the debts of the deceased to the extent of the assets received by them as heirs. This liability would in no wise be affected by the subsequent grant of letters of administration to some of them. The conclusion, then, at which we have arrived is that the acknowledgment of liability of the debt due to the plaintiff from the estate prevented the bar of limitation to his suit.

The only other question is whether the acknowledgment of liability by defendants 1, 2 and 3 serves to bind defendants 4 and 5. We do not think it does. The acknowledgment by defendants 1, 2 and 3, could only be effective against the other two defendants, if it could be shown that these two defendants authorized them to acknowledge liability on their behalf. But it is plain that no such authority can be implied, because at the time when the petition for administration was filed defendants 1 to 3 were disputing the claim of defendant 4 to be the widow of the deceased, and of defendant 5 to be his legitimate daughter. And it appears from

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(1) (1853) 8 Ex., 302.

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the written statement of defendants 4 and 5 that the status of these defendants was not established until 22nd July 1920, when a decree was passed by this Court in T.O.S. No. 21 of 1919. This decree was in a testamentary suit which resulted from the *caveat* entered by defendants 4 and 5 against the petition for administration filed by defendants 1 to 3. In *Fordham v. Wallis*(1), it was held that among devisees an acknowledgment by some did not keep alive the creditor's right against others, who had availed themselves of the Statute of Limitation. "Looking at the question upon principle" said TURNER, V.C., "I do not see upon what ground parties, who might have availed themselves of the statute and have neglected to do so, can insist upon contribution from other parties who have set up the statute, and have, upon the footing of it, succeeded in repelling the demand against them". In these circumstances, we are unable to find any possible ground for holding that defendants 4 and 5 are liable on account of the acknowledgment of liability made by defendants 1, 2 and 3. The recovery of the debt as against these two defendants is, therefore, barred. Reference has been made to an affidavit sworn by defendant 2, one of the administrators, on the 21st October 1921, in support of his application to the Court for leave to sell, as required by section 307 (2), Indian Succession Act, the immovable property of the deceased for the liquidation of the debts. This can have no bearing on the question of the liability of defendants 4 and 5. For the purpose of section 19 (1) of the Limitation Act an acknowledgment of liability must be before the expiration of the period prescribed for the suit, and at the date of this application by defendant 2, the suit on the two promissory

(1) (1858) 10 H. 217; 68 E.R., 905.

notes had already become barred against defendants 4 and 5.

The result is that we allow the appeal against defendants 1 to 3, but dismiss it as against defendants 4 and 5. There will be a decree for the amount due on the two pro-notes with interest up to date, and with 6 per cent interest from date of the decree till payment, against defendants 1 to 3 to the extent of the assets received by them as their shares of the deceased's estate.

Defendants 1 to 3 will pay the appellant the costs of this appeal. As there has been no appearance on behalf of defendants 4 and 5 to the appeal, we make no order as to costs in their favour. We do not give the appellant his costs in the Court of First Instance as it was due to his failure to present his case there properly. That judgment was given against him. The plaintiff will pay the costs of defendants 4 and 5 in the trial Court, but otherwise parties will bear their own costs.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

DOST MAHOMED (APPLICANT-CREDITOR

No. 1), APPELLANT,

v.

V. BROWNE AND ANOTHER (RESPONDENTS), RESPONDENTS.*

*Presidency Towns Insolvency Act (III of 1909), sec. 11 (b)—
Having a dwelling house—Circumstances which would not
constitute.*

Where a debtor was employed as an engine-driver at D outside the limits of the Ordinary Original Civil Jurisdiction of the High Court, and during the period of such employment he

* Original Side Appeal No. 118 of 1923.

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ordinarily resided with his wife at D. and there was a house within the limits of the Ordinary Original Civil Jurisdiction of the High Court in which his mother, his sisters and their children were living, and the debtor paid the rent for the house but not directly to the landlord, and he was providing money to enable his mother and sisters to live in that house, and the debtor presented a petition in the High Court on the Insolvency Side to be adjudicated an insolvent,

Held, that the debtor had no "dwelling house" within the meaning of section 11 (b) of the Presidency Towns Insolvency Act, and that therefore he was not entitled to present the petition for adjudication in the High Court.

ON APPEAL from the judgment of KUMARASWAMI SASTRI, J., dated 28th August 1928, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 589 of 1928 in I.P. No. 294 of 1928.

L. S. Veeraraghava Ayyar and V. Varadaraja Mudaliyar for appellant.

K. S. Narayana Ayyangar for respondents.

The JUDGMENT of the Court was delivered by

CORNISH, J.

CORNISH, J.—This appeal raises a question of the High Court's jurisdiction in Insolvency. The debtor, V. Browne, was adjudicated insolvent upon his own petition by this Court on the 25th July 1928. In his petition, he described himself as residing at No. 10, Old Jail Road, Rayapuram, Madras. The appellant, who is the principal creditor of the debtor, as soon as he heard of the adjudication, moved the Court to annul it, his allegation being that the High Court had no jurisdiction to adjudicate the debtor an insolvent. The question depends upon section 11 (b), Presidency Towns Insolvency Act, which requires, as a condition to the exercise of the High Court's jurisdiction, that the debtor, within a year before the date of the presentation of the insolvency petition, has ordinarily resided or had a dwelling house within the limits of the Ordinary Original Civil Jurisdiction of the High Court.

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The debtor is an engine-driver in the employment of the Madras and Southern Mahratta Railway Company, and for the four years immediately preceding the presentation of his insolvency petition he has been engaged in the work of engine-driver at Donakonda, Nellore District. It is clear from his evidence that Donakonda is the place where he has ordinarily resided with his wife during that period. Mr. Justice KUMARASWAMI SASTRI has accordingly held that the debtor has not ordinarily resided within the limits of the High Court's jurisdiction, as required by section 11 (b) of the Act. But the learned Judge was of opinion that the debtor had a dwelling house, namely, the house at No. 10, Old Jail Road, within the jurisdiction, and that the Court had consequently power to adjudicate him an insolvent. With all respect, we are unable to agree with this view. It has been held that a portion of a house may be the dwelling house of the person who has the exclusive occupation of that portion, and that it is not essential that a person having a dwelling house should have dwelt in it for any particular period, *In re Hecquard, Ex parte Hecquard*(1). In that case Lord ESHER referring to section 6 of the Bankruptcy Act, 1883, which corresponds to section 11 (b) of the Presidency Towns Insolvency Act, said :—

"It is quite clear that the time during which the debtor has 'ordinarily resided' or has 'had a dwelling house' need not be the whole year before the presentation of the petition; it is to be 'within a year' before the presentation of the petition. If within the year the debtor has had a dwelling house in England, no time is limited during which he must have dwelt in it. If he is not a mere passing or casual visitor he has got such a hold on this country as to make him liable to the English bankruptcy law."

(1) (1889) 24 Q.B.D., 71.

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But, in the case before us, the debtor is not the lessee or tenant of the house in Old Jail Road or of any portion of it. It appears from his evidence that this house is the dwelling house of his mother, his sisters and their children. He paid the rent, but not directly to the landlord, and it does not appear that he had undertaken any liability to the landlord for the rent. He sent it to his sister, and there can be no doubt that he contributed the money for the rent with the object of helping his mother and sisters. On his own evidence, it appears that he did not get any receipts for the rent, and that all he was concerned in getting were the money order receipts for the money sent by him to his sister. It is true that, in a sense, he was, as he states in his evidence, maintaining an establishment in Madras, but we fail to see how his providing money to enable his mother and sisters to live in this house can make it his establishment or his dwelling house; and it makes no difference that, on the infrequent occasions (only twice in 1927) when the debtor came to Madras from Donakonda to visit his mother and sisters, he stayed in the house. On the facts of this case, we do not think that the house can be regarded as the debtor's dwelling house. The order of adjudication was, therefore, without jurisdiction, and must be set aside. The appeal is allowed with costs. Pleader's fee Rs. 75.

Attorney for respondent: *T. V. Srinivasan*.

B.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and
Mr. Justice Madhavan Nair.*

K. V. E. SWAMINATHAN *alias* CHIDAMBARAM PILLAI 1929,
November 26.
(FIRST DEFENDANT), APPELLANT,

v.

LETCHMANAN CHETTIAR AND OTHERS (PLAINTIFF AND
SECOND DEFENDANT), RESPONDENTS.*

*Indian Registration Act (XVI of 1908), ss. 73 and 77—
Presentation of document before a Sub-Registrar—Non-
appearance of executant—Order refusing registration—
Making of order, meaning of—Application to Registrar,
more than thirty days after order passed by Sub-Registrar
but within thirty days of communication of order, if barred
—Dismissal as barred by limitation, if an order of refusal
—Suit under sec. 77 more than thirty days after
Registrar's order but within thirty days of communication
of such order to party, if barred.*

An order was passed by a Sub-Registrar refusing registration of a document on the ground that the executant did not appear and admit its execution; a party affected by the order applied to the Registrar under section 73 (1) of the Registration Act to establish his right to have the document registered more than thirty days after the Sub-Registrar passed the order but within thirty days after the communication of the order reached the applicant; the Registrar dismissed the application as barred by limitation under the section; the party then instituted a suit in a civil Court under section 77 (1) of the Act to enforce registration, more than thirty days after the date of the Registrar's order but within thirty days after the communication of the order reached the plaintiff:

Held, that an order under section 73 (1) or section 77 (1) of the Registration Act, 1908, cannot be deemed to have been

* Appeal against Order No. 269 of 1928.

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made unless passed in the presence of the parties, or after notice to them; or until it has been communicated to them;

that, in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed, the expression "within thirty days after the making of the order," used in section 73 (1) and section 77 of the Act, means within thirty days after the date on which the communication of the order reached the parties affected by it;

and that, consequently, in this case, both the application before the Registrar and the suit in the civil Court were within time under section 73 (1) and section 77, respectively, of the Act.

Held, also the order of the Registrar dismissing the application as being barred by limitation is an order of refusal within the meaning of section 77 (1) of the Act.

APPEAL against the order of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 7 of 1928, preferred against the decree of the Court of the District Munsif of Sivaganga in Original Suit No. 45 of 1927.

The material facts appear from the judgment.

Advocate-General (A. Krishnaswami Ayyar) with *V. Ramaswami Ayyar* for appellant.—The suit, as well as the application before the Registrar, were barred by limitation under sections 77 and 73, respectively of the Registration Act, 1908. The expression "making of the order"—used in both the sections should be strictly construed. We must have regard to the express wording of the section; and the words "making of the order" are too distinct to admit of any liberal construction. "Making of the order," is the starting point of limitation, and not the notice of the order to the party affected; communication of the order to the party or knowledge on his part is not required by the section, but only the making of the order. As regards the procedure before the Sub-Registrar, the Act prescribes no hearing before him, nor is there a duty to send a notice to the party. The acts which the Legislature enjoins on the Sub-Registrar are contained in sections 32, 34, 35 and 71. Section 71 contemplates three processes, viz., (1) order of refusal, (2) record of reasons in Book II, and (3)

endorsement on the document. See also Registration Manual, Part II, page 200, order 673. Non-appearance of the executant before the Sub-Registrar is denial of execution. See *Chhotey Lal v. Collector of Moradabad*(1).

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"Making of an order" under sections 73 and 77 of the Act cannot be made to include communication to or knowledge of, the parties affected by the order. There is abundant direct authority in the English cases: see *The King v. The Justices of Staffordshire*(2), *The Queen v. The Justices of Derbyshire*(3), *Queen v. Barnet Sanitary Authority*(4). The order of the Registrar dismissing the application before him on the ground of limitation is not an order of refusal to register under section 77 of the Act; see *Udit Upadhia v. Imam Bandi Bibi*(5), *Kunhimmu v. Viyyathamma*(6). "Making of the order," under section 77 means the recording of the order of refusal in writing and limitation for the suit runs from that date.

T. R. Ramachandra Ayyar and *S. R. Dikshit* for respondents.—The order, to be valid, must be passed either in the presence of the parties or communicated to them; otherwise there is no valid order passed. This is so under the general law; otherwise, the party affected by it will have no means of obeying the order or acting in conformity with it or of appealing against it or otherwise setting it aside. In the English cases referred to, the party affected by it was actually or constructively present when the order was delivered. The effect of the English cases is that knowledge of the party as regards the order is essential before the order can be said to be made: see *Ex parte Johnson*(7). Reference was made to *Abdul Ali v. Mirja Khan*(8), *Secretary of State v. Gopisetti Narayanasami Naidu*(9).

JUDGMENT.

VENKATASUBBA RAO, J.—The question we have to decide is, what is the meaning of the expression "making of the order" in sections 73 and 77 of

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(1) (1922) I.L.R., 44 All., 514, P.C.

(2) (1802) 3 East, 151; 102 E.R., 554. (3) (1845) 7 Q.B. 193; 115 E.R. 461.

(4) (1876) 1 Q.B.D., 558. (5) (1902) I.L.R., 24 All., 402.

(6) (1884) I.L.R., 7 Mad., 535.

(7) (1863) 32 L.J.M.C., 193; 122 E.R., 354.

(8) (1908) I.L.R., 28 Bom., 8.

(9) (1910) I.L.R., 34 Mad., 151.

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the Indian Registration Act? The plaintiff on 28th September 1926 presented, to the Sub-Registrar for registration, Exhibit A, the sale deed executed in his favour by the first defendant. The latter, in spite of notices served upon him, failed to appear before the officer in question, and, on the 16th of October the plaintiff filed a statement requesting the Sub-Registrar to make an order refusing registration. After making an order to that effect on the 18th of October, the Sub-Registrar sent a post-card, Exhibit B, to the plaintiff informing him of the order and it reached him on the 19th of October. The plaintiff on the 18th of November applied to the Registrar under section 73 to establish his right to have the document registered. That section enacts that the application should be made within thirty days after the making of the order of refusal by the Sub-Registrar. If the *terminus a quo* is the date when the order was communicated to the plaintiff, the application is in time; but if the thirty days should be computed from the date of the order, the application is a day too late.

The District Registrar rejected the application on the ground that it was barred by time. He made his order on the 16th of December and forwarded it to the plaintiff on the 20th and it reached him on the 23rd. The plaintiff filed the suit from which the present appeal arises on the 19th of January 1927. Section 77 enacts that the party desiring to impeach the order of the Registrar should file a suit within thirty days after the making of an order of refusal. If the starting point is the date of the District Registrar's order, the suit is out of time by four days; if it is the date when the order reached the plaintiff, the suit is well within time. The District Munsif dismissed the suit, holding that it is

time-barred. The lower appellate Court took the opposite view and remanded the suit for further trial.

I shall now notice briefly the various sections that have a bearing on the point to be considered. Section 35 provides that if any person by whom the document purports to be executed denies its execution, the Sub-Registrar shall refuse to register the document. It is conceded that failure of the executant to appear amounts to a denial of execution by him. See *Sivarama Pattar Kariakar v. Krishna Ayyar*(1), and *Chhotey Lal v. Collector of Moradabad*(2).

Section 71 says that when the Sub-Registrar so refuses, he shall make an order of refusal and record his reasons for such order in his Book No. 2 and endorse the words "Registration refused" on the document.

Section 73 (1) enacts that when a Sub-Registrar has refused to register a document on the ground that the alleged executant denies its execution, the person against whom the order is made, may, within thirty days after the making of the order of refusal, apply to the Registrar in order to establish his right to have the document registered.

Section 76 says that every Registrar refusing to direct the registration of a document shall make an order of refusal.

Lastly, section 77 enacts that any person claiming under such a document may, within thirty days after the making of the order of refusal, institute a suit for a decree directing the document to be registered.

I have now referred to the relevant sections of the Act and shall proceed to consider the points raised. Apart from authority, it seems to me that there can be no valid order unless it is made after notice to the

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(1) (1914) 26 M.L.J., 307.

(2) (1922) I.L.R., 44 All., 514 (P.C.) at 517.

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parties affected by it, or it is communicated to them in the absence of such notice. To take a contrary view seems opposed to reason and principle. The learned Advocate-General for the defence contends that we must have regard to the express wording of the Act and that the words "making of the order" are too distinct to admit of any liberal construction. The answer is that no two constructions are possible, the meaning I have suggested being the only reasonable construction of the words. The very word "order" by necessary implication means, in law, that the party affected has had reasonable notice of it. Not a single case in India has been brought to our notice which takes a different view. On the contrary, every decision on the point seems to recognise the principle I have stated. That any particular ruling proceeds on the special provisions of any Act makes, in my opinion, no difference. *Abdul Ali v. Mirja Khan*(1) is a case under section 77 of the Indian Registration Act and is directly in point. The same rule has been laid down without equivocation in *Annamalai v. Cloete*(2), *Seshamma v. Sankara*(3), *Secretary of State v. Gopisetti Narayanaswami Naidu*(4), and *Mahipat v. Lakshman*(5). The essence of the rule is that the decision should be passed in such circumstances that the parties should have reasonable notice of it. If when a petition is presented or a case is heard, the order is then and there made in the presence of the parties, no further question arises; if the making of the order is postponed, the parties should be given notice of the adjourned date, so that they may be present and hear the decision when passed. If, in these two cases, the party owing to his own fault, does not become aware of

(1) (1903) I.L.R., 28 Bom., 8.

(2) (1888) I.L.R., 6 Mad., 189.

(3) (1888) I.L.R., 12 Mad., 1.

(4) (1910) I.L.R., 34 Mad., 151.

(5) (1906) I.L.R., 24 Bom., 426.

the order, it nevertheless takes effect at once. If an order is made without previous notice, it does not become operative until it is communicated. These, in my opinion, are rules which are in conformity with justice and common sense.

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In the present case, the allegation in the plaint has not been challenged, that the Sub-Registrar neither fixed a date for pronouncing his order, nor gave notice of any day having been fixed. The same remark applies to the order made by the District Registrar.

The learned Advocate-General for the defence relies upon certain English cases; but, if properly examined, they support my view rather than establish the contrary. The first case relied on is *The King v. The Justices of Staffordshire*(1). Lord ELLENBOROUGH in that case no doubt says:

"It is, however, a case of great grievance and hardship where the interests of parties are thus invaded by an order made behind their backs; and may be a good ground to apply to Parliament for a revision of the clause of appeal but we cannot remedy the abuse."

These observations are apt to mislead if regard be not had to the facts of the case. Under the statute, any resident of the locality aggrieved by the order had a right of appeal. The party that preferred the appeal was a member of the public and was not a person directly concerned with the proceeding. It was such a party that urged that he had no notice of the order. In refuting his contention, LE BLANC, J., points out that, if the right of appeal were to depend, in the case of a public highway in which all the King's subjects are interested, on *personal* notice of the order in respect of each subject, there never would be an end of the time for appealing.

(1) (1802) 3 East, 151; 102 E.R., 554.

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This case, therefore, does not support the view urged for the defence.

The next case relied on by the learned Advocate-General is *The Queen v. The Justices of Derbyshire*(1). This does not help him, as there is nothing in it to show that the surveyor referred to in the judgment did not have an opportunity of knowing the order, when it was made.

The Queen v. Barnet Sanitary Authority(2) is a very instructive case on the point. Under the Act, a rate as well as an order may form a subject of appeal. In the former case, the time counts from the date when the party has notice of the rate; in the latter, from the date when the order itself is made. Why is this distinction made? BLACKBURN, J., points out, that a person may be rated behind his back, but *prima facie*, an order is not so made. MELLOR, J., even more pointedly observes:

"The Local authority had, under the Act, an opportunity to show cause and unless they chose not to appear, the order could not have been made in their absence."

I may lastly refer to *Ex parte Johnson*(3), which recognizes the anomaly involved in the position, that a party is bound by an order which he had no reasonable opportunity of knowing. It is, therefore, clear that the view contended for by the learned Advocate-General is opposed to the English and the Indian cases alike.

A feeble attempt has next been made to show that the order of the District Registrar rejecting the application as time-barred is not an order of refusal under section 77. This contention is clearly opposed to section 76, which makes no distinction between one kind of refusal and another. Whatever be the ground of his decision, the order is one of refusal. What significance can possibly attach to the fact that the ground

of refusal was that the application was barred? No case has held that rejection of an application on the ground that it is barred is not an order of refusal. Before a party can come to a Civil Court, he is bound as a condition precedent, to apply to the Registrar within a stated time. If the Registrar *rightly* holds that the application made to him is barred, it is obvious that the condition precedent has not been fulfilled. The civil suit in such a case is clearly incompetent. This, and no more, is the effect of the cases to which we have been referred, namely, *Kunhimmu v. Vinyathamma*(1), *Edun v. Mahomed Siddike*(2), *Gangadhara v. Sambasiva*(3) and *Udit Upadhia v. Imam Bandi Bibi*(4).

In the result, the appeal fails and is dismissed with the costs of the first respondent.

MADHAVAN NAIR, J.—This Civil Miscellaneous Appeal arises out of a suit instituted by the plaintiff under section 77 of the Indian Registration Act for getting a decree directing the sale deed, dated 4th January 1926, executed to him by the first defendant, to be registered in the Sub-Registrar's office at Sivaganga.

The facts are briefly these. The plaintiff presented the sale deed for registration before the Sub-Registrar of Sivaganga on the 28th September 1926. That officer declined to register the document on the 18th October 1926, as the executant failed to appear before him to admit registration. It is conceded that his failure to appear amounts to "denial of execution," under section 35 of the Registration Act; see *Radhakissen Rowra Dakna v. Chooneeloll Dutt*(5), *Sivarama Pattar Kariakar v. Krishna Ayyar*(6), *Ezekiel v. Annada*(7) and *Chhottey Lal v.*

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(1) (1845) 7 Q.B., 193; 115 E.R., 461. (2) (1876) 1 Q.B.D., 558.
(3) (1863) 32 L.J.M.C., 193; 122 E.R., 354.

(1) (1884) I.L.R., 7 Mad., 535 at 537.
(2) (1882) I.L.R., 9 Cal., 150 at 154. (3) (1916) I.L.R., 40 Mad., 759 at 764.
(4) (1902) I.L.R., 24 All., 402 (F.B.).
(5) (1879) I.L.R., 5 Cal., 445. (6) (1914) 28 M.L.J., 307.
(7) (1922) 36 C.L.J., 109.

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Collector of Moradabad(1). The Sub-Registrar's order was despatched to the plaintiff and he received it on the 19th October 1926. Thereupon he made an application under section 73 (1) of the Indian Registration Act to the District Registrar at Rāmṇād to establish his rights to have the document registered. Applications to the Registrar under this section should be made "within 30 days after the making of the order of refusal" by the Sub-Registrar. The plaintiff's application was presented on 18th November 1926, i.e., after 30 days from the date of the order of refusal by the Sub-Registrar on 18th October 1926, but within 30 days after the order was communicated to him. The District Registrar held that the application was out of time and rejected it on 16th December 1926. This order was communicated to the plaintiff on 20th December 1926. Thereupon the plaintiff instituted this suit under section 77 of the Registration Act. A suit under this section should be instituted "within 30 days after the making of the order of refusal" by the District Registrar. The plaintiff in the present suit was filed on 19th January 1927, i.e., after 30 days from the date of the order of the District Registrar but within 30 days after it was communicated to him.

It was contended by the defendants (1) that the suit having been presented more than 30 days from the date of the order of the District Registrar rejecting the application, was barred by limitation and (2) that the plaintiff has no right to institute the suit under section 77 of the Registration Act, as it was not brought on any "order of refusal" by the Registrar, as the application to the Registrar was thrown out as time barred. The District Munsif upheld these contentions and dismissed

(1) (1922) I.L.R., 44 All., 514.

the suit without going into the merits. On appeal the learned Subordinate Judge overruled them and remanded the suit to the lower Court for disposal. This appeal is by the defendants against the order of remand and the above contentions urged by them before the lower Courts are again pressed before us with great force by the learned Advocate-General.

The provisions of sections 73 (1) and 77 (1) of the Indian Registration Act, are as follows:—

Section 73 (1).—"When a Sub-Registrar has refused to register a document on the ground that any person by whom it purports to be executed, or his representative or assign, denies its execution, any person claiming under such document, assign or agent authorized as aforesaid, may, within thirty days after the making of the order of refusal, apply to the Registrar to whom such Sub-Registrar is subordinate in order to establish his right to have the document registered."

Section 77 (1).—"Where the Registrar refuses to order the document to be registered, under section 72 or section 76, any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the Civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office if it be duly presented for registration within thirty days after the passing of such decree."

The first question for consideration is whether the suit is time-barred under section 77 of the Registration Act. As already observed, a suit under this section will be within time, if it is instituted "within thirty days after the making of 'the order of refusal' by the District Registrar". It is argued, on one side, that the expression "making the order of refusal" in section 77 of the Registration Act means only recording the order of refusal in writing, and that the time should be calculated from the date of the "order of refusal", in which case the plaintiff's suit will be out of time;

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while, on the other side, it is contended that the expression means not merely the recording of the order in writing by the Registrar but communicating it to the party concerned, and that, in this case, time should be calculated from the date when the order was communicated to the plaintiff, in which case, his suit will be in time. The answer to the question must depend on the special circumstances of each case. If the order of refusal is pronounced in the presence of the parties immediately after inquiry by the Registrar, so that the person concerned knows that his request has been refused, then there can be no doubt that time should be calculated from the date of the order; but if the order was not so pronounced, and the person concerned does not know that his request has been refused, then it would not be just to hold that time should be calculated from the date of the order. How is an aggrieved party to take any action unless he *knows* that an adverse order has been passed by the Registrar? If the construction contended for by the appellant is accepted, then it is clear that in cases of this kind the party aggrieved may be altogether deprived of the privilege of taking proceedings under section 73 (1) and section 77 of the Act. It is not contended that the Sub-Registrar and the Registrar pronounced their orders in the presence of the parties after the inquiry was over, or that those officers fixed any day for pronouncing their orders, or gave notice fixing any date for pronouncing them. In these circumstances, it seems to me that, in this case, time should be calculated only from the date when the order was communicated to the parties. An order to be valid under section 77 of the Act should be passed in the presence of the parties, or after notice to them; if no notice has been given, then it should be communicated to them; in other words, the order to be a valid one

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must be brought to the knowledge of the party against whom it has been passed. It is conceded that there is no provision in the Act for communicating the orders of the Registrar and Sub-Registrar to the parties concerned. It seems to me, therefore, that the intention of the Act is that the officers should pronounce their orders in the presence of the parties after the inquiry is over, or should do so, after giving the parties notice.

This very question arose for decision in the Bombay High Court in *Abdul Ali v. Mirja Khan*(1), and it was held in that case by CHANDAVARKAR and ASHTON, JJ., that the expression "making an order" in section 77 of the Indian Registration Act (III of 1877) means not merely the recording of the order of refusal in writing but communicating it to the party concerned so as to bind him by it. The Punjab Chief Court also decided the question in the same way following *Abdul Ali v. Mirja Khan*(1); see *Kirpa Ram v. Asa Singh*(2). In our own Court, this particular point has not been considered in any case under the Registration Act, but attention may be drawn to cases under the Madras Survey and Boundaries Acts (Act XXVIII of 1860 and Act IV of 1897), which contain an analogous provision limiting the period allowed for the institution of suits in which it has been held that time does not begin to run until the date on which the decision sought to be set aside is communicated to the parties. (See *Annamalai v. Cloete*(3), *Seshamma v. Sankara*(4), and *Secretary of State v. Gopisetti Narayanaswami Naidu*(5). See also *Mahipat v. Lakshman*(6), a decision under the Khoti Act.) The correct principle is pointedly stated in 34 Mad., 151.

(1) (1903) I.L.R., 28 Bom., 8.
(3) (1883) I.L.R., 6 Mad., 189.
(5) (1910) I.L.R., 34 Mad., 151.

(2) (1917) 41 I.C., 76.
(4) (1888) I.L.R., 12 Mad., 1.
(6) (1900) I.L.R., 24 Bom., 426.

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"A decision cannot properly be said to be passed until it is in some way pronounced or published under such circumstances that the parties affected by it have a reasonable opportunity of knowing what it contains. Till then though it may be written out, signed and dated, it is nothing but the decision which the officer intends to pass. It is not passed so long as it is open to him to tear up what he has written and write something else."

In support of his contention that the time for the suit should be computed from the date of the order, the learned Advocate-General mainly relied on three English cases, *The King v. The Justices of Staffordshire*(1), *The Queen v. The Justices of Derbyshire*(2), and *The Queen v. Barnet Sanitary Authority*(3). These cases appear at first sight to support his contention, but, when read in the light of their circumstances, these will not be found to be inconsistent with the view which I have expressed above.

In *The King v. The Justices of Staffordshire*(1), an order was made under 13 Geo. III, Ch. 78 for turning part of a highway. By section 29 of that statute, an appeal is given to "the party grieved by any such order or proceeding at the next Quarter Sessions after such order made or proceeding had, etc." It was held that the appeal must be made to the Quarter Sessions next after the order made, without reference to any notice received by such appellant. The reason why the learned Judges arrived at this conclusion appears in the following observations of LE BLANC, J. :—

"In the case of a public highway, all the King's subjects may be said to be interested, and to have a right to appeal against an order for stopping it up; and therefore if the right of appeal were to depend on personal notice of the order to the appellant, there never would be an end of the time for appealing."

(1) (1802) 3 East 151; 102 E. R., 554. (2) (1845) 7 Q. B., 193; 115 E. R., 461.
(3) (1876) 1 Q. B. D., 558.

In commenting on this case, in *The Queen v. The Justices of Derbyshire*(1), which will be referred to presently, the learned Judges refer to these remarks of LE BLANC, J. From this we may infer that the literal construction, contended for, was put upon the words of the statute, as there would be no end of appealing, if such a construction was not adopted. Having regard to these observations, which give the reason for this decision, I do not think the case can be understood as laying down any general rule of interpretation. In *The Queen v. The Justices of Derbyshire*(1), an order was made, under 4 and 5 Vict. Ch. 59, requiring a surveyor of highways to pay money out of the highway rates in aid of turnpike funds. By section 3 of that statute a right of appeal is given to the person aggrieved "within 6 days after such order shall be made or given." It was held that the time for appeal runs from the making of the order, not from the service. It may be gathered, from the following remarks of Lord DENMAN, C.J., appearing in the judgment that, in cases under the statute, the parties interested would have opportunities to know about the order at the time when it is made. The learned Judge says "we may add that the Act provides some means for giving notoriety to the proceeding at the Petty Sessions, and even notice to the parties directly interested in opposing such an order." It would appear (see Maxwell's Interpretation of Statutes, 7th edition, page 7) that the order appealed against in this case must have been verbally pronounced by the Justices. If so, we may presume that it was pronounced either in their presence or after notice to them. In *The Queen v. Barnet Sanitary Authority*(2), it is clear from the report of the arguments that the order

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(1) (1845) 7 Q. B., 193; 115 E. R., 461. (2) (1876) 1 Q. B. D., 558 at 561.

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was made in the presence of the person affected by it. It also appears from the judgments of BLACKBURN, J., and MELLOR, J., that the persons affected by the "order" or "conviction" in such cases always have opportunity of being present at the time when the orders affecting them are made. BLACKBURN, J., observes thus :

"Where the appeal is against a rate, the "cause of appeal" would *prima facie* be upon notice of the rate, but where the appeal is from any order or conviction, one would certainly, *prima facie*, say that as soon as the order is made the party has a right to appeal, and is not bound to wait until the order is served."

The point is more explicitly stated by MELLOR, J., who observes thus :—

"Here the local authority had, under the Act, an opportunity to show cause, and unless, they chose not to appear, the order could not have been made in their absence The cause of appeal begins from the time the order is pronounced. The order is not required to be in writing, it may be a verbal and informal decision, and the party convicted either does know or ought to know the grounds on which the Justices have proceeded."

In this view, this case also does not support the appellant's contention. Attention may also be drawn to the decision in *Ex parte Johnson*(1), where it was held that under 7 and 8 Vict. Ch. 101, section 4, which enacts that "within 24 hours after the adjudication and making of any order" in bastardy, the putative father may give notice of appeal to the Quarter Sessions, that the time must be counted from the oral adjudication of the Justices in Petty Sessions and not from the time when the formal order is signed by them. On the whole, I do not think that these English cases compel us to hold that the time for instituting the suit under section 77 of the Registration Act must always be

calculated from the date of the order of the refusal made by the Registrar, irrespective of the question whether the party concerned had notice of the order or not.

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It follows from what I have said that, since the plaint in this case was filed within 30 days after the order of refusal by the Registrar was communicated to him, this suit under section 77 of the Registration Act is not time-barred. For the same reasons, I must hold that the application to the Registrar under section 73 (1) of the Act was also made in time and that the rejection of it by the Registrar as time-barred was wrong.

The next argument of the appellant is that the suit is not maintainable, as the Registrar rejected the plaintiff's petition on the ground that it is time-barred without going into the merits. It is argued that such orders are not "orders of refusal" as contemplated by the section. I do not think that this contention is well founded. No authority has been cited in support of it. An order dismissing a petition on the ground that it is time-barred is as much an "order of refusal" within the meaning of the section as an order dismissing the petition on the ground that it has no merits. The Act does not make any distinction between those two kinds of orders. One of the conditions that should be complied with by a person instituting a suit under section 77 of the Registration Act is that he must show that he applied to the Registrar within the time allowed by law. If the Registrar rightly rejects the petition on the ground that it is time-barred, then it means, that the plaintiff did not comply with this condition precedent to the maintenance of the suit under the section ; and a suit under section 77 of the Act will not therefore lie. This was all that was decided by the Allahabad High Court in

(1) (1863) 32 L.J.M.C., 193 ; 122 E.R., 364.

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Udit Upadhia v. Imam Bandi Bibi(1), where it was held that the Registrar's order in that case rejecting the application as filed beyond time could not be considered as a "refusal to register" within the meaning of the Act. The other decisions referred to by the appellant, *Kunhimmu v. Viyyathamma*(2), *Edun v. Mahomed Siddike*(3), and *Gangadhara v. Sambasiva*(4), do not advance his case any further. In this case, I have shown that the Registrar's order rejecting the application made by the plaintiff as time-barred is wrong, i.e., that the application was made in time; in other words, that the plaintiff has complied with the condition precedent to the maintenance of the suit. It therefore follows that the plaintiff's suit is maintainable.

This Civil Miscellaneous Appeal fails and must be dismissed with costs of the first respondent.

K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1929,
November 29.

D. MADAR SAHIB *alias* MADDU AND ANOTHER
(ACCUSED), PETITIONERS.*

Madras District Municipalities Act (V of 1920), Sch. IV, App. A
—Signature—Meaning of—Warrant issued by Chairman
—Not signed but bearing facsimile—Validity of.

A warrant purporting to have been issued by the Chairman of a Municipality, not signed by him but only bearing a facsimile stamp of his signature, is not a valid warrant.

(1) (1902) I.L.R., 24 All., 402. (2) (1884) I.L.R., 7 Mad., 535 at 537.
(3) (1882) I.L.R., 9 Cal., 150 at 154.
(4) (1916) I.L.R., 40 Mad., 759 at 766.

* Criminal Revision Case No. 617 of 1929.

The word "Signature" in Appendix A of Schedule IV of the District Municipalities Act must be taken in its accepted sense of Sign Manual. MADAR SAHIB, *In re*.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Cuddapah in Criminal Appeal No. 27 of 1929, preferred against the judgment of the Court of the First-class Magistrate of Cuddapah in Calendar Case No. 23 of 1929.

V. L. Ethiraj and S. Ramachandran for petitioners.

K. S. Vasudevan for Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

The two petitioners have been sentenced to three months' simple imprisonment and Rs. 50 fine under section 332, Indian Penal Code, for resisting a distraint under a warrant purporting to have been issued by the Municipal Chairman of Cuddapah.

It seems clear that there was no warrant. The prosecution theory is that the ex-Chairman left a facsimile stamp of his signature behind him, which the peons continued to use. Of course, this would be quite irregular and would give no validity to a warrant.

It is clear from Appendix A of Schedule IV of the District Municipalities Act that the warrant must bear the signature of the Chairman. "Signature" must be taken in its accepted sense of Sign Manual. The fact that in section 2 (20), Code of Civil Procedure, sign is used as including stamp has no bearing on the Madras District Municipalities Act.

The only departure from the general rule is that, if the Chairman happens to be illiterate, under section 3 (29), Madras General Clauses Act, he may affix his mark.

Even if the distrainers had a warrant, they had no right to do as they threatened, and take the front door

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of the house, *Queen Empress v. Shaik Ibrahim*(1), a proceeding which rendered the house unsafe, and called for immediate defence of private property. In the circumstances, I am not prepared to hold that the accused exceeded that right. The conviction is set aside and the fine ordered to be refunded.

Accused's bail is released.

R.C.S.

SPECIAL BENCH.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
Mr. Justice Ramesam, Mr. Justice Krishnan Pandalai,
Mr. Justice Eddy and Mr. Justice Cornish.*

1930,
January 20.

S. A. SUBBIAH AYYAR, PETITIONER,

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

Indian Income-tax Act (XI of 1922), secs. 66 (1) and (2) and sec. 4 (2)—Application by assessee for reference to High Court—Point of law, not included in the application, whether can be ordered by the High Court to be referred—Application under sec. 66 (1) by assessee, if competent—Remittances from foreign places to British India to the assessee, whether out of profits or capital—Presumption, whether conclusive or rebuttable by assessee—Entries in assessee's account, whether relevant evidence.

Where an assessee had not made an application to the Income-tax Commissioner, under section 66 (2) of the Income-tax Act, 1922, to refer a point of law to the High Court within one month of the passing of an order under section 31 or 32 of the Act, he cannot ask the High Court to direct the Commissioner to refer such a question to the High Court.

(1) (1890) 1 L.R., 13 Mad., 518.

* Original Petition No. 180 of 1928.

Neither section 66 (1) of the Indian Income-tax Act, nor section 45 of the Specific Relief Act, empowers the High Court to direct the Commissioner to refer such a question under such circumstances.

Commissioner of Income-tax, Madras v. Thiruvengada Mudaliar, (1927) 55 M.L.J., 19 (F.B.), approved.

The ordinary presumption that money remitted from a foreign business and received in British India by an assessee is out of profits and not out of capital is one which can be rebutted by the assessee.

Scottish Provident Institution v. Allan, [1903] A.C., 129, explained and applied.

REFERENCE under section 66 (2) of the Indian Income-tax Act (XI of 1922), and In the matter of section 45 of the Specific Relief Act (I of 1877), and In the matter of the Income-tax Assessment of S. A. Subbiah Ayyar, Tinnevely.

V. V. Srinivasa Ayyangar for petitioner.—The assessee carried on money-lending business in Tinnevely and in three foreign places. The Tinnevely business was a feeder business to the money-lending business in the foreign places. Funds were borrowed by him in Tinnevely and remitted to foreign places for lending them out. There are three questions referred to the High Court. The first is whether the purchase of lands in British India, belonging to a foreign constituent for debts due from him, is a receipt of profits in British India, liable to assessment. [A preliminary objection was taken by the respondent's advocate that this point could not be taken, as it was not one of the points of law taken in the application to the Commissioner by the assessee, under section 66 (2) of the Act.] The Income-tax Officer and the Assistant Commissioner held that Rs. 43,810, value of lands bought in British India, was profits received in British India under section 4 of the Act. There was no second appeal but only a Revision to the Commissioner filed under section 4. It was dismissed by the Commissioner. The assessee then applied under section 66 (1) to refer this point (as to purchase of land) to the High Court. The Commissioner dismissed this petition, holding that the assessee should have applied under section 66 (2). There were two applications to the Commissioner under section 66 (2), one dated 4th October 1927, and another in February 1928. The

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former did not include this point as to purchase of land; the latter containing it was more than one month after the decision of the Commissioner. The assessee is entitled to have this point referred to the High Court under section 66 (1). The Privy Council has so decided under the Act of 1918, section 51 (the previous Act): see *Alcock Ashdown and Company, Limited v. Chief Revenue Authority of Bombay*(1). Further under section 66, the whole case must be referred; section 66 refers to 'case'. See *Shiva Prasad v. Commissioner, Income-tax*(2).

Moreover, under section 45 (d) of the Specific Relief Act, the High Court can call upon the Commissioner to include this question in the reference.

On points 2 and 3 in the Reference.—The facts and circumstances of the remittances to the assessee from Quilon into British India, completely negative any presumption as to the remittances being from profits and not from capital. The presumption laid down in the decision in *Scottish Provident Institution v. Allan*(3) is not a conclusive presumption, but is one, which can be rebutted by the assessee. The decision itself shows that the presumption is rebuttable. Here the foreign and British Indian accounts show that the remittances were from capital and not from profits. The accounts are held to be honest and *bona fide* accounts. The fact that the Tinnevely debts of the assessee were discharged from the remittances does not convert remittances into profits. See also *In re Murugappa Chettiar*(4), *Scottish Provident Institution v. Allan*(3), *The Commissioner of Inland Revenue v. The Sterling Trust, Ltd.*(5).

M. Patanjali Sastri for respondent (on the preliminary point).—Section 66 (1) does not apply to an application by the assessee, but only enables the Income-tax Commissioner to refer any point of law, *suo motu*. An application by the assessee must be only under section 66 (2) within one month of the passing of the order. The High Court has no power to call on the Commissioner to refer a point of law, which was not included in an application under section 66 (2). Section 45 of the Specific Relief Act does not apply where some other remedy was open and was not availed of. The matter is concluded by the decision of the Full Bench in *Commissioner of Income-tax,*

(1) (1923) I.L.R., 47 Bom., 742 (P.C.). (2) (1929) A.I.R. (All.), 819.
(3) [1908] A.C., 129. (4) (1925) I.L.R., 49 Mad., 465.
(5) (1925) 12 Tax Cas., 868.

Madras v. Thiruvengada Mudaliar(1). See also *A. K. A. C. T. V. Chettyar Firm v. The Commissioner of Income-tax*(2) and *Ishar Das Dharam Chand, In re*(3).

The appellant only relies on entries in his own accounts in Tinnevely and Quilon. The entries are not relevant evidence. Even otherwise they are evidence of very slight value. There was a mixed fund of the assessee in the foreign and Tinnevely shops, out of which the remittances and receipts were made. After remittances were made from the common fund, the entries were made as capital in the various ledgers or day-books. *Scottish Provident Institution v. Allan*(4) shows that an entry by the assessee as capital is not evidence at all. The way an assessee spends the remittance is evidence whether remittance was from capital or profits.

JUDGMENT.

BEASLEY, C.J.—In accordance with the order^{BEASLEY, C.J.} of the High Court, dated the 24th April 1929, three questions have been referred to the High Court, under section 66 (3) of the Indian Income-tax Act, by the Commissioner of Income-tax, Madras. Those questions are (1) whether a sale and conveyance by a debtor of the assessee, in respect of a money-lending business carried on by the assessee out of British India, in discharge of the principal and interest of a debt due to such business, of lands situate in British India amounts to a remittance into British India of profits of the assessee made in that foreign business, (2) whether the presumption as to foreign remittances being from out of the profits is applicable or available in a case where the dealings between the British and the foreign businesses consist of large sums of money being lent out by the British Indian business to the foreign business and of such loans being more or less regularly repaid by remittances by the foreign business, and (3) whether the said presumption is applicable or available in a case where

(1) (1927) 55 M.L.J., 19.

(2) (1928) I.L.R., 6 Rang., 492.

(3) (1925) 2 Tax Cas. (Ind.), 12.

(4) [1901] 4 Tax Cas., 408 at 417-418.

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the moneys remitted are in the current dealings account and debited to such account and not to the personal or profits account of the assessee and where interest earned every year by the British Indian business in respect of such dealings is included in the assessment of the British Indian business.

Question (1) was not submitted to the Commissioner of Income-tax for reference to the High Court when the assessee under section 66 (2) of the Indian Income-tax Act required the Commissioner to refer the other two questions to the High Court; and the High Court, in directing the Commissioner of Income-tax to refer all the three questions, reserved to the Commissioner the right to contend that the reference on the first point did not lie at all by reason of the fact of its not having been submitted to him under section 66 (2) of the Act. That question was fully argued on the reference. The Commissioner by his order on the petitioner's application, dated the 23rd February 1928, stated that his request could not be granted, that section 66 (1) had no application and that the petitioner could have preferred an application under section 66 (2) but did not do so. Admittedly, the petitioner did not prefer an application under section 66 (2), but Mr. V. V. Srinivasa Ayyangar contends that the High Court can, nevertheless, require the Commissioner to refer the question under section 66 (1), if the question raises an important point of law for decision. He further contends that, even if section 66 (1) has no application, then under section 45 of the Specific Relief Act the High Court can decide the question. On the former question he relies upon a decision of the Privy Council in *Alcock Ashdown and Company, Limited v. Chief Revenue Authority of Bombay*(1). In that case it was held that it is the duty of

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the Chief Revenue Authority under section 51 of the Indian Income-tax Act, 1918, to state a case and refer it to the High Court, when, in the course of an assessment, a serious question of law arises. On page 752 Lord PHILLIMORE stated,

"In their Lordships' view, always supposing that there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court, and if he does not appreciate that there is such a serious point, it is in the power of the Court to control him and to order him to state a case."

It was argued that section 51 of the Indian Income-tax Act of 1918 is similar to section 66 of the present Act, namely, the Indian Income-tax Act of 1922. Section 51 of the Indian Income-tax Act of 1918 is as follows :

"If, in the course of any assessment under this Act or any proceeding in connexion therewith other than a proceeding under Chapter VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any rule thereunder, the Chief Revenue authority may, either on its own motion or on reference from any Revenue officers subordinate to it, draw up a statement of the case, and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary."

We do not agree that that section is similar to section 66 of the present Act. Under section 55 (1) of the Act of 1918, the assessee could apply to the Chief Revenue Authority to refer any such question and he was not limited in that section as to the time in which he had to make his application. Section 66 (2) of the present Act requires the assessee to make his application within one month of the passing of the order under section 31 or section 32, and furthermore requires that application to be accompanied by a fee of Rs. 100 or any such lesser sum as may be prescribed. Mr. Srinivasa

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Ayyangar's contention is that the assessee has two remedies open to him, one under section 66 (1) and another under section 66 (2). We are unable to accept that contention. It is most unlikely that the Legislature intended to give an assessee two remedies, one within a specified limit of time and another without any such limitation. It cannot seriously be argued that, after an order has been made, an assessee, who has neglected to make an application to the Commissioner to refer a question of law arising out of that order within one month of the making of that order, can, nevertheless, many months afterwards, ask the Court to require the Commissioner of Income-tax to refer the same question to the High Court merely because it is one of importance. Moreover, it is clear that section 66 (1) is not intended to benefit an assessee, but is merely to enable the Commissioner, when he feels any difficulty with regard to a question of law, to refer the matter himself to the High Court. The assessee, therefore, not having made his application to the Commissioner to refer question (1) to the High Court within one month of the passing of his order, cannot ask the High Court to direct the Commissioner to refer such a question.

It was also contended, on behalf of the assessee, that any point of law arising out of the facts of the case can be taken cognizance of by the High Court and an opinion given upon it, because section 66 says that the Commissioner is to draw up a statement of the case, and it is contended that this means the whole case, i.e., the whole assessment. In support of this contention, *Shiva Prasad v. Commissioner, Income-tax*(1) was referred to. There it was decided that, though ordinarily the Income-tax Commissioner would be the

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officer who would frame the points of law that arise in the case stated by him, and though he would be expected to give his own opinion on those points of law for the benefit of the High Court, section 66 requires the High Court to decide the questions of law that arise in the case, i.e., the High Court is entitled to resettle the issues, as it were, and to decide those issues. On page 821 MUKERJI, J., states :

"The meaning and object, however, of the entire section 66 seems to me to be free from obscurity. My impression is that the High Court has to accept the facts as found by the Commissioner of Income-tax and, if necessary, may call for more facts by asking him to make a fresh statement of them under subsection (4), section 66. But it is for the High Court to find out from the contention of the assessee on the one hand and the contention of the income-tax authorities on the other, what is the real point of law that arises between the parties and what it has to decide. This reading of section 66 seems to be clear to me from among other matters the fact that the High Court is nowhere called upon to decide such questions as may be framed by the Commissioner of Income-tax."

In my view, this decision does not mean that the assessee is entitled to argue any question of law which may arise out of the assessment and which he has not asked the Commissioner of Income-tax to refer to the High Court, but merely means that the High Court can, if it chooses, alter the questions referred by the Commissioner of Income-tax, or reject them altogether, and decide the real questions of law at issue between the Commissioner and the assessee *at the time when application was made to him to refer the question or questions*. This question has also been considered by a Full Bench of this Court in *Commissioner of Income-tax, Madras v. Tiruvengada Mudaliar*(1), and it was there held that, if a point of law is not raised before the Commissioner of Income-tax within the time

(1) (1929) A.I.R. (All.), 819.

(1) (1927) 53 M.L.J., 19.

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specified by section 66 (2) of the Indian Income-tax Act, it cannot be raised at all and the Commissioner cannot be required to state a case to the High Court raising that question. It was because the correctness of this decision was questioned that this present reference was directed to be heard by a Bench of five Judges. In my view that decision was correct. In *A. K. A. C. T. V. Chettyar Firm v. The Commissioner of Income-tax*(1), and *Ishar Das Daram Chand, In re*(2), a decision of the Lahore High Court, a similar view was taken.

Obviously section 45 of the Specific Relief Act is of no avail to the assessee because by sub-section (d) of that section it is subject to the proviso that the applicant has no other specific and adequate legal remedy. In this case a remedy is provided by section 66 (2) of the Indian Income-tax Act of 1922 but the assessee neglected to avail himself of it. The assessee, therefore, cannot be permitted to argue the point of law raised in question (1), and it is unnecessary to state any of the facts out of which that point of law emerges.

With regard to questions (2) and (3), the answer to question (2) answers question (3). I, however, think that question (2) does not really raise the question we have to decide. As it stands, the answer clearly must be in the negative. The real question is whether the ordinary presumption that money remitted from a foreign business and received in this country is out of profits is one which can be rebutted and what facts rebut it. Mr. Patanjali Sastri, in the course of his argument, was driven to take up the attitude that it could not be rebutted, although he was bound to admit in the earlier stages of his argument that such a presumption could be. He further contended that, if it could be rebutted,

(1) (1928) I.L.R., 6 Rang., 492.

(2) (1925) 2 Tax Cas. (Ind.), 12.

it was purely a question of fact whether it had been rebutted. I think this is a mixed question of fact and law and that obviously such a presumption can be rebutted, the onus of doing so being upon the assessee.

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The facts are that the petitioner is a resident of Tinnevely carrying on a money-lending business in Tinnevely and various other places outside British India of which Quilon in the Travancore State is one. The petitioner was assessed for the year 1926-27 on an income of Rs. 68,395, the year of account being the year ending the 16th August 1925. The details of the assessment were as follows:—

	RS.	A.	P.
Income from property	200	0	0
Income from other sources (remittances from petitioner's foreign business)	69,473	0	0
Total	69,673	0	0
Less loss in petitioner's Tinnevely business	1,278	0	0
Total	68,395	0	0

The amount of remittances of foreign profits was calculated by the Income-tax Officer as follows:—

	RS.	A.	P.
Drawings from petitioner's Tinnevely shop (there were no profits in this shop and there were large remittances from the foreign branches to this shop)	21,469	0	0
Amount drawn from Quilon for purchases of lands in Tenkasi Taluk	43,810	0	0
Amount drawn from Quilon branch by debit to assessee's drawings account for purchase of lands	4,000	0	0
Amount received from Quilon in the shape of articles	194	0	0
Total	69,473	0	0

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The Income-tax Officer found that the profits of the petitioner's foreign business for the year amounted to Rs. 1,99,185 and held that the sum of Rs. 69,473 should be regarded as a remittance out of profits and accordingly included it in the petitioner's assessment. From this assessment the petitioner appealed to the Assistant Commissioner and it was found that, during the year of account, the petitioner had drawn Rs. 89,847 from his foreign businesses in excess of the amounts sent by him to those businesses. The petitioner's course of business was to supply his foreign business with money from Tinnevely. This money he himself borrowed from other persons. The money sent by the petitioner to his foreign businesses was sent by means of hundies and money remitted from those foreign businesses to Tinnevely was also sent by means of hundies. There was a continuous flow of money during the year in both directions. The Tinnevely business made no profits in the year of account. The Assistant Commissioner held that, as the money received from the foreign businesses was in excess of that sent by the petitioner to those foreign businesses, the excess should be regarded as a remittance of foreign profits. He enhanced the assessment by Rs. 68,378 by taking the excess figure of Rs. 89,847 and deducting from it a sum of Rs. 21,469 which had been applied in part by the petitioner towards the discharge of borrowings by him in his Tinnevely business. The petitioner then preferred an appeal to the Commissioner of Income-tax against the Assistant Commissioner's order of enhancement and succeeded in reducing the assessment. The petitioner applied to him to refer the following question, namely, "Whether or not Rs. 67,209 can be taxed as a remittance of foreign profits under section 4 (2) of the Income-tax Act in the facts and circumstances of this case." The Commissioner of

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Income-tax declined to refer that question, being of the opinion that it was not one of law. He was, however, directed to refer the question to the High Court and it has come up in the shape of questions (2) and (3).

If an assessee's foreign business remits money to him in a country in which his profits from his business in that country are assessed to income-tax, the presumption is that the remittance is a remittance from out of the profits of the foreign business; *Scottish Provident Institution v. Allan*(1), followed in *In re Murugappa Chettiar*(2). In the latter case, it was decided that money remitted to the headquarters of a firm in British India from a branch situated in a foreign country is presumed to be profits and not capital and is assessable to Income-tax as profits, unless the assessee proves the contrary. The Commissioner of Income-tax argues that the assessee has mixed up his accounts of capital and profits and that, although he keeps a capital account in Quilon, a current account, and a profit account, in his books, there is no separate fund kept in respect of these items. It is admitted by him that these remittances from the current account in Quilon are shown in that account to be remittances from capital and are similarly shown in the Tinnevely books to be received in the shape of capital. It is argued that, nevertheless, the remittances were not from capital at all, but were from profits, because it is shown that there were profits earned by the foreign business to an amount more than enough to repay the loans received from Tinnevely, and that no businessman would be likely to remit capital when he has profits out of which he can repay the loans, and in this contention he is supported by the observations made in *Allan's case*. In the report

(1) [1903] A.C., 129.

(2) (1925) I.L.R., 49 Mad., 465.

capital rather than wait until he winds up his foreign business as the Commissioner of Income-tax suggests he should do.

Another argument addressed to us was that the remittances from the foreign business must be remittances of profits and not capital, by reason of the fact that part of the sums remitted was used by the assessee for re-paying the loans taken in Tinnevely for the conduct of the Tinnevely business, and part, for the personal expenses of the petitioner. With regard to the former reason, I think that the fact that the funds were utilized for repayment of the loans taken at Tinnevely supports the assessee's case rather than weakens it, and with regard to the latter reason, the use to which an assessee chooses to put his money on receipt of it cannot alter the character in which it was received. If this money was received in British India as capital, the fact that the assessee chose to use some of it for his own personal expenses did not change its nature.

For these reasons, the answer to questions (2) and (3) is that, in the circumstances of this case, the presumption as to foreign remittances being out of profits has been rebutted by the assessee.

Rs. 300, costs of this reference, are directed to be paid by the Commissioner of Income-tax to the assessee. Rs. 100 deposited is to be returned to the assessee.

RAMESAM, J.—I concur with the order just pronounced by my Lord. On questions (2) and (3), I only wish to add that *Allan's case* itself shows that the presumption laid down therein is a rebuttable presumption. To say that, even where the party indicates, by some evidence, his wish to withdraw the capital, leaving the profits in the foreign country, he must be deemed to have withdrawn the profits and left the capital, is to make the presumption irrebuttable. On the contention for the Income-tax

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of that case in 4 Tax Cases, on page 419, Lord McLaren stated,

"But, where a capitalist company, as in the present case, has invested large sums for a period of 15 years in a Colony, and has an agent employed not only to receive interest but also to receive the capital of the investment when paid up, and to reinvest it, even if unappropriated remittances are made to this country, I think every one would agree that they must be dealt with according to the ordinary course of business, and these remittances must be presumed to be paid in the first place out of interest so far as they are income, and in the second place out of principal or capital. I think that rule results from the fact that no prudent man of business will encroach upon his capital for investment when he has income uninvested laying at his disposal."

The Commissioner's contention goes to the length of saying that a businessman is not to be allowed to conduct his own business as he chooses. In the present case the Commissioner of Income-tax agrees that the assessee has acted perfectly honestly, that is to say, he intended to remit capital and not profits from Quilon to Tinnevely and kept genuine accounts and made true entries in those accounts but contends that, nevertheless, as profits were earned in the assessee's foreign business, those remittances must be held to be from those profits and not to be capital. It seems to me clear that, as the Commissioner of Income-tax admits that the assessee acted honestly in making the entries in the account books and had a *bona fide* intention of remitting capital and not profits, his argument that the sums remitted are liable to be taxed must at once fail, and I am far from saying that the assessee did what a prudent man of business would not do. He had borrowed money in Tinnevely for the purpose of lending it out to his foreign business and to make a profit on it and what he had borrowed had to be repaid. I see nothing unbusiness-like in his choosing to repay those loans out of

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Commissioner (at one stage of the argument), the capital can only be brought up last, i.e., only when the trader wishes to wind up his business in the foreign country. This is to dictate to him in what order he should withdraw his funds, and it is difficult to see why it should be so.

It must be remembered that this method of treating his funds is available to the party only once in respect of a particular item of capital. Only when another item of advance is made can he claim again to withdraw capital. If once it is conceded that the trader may call back his capital, it is for him to choose in what particular year he does so, and to indicate his choice by accounts (which there is no reason to suspect) or otherwise. Once the choice is made, the presumption is rebutted.

In O.P. No. 263 of 1928, I concur with my Lord's order and have nothing to add.

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KRISHNAN PANDALAI, J.—I agree with my Lord for the reasons stated by him that it is not open to the assessee to raise before us the first question which relates to Rs. 43,310.

The second and third questions relate to Rs. 67,209, the amount which the Income-tax Commissioner attributed to foreign profits received in British India in the year of account, and they both present different aspects of the same matter, whether the Commissioner was justified, on the account books and other materials furnished by the assessee and the nature of his business, in thinking that there was any presumption that the sum in question was profits, and if there was any presumption in the matter, whether he ought not to have held that it was rebutted. Whether the sum was in fact profits or capital is ultimately one of fact. But if, in determining that fact, the Commissioner has acted on a presumption, which either did not arise, or which, on

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the admitted facts, must be held to have been rebutted, then the conclusion is vitiated by an error of law and this Court will correct it. The ground of the Commissioner's decision is stated as follows in paragraph 5 of his order, dated 3rd September 1927 :

"It is arguable that the appellants discharged debts due to creditors in British India, that he had no funds in British India to draw upon and he must therefore have drawn upon his foreign business. As there were profits in the foreign business more than sufficient to cover the discharge of these liabilities it must be presumed that these profits were drawn upon. . . . If the appellant incurred liabilities in the course of his British Indian business and met them by drawing on his funds abroad there is certainly a presumption that any profits that may have been available abroad were drawn on for this purpose."

The Commissioner accordingly made a calculation based on a comparison of the volume of the Tinnevely business with that of the foreign business and computed Rs. 67,209 to be the amount repaid on account of the purely British Indian liabilities and so held that sum to represent the foreign profits received at Tinnevely.

The question before the Commissioner was whether the balance, according to the current account, as it is called, of remittances passing during the year between the Tinnevely Head-office and the foreign branches of the assessee's business, represents, or must be presumed to be, profits. When regard is had to the nature of the assessee's business, which may be broadly described as carrying on a money-lending business in Travancore and Cochin with money borrowed at Tinnevely, it is seen that the account is in no way intended to show the profits of the business at all, but on the contrary, it represents, on one side, the working capital sent by Tinnevely to the foreign shops, and on the other, the amounts returned from the latter to Tinnevely for repayment to the depositors from whom the

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assessee had borrowed. There is a separate profit and loss account in the books of the foreign shops. There is no question that the books are not honestly and properly kept or that they were intended to conceal the facts. It was also admitted that, if the opening balance in the account were taken into consideration, there was no excess remittance to Tinnevely at all, the excess of Rs. 89,847 being the result, if only the remittances during the year of account were taken. As to this, the Commissioner in paragraph 4 says:

"I think the appellant is right on this point also. The argument underlying what has been known as the 'theory of excess remittances' is that so far as money brought into British India is found to be in excess of the sum required to replace money previously sent abroad, it should be presumed that the money sent in is a remittance of profit, if profit was available for remittance. In this case, there seems to be no doubt that the balance shown as due by the foreign shops at the beginning of the year represent money supplied at some time or other from Tinnevely. The 'net remittance' of Rs. 89,849 in the year of account was not sufficient to replace the sums supplied but not replaced in the previous years. A mere comparison of the amounts of remittances each way is not, therefore, by itself a sufficient ground for holding that money was sent in otherwise than by replacement of money previously sent out."

Having thus, I think, rightly, held that a mere comparison of remittances each way is not sufficient to say that money was sent in otherwise than in replacement of money previously sent out, the Commissioner went on to hold, I think, wrongly, that so much of the remittances to Tinnevely as were utilized to pay off Tinnevely debts must be presumed to be foreign profits received in British India.

It is difficult to see how the character of a remittance into British India, whether it is capital or profits, is to be judged by the use to which it is put after its receipt in British India. If a man receives his foreign

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profits in British India, they will be equally liable to tax whether he pays debts, or gambles with them. But if what he received was not profits, but his foreign capital, he cannot be taxed here because he pays off therewith the debts he had incurred to carry on his business, local or foreign. The nature of the remittance must depend on what it was in its origin. If the moneys remitted were not or cannot be presumed to be profits when remitted, the fact that debts were paid off with them cannot make them such.

Before us, the main contention was not that the repayment of Tinnevely debts shows that the money with which it was done was from foreign profits brought into British India, because it was recognized that it only showed that the assessee was paying off borrowed capital sent to foreign business and returned therefrom. But the main contention was that according to the rule in *Scottish Provident Institution v. Allan*(1), followed in *In re Murugappa Chettiar*(2), when there are profits available in a foreign country and remittances are made from that country into British India, the inference must be drawn that such remittances are from profits, and this in spite of whatever the assessee may do, and of the fact that according to the books of the assessee, accepted as properly and honestly kept, such remittances are shown to be, and are honestly regarded by the assessee himself to be, return of capital previously sent from British India to the foreign country for the business there.

The decisions cited do not support the contention to the length to which it goes. In the *Scottish Provident Institution case*, about £1,500,000 had been sent to Australia for investment, and after making

(1) [1903] A.C., 129.

(2) (1925) I.L.R., 49 Mad., 465.

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the remittance in question, there was still more than £1,800,000 in investment there. Apparently in order to escape the British tax, the Australian branch office of the company had, according to instructions, accompanied each of the disputed remittances with a letter to say that it was towards particular advances, most of them made several years previously. On these facts, the Lord President of the Court of Exchequer (Scotland) concluded his judgment in the lower Court with the observation that under the circumstances indefinite remittances to this country must be presumed to consist of interest, not of capital, so long as the amount of capital remitted to Australia for investment still remains invested there (4 Tax Cases, 419). Lord McLAREN similarly said that the sound principle is that the source of the fund remitted, in the absence of evidence to the contrary, must be determined according to the ordinary course of business in dealing with uninvested funds (page 420). In the House of Lords the Lord CHANCELLOR referred to the instructions and letters above referred to as mere nicknaming the sum received and said that the right of the Crown could not be defeated thereby (1903 A.C., 135). Lord DAVEY referred to the fact that the company had in all remitted $1\frac{1}{2}$ millions to Australia and had at the end of the year in question $2\frac{1}{2}$ millions there and that in every sense that is profit. As to the attempt to make out that what was remitted back were sums which had been sent out several years previously, his Lordship said it was mere book-keeping and not actual facts. The mere calling it capital for the purpose of the Inland Revenue Department will not make into capital that which is essentially and in truth profits (page 137). Lord SHAND and Lord ROBERTSON also referred to the fact that the sum still in Australia was more than the sum sent there (pages 136

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and 138). The decision in 49 Mad., 465 does not carry the matter further than to show that where the Commissioner has not misdirected himself as to the nature and scope of the presumption, the Court will not interfere with his inference on the question of fact whether the remittance was profits or capital.

In this case the Commissioner, in my opinion, misdirected himself in raising the presumption where the admitted facts did not leave any scope for it, or to put it in another way, where he ought to have held that the admitted facts rebutted it. In the first place, the presumption is certainly rebuttable and can only be used in the absence of proof to the contrary. Whether the proof is sufficient is certainly a matter for the Commissioner only. But, in the present case, there is no dispute as to the facts, i.e., the course of business and assessee's books which are admitted to be honestly kept in the usual course of that business, and the only question is what is the proper legal inference from those admitted facts, and this is a question of law, *Nafar Chandra Pal Chowdhury v. Shukur Sheikh*(1).

The Commissioner recognized that there was no ground in the amounts of remittances to and from Tinnevely for holding that more money was sent to Tinnevely than was necessary to replace capital previously sent out. He recognized that the foreign business was financed by borrowings at Tinnevely, and that these loans were repaid by remittances from foreign businesses. There was nothing to show, as there was in the *Scottish Provident Institution case*, that the investments still left in the foreign country were more or less than the unreturned capital *plus* the foreign profits earned more than three years prior to the year of

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account which are not liable to tax. The important fact on which the presumption was based in that case was therefore lacking in this, and I am not sure that, in using the presumption in that case, care should not be taken to see that the circumstances are similar.

In any case, I cannot accede to the contention that, even when it is shown that the assessee, who has borrowed in British India and carried on a business with such borrowed capital in foreign parts, wants to return his borrowed capital and for that purpose remits that capital to British India and has deliberately and honestly maintained his books in the usual course to show what he has done, there is still a presumption that the source from whence he repays his debt is his foreign profits and not the borrowed capital. So long as it is open to a man to keep his foreign profits abroad, it is not for the Commissioner or any one else to compel him to do what he is not bound to do by law. After all, a man can remit any particular amount of capital from foreign parts into British India only once, and further remittances, unless there were fresh capital sent out which could be returned, must be from profits. The order in which a man must dispose of his capital and profits is for himself to determine, and where, as in this case, he has determined that order, and there is nothing to suspect his bona fides or to show that his books are intended to conceal his real purpose, we cannot by resort to a presumption hold that he has done what he had not done and what he cannot be compelled to do.

I agree that the answer to the second and third questions must be as proposed by my Lord.

EDDY, J.

EDDY, J.—I agree with the judgment of my Lord and desire to add only a word or two with regard to the construction of section 66 of the Indian Income-tax

Act. The contention that under this section an assessee has alternative remedies is, in my opinion, untenable. It is quite plain from sub-section (2) of that section that an assessee, who desires a question of law to be referred to the High Court, must make his request to the Commissioner so to refer it within one month of an order affecting him. None the less, it was contended before us that, when he had allowed that time to go by, he might avail himself of the provisions of the first sub-section of that section. The first sub-section of that section, in my opinion, confers no rights on the assessee at all. It is a provision, as I think, to enable the Commissioner to seek the assistance of the High Court when a question of law arises. Moreover, the provision, as I think, contains its own time-limit. Observe the words: "If, in the course of any assessment under this Act or any proceeding in connexion therewith." If one reads these words in conjunction with the rest of the sub-section, it is clear, I think, that this provision is to enable the Commissioner to refer a question of law to this Court, before he or any income-tax authority subordinate to him, as the case may be, comes in the first instance to a final determination with regard to any assessment.

CORNISH, J.—After the judgments which have been delivered, it is hardly necessary to add anything more. But I will say a few words on the point raised in the argument, whether the Court could entertain a question of law not referred to the Court by the Commissioner of Income-tax and which he had not refused to refer at the request of the assessee. The scheme of section 66 appears to be this: Sub-section (1) enables the Commissioner to obtain *suo motu* a determination by the High Court of a question of law. Sub-section (2) enables an assessee, who has exhausted his right of

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appeal under section 32, to get a determination of a question of law by requiring the Commissioner to state a case and refer the question of law to the High Court; and sub-section (3) empowers the High Court to require the Commissioner to state a case if the High Court is satisfied, on the assessee's application, that the Commissioner should have referred the question of law which the assessee required him to refer. But clearly the time-limit imposed by sub-section (2) is intended to qualify the assessee's right to require the Commissioner to refer a question of law; and it seems to me equally clear from the language of sub-section (3) that the question of law which the Commissioner has refused to refer is the only question of law which the High Court can require him to refer on the assessee's application. The Commissioner cannot be called upon under sub-section (3) to state a case in respect of a question of law which the assessee has not required him to refer to the High Court under sub-section (2). If, therefore, the assessee fails to require the Commissioner to refer a particular question of law within the prescribed period of time, he cannot, after the expiry of that period, apply to the High Court to call upon the Commissioner to refer it. Any other construction would, in my judgment, render the one month limit imposed by sub-section (2) meaningless. I agree with the proposed answers to the questions.

K.R.

APPELLATE CIVIL.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Curgenvven.*

SUBBANNA (CLAIMANT), APPELLANT,

v.

1930,
January 8.

DISTRICT LABOUR OFFICER, EAST GÔDĀVARI
(REFERRING OFFICER), RESPONDENT.*

*Land Acquisition Act (I of 1894), sec. 9 (2) and 25 (1)—
Making of a claim for a specific amount, necessary for
claiming more compensation than that allowed by the Land
Acquisition Officer.*

According to sections 9 (2) and 25 (1) of the Land Acquisition Act (I of 1894), a claim for compensation for land taken under the Act can be considered to have been made, only if the person whose property is acquired under the Act makes a claim, either orally or in writing, for a *specific* amount as compensation for his land. The mere filing by him of certain sale-deeds of neighbouring lands without making a claim for a *specific* amount will not amount to the making of such a claim, though the Land Acquisition Officer may consider the prices given in the sale-deeds to help him in the course of his duty to determine the value of the land acquired.

APPEAL against the decree of the Court of the Subordinate Judge of Rajahmundry in Original Petition No. 4 of 1927.

P. Somasundaram for appellant.

Government Pleader (P. Venkataramana Rao) for respondent.

JUDGMENT.

BEASLEY, C.J.—The appellant was served with a BEASLEY, C.J. notice under section 9 of the Land Acquisition Act

* Appeal No. 253 of 1928.

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(I of 1894), Exhibit A. The date upon which he was called upon to appear was the 21st September 1926. According to the Land Acquisition Officer, the appellant did not appear on the 21st September 1926. According to the appellant, he did appear, but appeared late, and the Land Acquisition Officer was angry with him, but nevertheless allowed him to make his claim orally at a later date, and allowed him to file two sale-deeds in respect of land close by the land under acquisition. On the 1st December the Land Acquisition Officer made his award, and in that award he commenced by stating, "The landowner did not turn up and make any claim in response to the notice issued under sections 9 and 10 of the Act. He, however, filed copies of two sale-deeds which give a rate of Rs. 2,400 and Rs. 2,450 an acre," and then he proceeded to deal with those sales, and show how those lands were distinguishable from the land comprised in the award, and he eventually valued the land under acquisition at Rs. 1,800 per acre, and awarded compensation accordingly with 15 per cent allowance extra under the Act. The appellant was dissatisfied with this award and requested the Land Acquisition Officer to refer the case to the Court. It was accordingly referred by him to the Subordinate Judge of Rajahmundry on the 27th January 1927. In that letter of reference, the Land Acquisition Officer stated that the landowner did not turn up on the date of hearing fixed for enquiry and hence the amount of compensation awarded need not be enhanced under section 25 (2) of the Act.

It is quite clear that, under section 25 (2) of the Act, if the applicant—the appellant in this case—has omitted without sufficient reason (to be allowed by the Judge) to make a claim, the amount awarded by the Court is in no case to exceed the amount awarded by

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the Collector; and therefore the point for consideration by the learned Subordinate Judge was whether the appellant had made any claim for compensation. It is argued here by Mr. Somasundaram, on behalf of the appellant, that the appellant did make a claim. First of all, he contends that the evidence of the appellant is to be accepted on this point, namely, that the Land Acquisition Officer gave him an adjournment and that he made a claim and supported it by the filing of these two sale-deeds already referred to. Admittedly, two sale-deeds were filed because they were considered by the Land Acquisition Officer and are dealt with by him in his award. But the Subordinate Judge, after hearing evidence on the point, has not accepted the appellant's evidence that he made any claim. He regards his evidence as most improbable.

This case can be considered in two views, viz., (1) that the appellant did not turn up on the 21st September or turned up too late, but nevertheless the Land Acquisition Officer said that he might bring forward his claim at a later date, and that the applicant made a claim for compensation, and as evidence of his claim produced these two sale-deeds, or (2) that, having failed to turn up on the 21st September, the Land Acquisition Officer, nevertheless, allowed him to file the two sale-deeds. In the former alternative, I am of the view that the provisions of section 9 (2) of the Act would have been complied with, because the claimant is not required necessarily to make his claim in writing so long as he makes a claim for compensation, and it is in the discretion of the Land Acquisition Officer to grant him an adjournment. Supposing he does not make a claim on the first day, the Land Acquisition Officer can, if he chooses, adjourn the hearing and allow him to make a claim, and in support of this view, we were

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referred to the decision of the Punjab Chief Court in *Secretary of State v. Sohan Lal*(1). In that case, the claimant did not put in a claim on the appointed date but subsequently put in a written claim and it was held by the Punjab Chief Court that that was a sufficient compliance with the Act. But in this case, there is no written claim at all and we merely have the evidence of the claimant himself that he made a claim and that evidence has not been accepted by the learned Subordinate Judge; and we see no reason for disagreeing with the view he has taken with regard to that evidence. The case therefore is this:—that the claimant made no claim at all. He did not appear on the appointed day and therefore under the Act the Land Acquisition Officer had to use the best judgment he could and make his award in the absence of any claim. The mere fact of his having considered the two sale-deeds does not justify the argument that he must be held to have treated the amounts therein as the valuation placed upon the land by the claimant. It was his duty to make use of all the information available. Having made such an award, it was not open to the Court to make any award in excess of the amount awarded by the Land Acquisition Officer. But we are asked to say that the filing of the sale-deeds amounted to making a claim for the amount which the sale-deeds show that the adjoining lands were sold for, namely, in the one case Rs. 2,400 and in the other Rs. 2,450 per acre, and it is contended that that is a sufficient compliance with the provisions of section 9 (2) which is as follows:—

“Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time

(1) (1918) 44 I.C., 883.

and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests, and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.”

In this case, the claimant was not required in the notice to make any statement in writing, but we are satisfied that he did not like to make any statement orally. He placed no specific value upon the land, he did not state the nature of his interest in the land, but merely contended himself with putting in the sale-deeds. Does that justify us in drawing the inference that the amount set out in the sale-deeds was the amount which he was claiming in respect of the land which was under acquisition? I am of the opinion that it is not open to us to do that, because section 25 (1) says:

“When the applicant has made a claim to compensation pursuant to any notice given under section 9, the amount awarded to him by the Court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under section 11.”

The claimant has got to claim an amount. I am satisfied from a reading of that section and the other sections that a specific amount has got to be claimed. In these cases it is common for claimants in support of their claims to put in sale-deeds, many in number and varying greatly in the amount of the purchase price. If no claim for a specific amount is made, what amount is the Court to infer is claimed by the claimant? It may be the top purchase price or it may be the lowest purchase price or it may be the average purchase price; but no specific amount having been claimed, if this contention is right, it would be open to a claimant, after an

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award has been made by the Land Acquisition Officer or by the Collector, to go to the Court and say: "The amount awarded is less than the amount which I really claimed. It is quite true that the evidence shows that other lands were sold for certain amounts, but my real claim was for more than those amounts and I am entitled to an enhancement of the award made by the Land Acquisition Officer." In my view, that contention is unsound. What the Act does require is that there should be a specific claim, namely, a claim which states in rupees the value the claimant places upon his property; and there has been no such claim here and, in my view, the provisions of section 9 (2) of the Act have not been complied with. This was the only point of importance which the learned Subordinate Judge had to consider and, disbelieving the evidence of the claimant, he came to the conclusion that no claim had been made and that therefore it was not open to him to consider any enhancement of the award made by the Land Acquisition Officer. I agree with him in his findings both on the facts and with regard to the law. The appeal must therefore be dismissed with costs.

CURGENVEN,
J.

CURGENVEN, J.—I agree with my Lord and have little further to add except to point out that the first "point for determination" framed by the learned Subordinate Judge, upon which this appeal has been preferred, does not really set out the scope of the case as it has been presented before us. The terms of that "point" were whether the appellant appeared before the Labour Officer on the date fixed in the notice served on him and, if not, whether he had sufficient reasons for the omission. I should preferably have so framed it as to refer expressly to the terms of section 25 (2) of the Act, namely, whether the appellant omitted to make a claim for compensation pursuant to

any notice given under section 9, and if so, whether he had sufficient reason for the omission. The question for our determination, as my Lord has said, is whether what the appellant did amounted to making a claim. There is certainly no evidence that he made any claim on the 21st September. As regards what happened on the 18th November when he filed the two sale-deeds, he himself has stated in cross-examination that he filed a statement along with them. But even so, he does not claim that the statement comprised a precise claim to an amount of compensation, and his allegation is contradicted by the evidence of the Revenue Inspector. We must take it accordingly that either the mere filing of the sale-deeds constituted an implied claim or that no claim at all was made. It seems clear to me that, according to the terms of section 25 (1), a claim must embody a precise amount claimed, because that sub-section provides that the amount awarded may not exceed the amount so claimed. It may very well be, as decided in *Secretary of State v. Sohan Lal*(1), that the mere circumstance that the claim was not made upon the date fixed in the notice does not deprive the Collector of jurisdiction to entertain it. Every Court and every officer exercising quasi-judicial functions has, I think, an inherent power to grant an adjournment. The case more apposite to the present one is *Orient Bank of India v. Secretary of State*(2), which dealt with what was contended to be a claim but which was not in fact a legally sufficient claim, preferred by the Bank in a land acquisition case. There too, a sale-deed was filed and it was actually a sale-deed which included the property acquired. I think therefore that it is an untenable position to take up here that a claim in accordance with the terms of section 9 (2) was put in, nor am I prepared to say that, in accepting

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(1) (1918) 44 I.C., 883.

(2) (1926) I.L.R., 7 Lah., 416.

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the sale-deeds and in appreciating the evidence which they afforded, the Collector waived the necessity for such a claim, whether or not he had jurisdiction to do such a thing. Under section 11 of the Act, he is to enquire into the objections, if any, and make his award of the compensation which, in his opinion, should be allowed. There is never any question of such proceedings going by default. He must, to the best of his discretion, find out the true value of the land and I can see no objection to his using any material, even when it may be supplied by the applicant, without giving rise to the implication that he has recognized that a claim as required by the Act has been preferred. I agree accordingly that the appeal should be dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Curgenvven.

1930,
January 22.

KANDUNNI NAIR (FIRST DEFENDANT), APPELLANT,

v.

ITTUNNI RAMAN NAIR AND EIGHT OTHERS (PLAINTIFF AND
OTHER DEFENDANTS), RESPONDENTS.*

*Secs. 5, 7 (iv) (b) and (v) and Sch. II, article 17 (vi)
Court-fees Act (VII of 1870)—No decision by Taxing
Officer under sec. 5, on sufficiency of court-fee on appeal—
Jurisdiction of Court to decide sufficiency, on hearing appeal—
Suit for possession alleging adverse possession by defend-
ant—Court-fee on suit and appeal—Court-fee on unascer-
tained mesne profits, if payable on appeal.*

If there has been no decision of the Taxing Officer under section 5 of the Court-fees Act, it is open to the respondent to

* Appeal No. 453 of 1928.

object at the hearing of the appeal as to the sufficiency of Court-fee paid on the appeal. *Kasturi Chetti v. Deputy Collector, Bellary*, (1898) I.L.R., 21 Mad., 269, followed. But if there is such a decision, the respondent cannot raise any such objection, though he had no opportunity of urging his objection before the officer. *Ranga Pai v. Baba*, (1897) I.L.R., 20 Mad., 398, followed.

Except in cases where a plaintiff alleges in the plaint that he is in actual or constructive possession of joint properties, as in suits for partition between members of a joint Hindu family or between tenants in common, in all other cases, where a plaintiff sues for possession either of whole or of part, alleging adverse possession by the defendant, he must pay Court-fee as for possession under section 7 (v) of the Court-fees Act.

It is only if the amount of mesne profits had been ascertained and decreed, Court-fee on appeal is payable thereon: but where the decision was only that the defendant was liable to pay mesne profits, leaving the amount thereof to be determined in execution, no Court-fee is payable in appeal on the profits.

APPEAL against the decree of the Court of the Subordinate Judge of Ottapalam in Original Suit No. 32 of 1925.

K. P. Krishna Menon for plaintiff-respondent raised a preliminary objection that the Court-fee paid on appeal was insufficient. There has been no decision of the Taxing Officer on this question, and hence this question can be raised now; *Kasturi Chetti v. Deputy Collector, Bellary*(1). The plaint states that the suit properties were originally acquired by the deceased, that on his death they lapsed to the tarwad, but that the defendants were in adverse possession, and prayed for division and possession; hence, plaintiff paid Court-fee as in a suit for possession. The decree having been in favour of the plaintiff for possession, the defendant must pay Court-fee on the appeal as for possession under section 7 (v) and not as in a case where a member of a joint Hindu family or a tenant-in-common who is in actual or constructive possession of the joint properties would sue for division of his share; *Rangiah Chetty v. Subramania Chetty*(2), *Gill v. Varadaraghavayya*(3), *Ramakrishna*

(1) (1898) I.L.R., 21 Mad., 269.

(2) (1910) 21 M.L.J., 21 (F.R.).

(3) (1910) I.L.R., 43 Mad., 396.

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RAMAN NAIR, *Iyer v. Muthuswamy Iyer*(1) and *Govindan Nair v. Sankaran Nair*(2). Moreover, the appellant must pay Court-fees on the mesne profits which have been decreed to the plaintiff at the rate claimed by the plaintiff; *In re Punya Nahako*(3).

P. Govinda Menon for defendant-appellant.—The respondent cannot now contend that the Court-fee paid is insufficient as the same has been approved by the office; *Ranga Pai v. Baba*(4), *Bhubaneswar Trigunait, In re*(5). The plaint is only for partition of properties alleged to belong in common to all the members of the tarwad on the ground that they lapsed to the tarwad as a whole; see *Govindan Nair v. Sankaran Nair*(2). The suit and appeal fall under section 7 (iv) (b) or article 17 (vi). The decisions quoted by the respondent himself are in my favour; see also *Pudammah v. Themana Ammah*(6). I need not pay Court-fee on mesne profits for two reasons: (a) mesne profits stand or fall with possession; hence if the decision is set aside no question of mesne profits will arise, (b) they have not yet been ascertained; only my liability to pay them has been adjudged; *Ramgulam Sahu v. Chintamon Singh*(7) and *Jagdip Sahay v. Khajuri Sahu*(8). The amount of mesne profits not having been ascertained, it is not possible to value them; schedule II, article 17 (vi) applies.

K. P. Krishna Menon in reply, quoted *Chowkaran Kunhi Pocker v. Chowkaran Malikaimal Valia Bappotty*(9).

JUDGMENT.

The first defendant is the appellant. He is a junior member of a tarwad of which the plaintiff is the manager appointed under a karar. Jointly with a younger brother, the first defendant acquired a certain property, and the younger brother subsequently died. The plaintiff brought the suit as manager of the tarwad for partition and recovery of the younger brother's half-share of the property, on the ground that it had passed to the tarwad by inheritance. There was also a prayer for

(1) (1924) 86 I.O., 627.

(3) (1926) I.L.R., 50 Mad., 488.

(5) (1925) I.L.R., 52 Cal., 871.

(7) (1925) I.L.R., 5 Pat., 361 (F.B.).

(2) (1909) I.L.R., 32 Mad., 351.

(4) (1897) I.L.R., 20 Mad., 398.

(6) (1894) I.L.R., 17 Mad., 232.

(8) (1928) 108 I.O., 801.

(9) (1919) 37 M.L.J., 544.

mesne profits from the date of the younger brother's death. In his written statement, the first defendant alleged that the younger brother's name was only nominally added in the assignment deed and that in fact the whole property was acquired by himself alone. The learned Subordinate Judge has disbelieved this allegation and has given a preliminary decree for partition, which directs that the amount of mesne profits due to the tarwad shall be determined at the time of passing the final decree. The judgment decides that only three years mesne profits are awardable, but this decision is not carried into the decree.

The plaintiff, as respondent, raises the preliminary question of the sufficiency of the Court-fee paid on the memorandum of appeal. The appellant disputes his right to raise an objection of this character, and refers to the procedure laid down in Chapter II of the Court-fees Act, so far as it applies to a High Court. Section 4 provides that Court-fees must be paid before any of the documents specified in the first or second schedules of the Act are filed. Section 5 states that when a difference arises between the officer whose duty it is to scrutinize the sufficiency of the Court-fee and a suitor or attorney, the question shall be referred to the Taxing Officer, whose decision shall be final, unless he considers the question of sufficient importance to refer it to the Chief Justice. In the Madras High Court, the officer who has to ensure that the Court-fee has been duly paid is the Deputy Registrar, Appellate Side, and the Taxing Officer is the Master. It is conceded that in the present case the procedure permitted by these sections was not availed of. Not only so, but it is very difficult to see what opportunity a respondent would have of setting it in operation. The case for which section 5 ordinarily provides is when the officer who has to admit

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the appeal finds the Court-fee paid insufficient and calls upon the appellant to pay the deficit. If then the appellant contests the correctness of the requisition, the officer makes a reference to the Taxing Officer. In such a case, no doubt, the Taxing Officer's decision is final; and even though the respondent was unrepresented when the correct Court-fee was finally fixed, it may well be, as appears to have been decided in *Ranga Pai v. Baba*(1), that he cannot raise the question at the hearing of the appeal. We have been referred to no authority however for the position that, where no recourse has been had to section 5, he is still debarred from so doing. In *Bhubaneswar Trigunait, In re*(2), all that was decided was that, where in a probate case a Taxing Officer's certificate as to the sufficiency of the duty is produced, although it may have been given after no such difference as is contemplated in section 5, it is still final. This part of that decision was followed by one of us in *Swaminatha Ayyar v. Guruswami Mudaliar*(3). There is, however, a direct decision in *Kasturi Chetti v. Deputy Collector, Bellary*(4), that where there has been no decision by the Taxing Officer under section 5, the Court is not precluded from taking notice at the hearing, of the deficiency in the stamp duty.

"Otherwise,"

the learned Judges say,

"there would be no remedy for the most obvious error, or even for a deliberate trick to defraud the stamp revenue, unless detected by the routine establishment in the first instance, and before the admission of the appeal or the reception of the paper, as the case might be."

We think that this is the correct view and following it, we have allowed the respondent to address us on the question of Court-fee.

(1) (1897) I.L.R., 20 Mad., 398. (2) (1925) I.L.R., 52 Calc., 871.
(3) (1927) 53 M.L.J., 457. (4) (1898) I.L.R., 21 Mad., 289.

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The appellant has placed his own valuation on the appeal, valuing the half-share at Rs. 75 and one year's mesne profits at Rs. 350, and endeavours to justify this course by showing that the suit falls either under section 7 (iv) (b) as a suit to enforce the right to share in the property on the ground that it is joint family property, or alternatively under Schedule II, article 17 (vi), which provides for a suit or appeal where it is not possible to estimate at a money value the subject-matter in dispute, and which is not otherwise provided for by the Act. The respondent, on the other hand, urges that the suit is one for possession as provided for by section 7 (v). It appears to us that the question must depend upon whether the plaintiff, at the time he brought the suit, was in or out of possession, actual or constructive, of the suit property. If he was in constructive possession, the suit would resemble in nature one filed by a coparcener in joint possession of the family property for partition, and it has been held by a Full Bench of this Court in *Rangiah Chetty v. Subrahmania Chetty*(1) that such a suit is governed by section 7, clause (iv) (b) of the Act, on the theory that what the plaintiff really asks for is the conversion of his joint possession of the whole, whether actual or constructive, into separate possession of his share. Similarly, as has been held in *Gill v. Varadaraghavayya*(2), a suit by a co-tenant for partition is governed by Schedule II, article 17 (vi), because it would not fall under section 7 (iv) (b), the property not being joint family property. Mr. Govinda Menon for the appellant further relies upon *Pudammah v. Themana Ammah*(3), which related to an invalid kanom of tarwad property granted by the karnavathi to two junior members. It was found that although there had been attornment of the tarwad tenants to the kanomdars,

(1) (1910) 21 M.L.J., 21. (2) (1919) I.L.R., 43 Mad., 396.
(3) (1894) I.L.R., 17 Mad., 232.

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possession really remained with the karnavathi, and consequently it was enough for the plaintiff, who sued as a junior member of the tarwad to upset this arrangement, to ask for a declaration that the kanom was invalid. If, however, the kanom had been granted to a stranger who was in possession, the learned Judges add, then possession also must be sought as a relief consequent upon the declaration. This decision has been considered and explained in *Chowarkaran Kunhi Pocker v. Chowkaran Malikaimal Valia Bappotty*(1), where the circumstances were closely similar,

"There are no doubt observations in that judgment" the learned Judges say,

"about unity of possession and about the possession of the tenant being the possession of the tarwad, etc. But they must be read with the facts of the case and do not support the contention that under no circumstances can a junior member of the tarwad sue for possession if the tarwad had parted with possession."

They further remark,

"The character in which an alienee anandravan holds possession will depend upon how far he ousts the tarwad and not upon whether he is a member of it or not. If the tarwad is ousted, then the possession of the ouster, whether he be a member of it or not, is as injurious to the tarwad as ouster by a stranger and the member in possession must be sued, as if he was a stranger."

The same principles have been followed by WALLACE, J., in the case of a Hindu co-parcenary in *Ramakrishna Iyer v. Muthuswamy Iyer*(2). It is accordingly necessary here to decide upon the plaint, the terms of which must determine the nature of the suit and the amount of Court-fee to be paid, whether it was incumbent or not upon the plaintiff to sue for possession. There is an averment in paragraph 4 that after the death of the younger brother, the first defendant had been collecting and appropriating the whole of the income of the

(1) (1919) 37 M.L.J., 544.

(2) (1924) 86 I.C., 627.

property; in paragraph 7, that although he had been requisitioned that the property should be divided he had refused to comply through selfish motives and with a view to defraud the tarwad; and in paragraph 8, that the tenants were in possession of the property. The prayer is accordingly for a decree directing the division of the property into two equal shares and that one of these shares be caused to be surrendered and given delivery of to the plaintiff. It appears to us that these allegations clearly amount to saying that the first defendant is holding the half-share of the property which since his younger brother's death belongs to the tarwad, not permissively from the tarwad or in any other way constructively, but wholly adversely. The property was in origin self-acquired, and there appears to be no ground for the view that the tarwad at any time had possession in any form. The plaintiff was assessed to Court-fee on the footing that the suit was one for possession and we consider that this is clearly right and that the appellant must pay a fee upon his memorandum accordingly. So far then as the prayer for possession is concerned, the fee will be assessed as regards items 1 to 3 which are assessed lands, upon one-half of ten times the assessment, or Rs. 150, under clause (a) of section 7 (v); on the remaining items, Nos. 4 to 13 which are sarvamanyam or revenue free, upon one-half of 15 times the mesne profits, or Rs. 4,387-8-0 under clause (c) of the same section. Therefore, on this part of the memorandum, the fee will be payable on Rs. 4,537-8-0.

There remains the question of mesne profits. In his judgment, the learned Subordinate Judge has found that the claim to mesne profits prior to three years before suit was barred, although he does not in express terms award mesne profits for this period. He adds that the rate will be determined at the stage of the

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final decree. The preliminary decree embodies this latter direction but makes no reference to the term of three years. There is accordingly no sum certain fixed in this respect upon which the Court-fee can be paid by the appellant. The alternatives seem to be either that he should pay no fee at all or, as was held, we think, *obiter*, in *In re Punya Nahako*(1), that he should pay it on the valuation given in the plaint. With much respect to the learned Judges who expressed that view, we can find no sufficient justification for adopting this latter course. The decree, which we must follow in preference to the judgment, contains no more than a direction for the determination of the mesne profits and accordingly it is difficult to apply the terms of Schedule I of the Court-fees Act, where it is said that the fee is to be payable on the amount or value of the subject-matter in dispute. Mr. Govinda Menon for the appellant asks us to adopt the position that in the case of all decrees for possession and mesne profits, it is only necessary to appeal against that part of the decree which awards possession, because if it be set aside the award of mesne profits must necessarily go with it. We need not go so far as to discuss the tenability of this view. Where, however, a preliminary decree only makes provision for the subsequent determination of the mesne profits, we think that the apt occasion for requiring a defendant to pay a Court-fee in this respect would be, if and when the profits have been determined by a final decree. To require him to pay now a Court-fee upon the profits as estimated in the plaint, where there is as yet no question as to their amount but only as to the right of the plaintiff to receive them, appears not only difficult to justify on principle but also to lead to the difficulty that if the defendant subsequently has

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to appeal against the amount of mesne profits awarded by the final decree, he would pay Court-fee twice over. We do not think therefore that at the present stage the fee payable should comprise this item.

We give the appellant three months to pay the Court-fee as settled above. The appeal will be posted for hearing immediately the Court-fee is paid. In default of payment, the appeal will stand dismissed with costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

NANCHAPPA GOUNDAN AND OTHERS (DEFENDANTS),
APPELLANTS,

1929,
September 4.

v.

VATASARI ITTICHATHARA MANNADIAR (SECOND
PLAINTIFF), RESPONDENTS.*

The Interest Act (XXXII of 1839)—Lease-deed—Provision for bringing waste lands under cultivation—Agreement to pay rent at a certain rate on area of lands brought under cultivation—Rent payable from the year in which Government levied revenue on such lands brought under cultivation—No agreement in lease to pay interest on arrears of rent—Suit for arrears of rent with interest thereon—Interest, whether payable under Interest Act, or on general equitable grounds, or as damages—Cases when interest was payable prior to the Indian Act—English Law under 3 and 4 William 4, c. 42—Effect of proviso in the Interest Act (XXXII of 1839)—Interest, whether payable as damages, sec. 73, ill. (n) of the Indian Contract Act.

In a lease-deed, under which waste lands were to be gradually brought under cultivation, the lessee agreed to pay

* Letters Patent Appeals Nos. 255 to 258 of 1925.

(1) (1928) I.L.R., 50 Mad., 488.

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rent at a certain rate on the extent of the land reclaimed, from the year in which the Government revenue was assessed on such lands; there was no provision in the deed for payment of interest on the arrears of rent. On a suit being instituted by the lessor to recover arrears of rent, together with interest thereon,

Held, (1) that interest was not payable on the rent under the Interest Act (XXXII of 1839), as the rent payable under the lease-deed was not "a sum certain," and the time for its payment was not "a certain time," within the terms of the Act; *Maine and New Brunswick Electric Power Co. v. Hart*, [1929] A.C., 631 (J.C.) relied on;

(2) that, interest could not be awarded by the Court on general equitable grounds, as the proviso to section 1 of the Interest Act only enables the Court to award interest in all cases where it was payable in law before the Act, and the Courts in India, following the practice of the English Courts, did not, prior to the Indian Act, award interest in the case of ordinary debts but did so only in certain special cases; *Main and New Brunswick Electric Power Co. v. Hart*, [1929] A.C., 631 (J.C.), and *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*, [1893] A.C., 429, applied; and

(3) that interest could not be granted by way of damages by virtue of section 73 of the Indian Contract Act, read with illustration (n) to that section; *Kamalammal v. Peeru Meera Levvai Rowthen* (1897) I.L.R., 20 Mad., 481, followed; but

(4) where the rent was made a charge on land, interest was awardable on the arrears thereof, though there was no provision for interest in the deed creating the charge; *Drax, In re*; *Savile v. Drax*, [1903] 1 Ch. D., 781, referred to.

APPEALS under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., in Second Appeals Nos. 137 and 138 of 1922, and 1411 and 1422 of 1921, preferred against the decrees of the District Court of South Malabar in Appeal Suit Nos. 866, 846, 858 and 859 of 1920, preferred against the decrees of the District Munsif's Court of Palghat in Original Suits Nos. 65 of 1915 and 60, 61 and 63 of 1918 respectively.

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These are Letters Patent Appeals from the judgment of PHILLIPS, J., in certain second appeals. The suits were to recover arrears of rent due on lease-deeds, together with interest on such arrears. The material facts appear from the judgments. The District Judge held that interest was not payable on arrears of rent either under the Interest Act (XXXII of 1839) or as damages. In the second appeals, PHILLIPS, J., held that interest was not payable under the Interest Act but could be awarded on general equitable grounds. In some of the second appeals the rents were charged on immovable property. The defendants preferred these appeals under clause 15 of the Letters Patent against the judgments of PHILLIPS, J.

B. Sitarama Rao for appellants.—The defendants, who were lessees, appeal against the judgment of PHILLIPS, J., awarding interest on arrears of rent. There is no agreement to pay interest in the lease-deed. The Interest Act (XXXII of 1839) does not apply, as the amount of rent and the date of payment are not certain within the provisions of the Act. PHILLIPS, J., held that interest was not payable under the Act, but awarded interest on general equitable grounds. The amount of rent, was uncertain, as the amount varied with the extent of land cultivated by the lessee, and the time was uncertain, as it depended on the event of assessment by the Government on such lands. Apart from the Contract Act and the Interest Act, interest is not payable on general equitable grounds. See *Raja of Pittapur v. Ballapragada Pallamraju*(1), *Kamalammal v. Peeru Meera Levvai Rowthen*(2), *Nanu Nair v. Ashta Moorthi Nambudripad*(3), *Ganesh Bakhsh v. Harihar Bakhsh*(4), *Muhammad Mehndi Ali Khan v. Muhammad Yasin Khan*(5), *Kalyan Das v. Maqbul Ahmad*(6) and *Subramania Aiyar v. Subramania Aiyar*(7).

The cases that decide the other way are the following:—*Abdul Saffur Rowther v. Hamida Bivi Ammal*(8), *Miller v.*

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| (1) (1920) 40 M.L.J., 18. | (2) (1897) I.L.R., 20 Mad., 481. |
| (3) (1915) 29 M.L.J., 773. | (4) (1904) I.L.R., 26 All., 299 (P.C.). |
| (5) (1893) I.L.R., 26 Cal., 523 (P.C.). | (6) (1918) I.L.R., 40 All., 497 (P.C.). |
| (7) (1908) I.L.R., 31 Mad., 250. | (8) (1919) I.L.R., 42 Mad., 681. |

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Barlow(1). The proviso to the Indian Interest Act says that interest will be payable apart from the Act only in those cases where it was payable by law before passing of the Act. Interest was payable under the English Law, only in certain special cases under the rules in equity. In all cases of contract, in England and in India, no interest was payable apart from the Interest Act and other statutory provisions. Apart from contract and statutory provisions, interest was payable in equity, in cases of fraud, of restitution of property taken by officers of Court or by judicial process, or in cases of special relationship of the parties, apart from the obligation of debtor and creditor, as, e.g., mortgagor and mortgagee, trustee and *cestui que trust*; see also the statutory provisions under sections 23 (f), 88 (f) and section 95 of the Indian Trusts Act. In contracts to pay money, interest was payable only by (1) agreement, (2) usage, and (3) statutory provisions, but not in other cases. The case of *Rodger v. The Comptoir D'Escompte De Paris*(2) is distinguishable as a case of restitution. At Common Law, no interest was awardable on debts unless there was a contract to pay interest or a statutory provision. The Courts of Equity awarded interest on equitable grounds, only in certain special cases: see *London, Chatham and Dover Railway Company v. South Eastern Railway Company*(3) and *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(4). The English Act (3 and 4 William 4, c. 42) and the Indian Interest Act, 1839, provided for payment of interest on debts only in certain cases; in other cases, even after the Acts, interest cannot be awarded in those cases where it could not be given under the practice of the Court of Equity.

The question is whether the Courts of Equity would have given interest in a case like this. The English decisions show that the Courts of Equity would not have awarded interest in this case: see *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(4), *Maine and New Brunswick Electric Power Co. v. Hart*(5); see also Halsbury's Laws of England, Vol. XXI, page 37.

T. R. Venkatarama Sastri for respondent.—The Interest Act, 1839, is applicable to this case. The amount of rent and

(1) (1871) L.R., 3 P.C., 733.

(2) [1892] 1 Ch., 120.

(2) (1871) L.R., 3 P.C., 465.

(4) [1893] A.C., 429.

(5) [1929] A.C., 631 (J.C.).

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the time for payment are certain within the terms of the Act. The amount is payable when Government assessed the lands: both the amount and time of payment are certain. See *In re Horner, Fooks v. Horner*(1), *London, Chatham and Dover Railway Company v. South Eastern Railway Company*(2), *Surja Narain v. Pratap Narain*(3), and *Juggomohun Ghose v. Manickchand*(4). The debtor knows from what time the obligation is enforceable; the mode of calculation and the contingency on which the obligation arises are fixed by the contract.

Interest is awardable as damages under section 73, illustration (n) of the Indian Contract Act. Even if the Interest Act applies, the provisions as to damages contained in section 73, illustration (n) of the Contract Act will also apply. Further, Interest Act is inapplicable to this contract, as it is one for payment of rent in paddy and not in money; hence, interest by way of damages for breach of contract can be given under section 73, illustration (n) of the Contract Act.

The decision in 42 Mad., 657 governs this case; see also the decision of the Privy Council in *Hamira Bibi v. Zubaida Bibi*(5), *Hurroppersaud Roy v. Shama Persaud Roy*(6), *Arunachalam Chettiar v. Raja Rajeswara Sethupathi*(7), *Canadian Pacific Railway v. Toronto Corporation*(8), *Khetra Mohan Poddar v. Nishi Kumar Saha*(9), *Rodger v. The Comptoir D'Escompte De Paris*(10) and *Miller v. Barlow*(11).

B. Sitarama Rao in reply.—The decision in [1905] A.C., 33 (P.C.), is distinguishable, as it is a case of specific performance falling within the exclusive jurisdiction of the Courts of Equity. The case in 3 P.C., 455 is a case of restitution. The Interest Act is applicable even to contracts in which rent is payable in paddy; see *Govindan Nair v. Cheral*(12).

JUDGMENT.

VENKATASUBBA RAO, J.—This is a Letters Patent Appeal from the judgment of Mr. Justice PHILLIPS. The question raised is whether the defendants are liable to

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(1) [1896] 2 Ch. D., 188.

(3) (1899) I.L.R., 26 Cal., 955.

(5) (1916) I.L.R., 38 All., 581 (P.C.).

(7) (1921) 42 M.L.J., 74.

(9) (1917) 22 C.W.N., 488.

(11) (1871) L.R., 3 P.C., 733.

(2) [1892] 1 Ch., 120 at 144.

(4) (1859) 7 M.I.A., 203.

(6) (1878) I.L.R., 3 Cal., 654 (P.C.).

(8) [1905] A.C., 33.

(10) (1871) L.R., 3 P.C., 465.

(12) (1913) I.L.R., 38 Mad., 464.

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pay interest on the rent due by them under a written lease. The learned Judge has held that the Interest Act (XXXII of 1839) is not applicable but that interest is nevertheless payable on general equitable grounds. The case has been argued fully on both sides and numerous authorities have been cited. To my mind, the case presents no difficulty, although the state of the law is not satisfactory, and I shall briefly deal with the points raised without burdening my judgment with needless citation of cases.

The effect of the lease deed is thus stated in the judgment of Mr. Justice PHILLIPS:

"It is clear from the terms of the document that the payment of rent to the plaintiff is to commence as soon as the lands are assessed. The lease is an improvement lease under which the lands are to be gradually brought under cultivation and until they are so brought under cultivation nothing would be payable either to the Government or to the jenmi."

Again, the learned Judge refers to a clause in the lease,

"Under which the tenant agrees to pay, from the year in which Government revenue is paid, rent at the rate of three-fourth of a para for one para seed area".

It is not disputed that these passages correctly represent the effect of the document. The question then arises, does the Interest Act apply?

I leave out the words which are not relevant for the present purpose and reproduce that part of the Act with which we are concerned.

"It is, therefore, hereby enacted that, upon all debts or sums certain payable at a certain time, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable if such debts or sums be payable by virtue of some written instrument at a certain time, provided that interest shall be payable in all cases in which it is now payable by law."

The question then is, *is the sum certain and is the time certain?* Mr. Venkatarama Sastri has contended that under the instrument, both the sum and the time should in the eye of the law be deemed to be certain. This contention cannot prevail in view of the authorities by which we are bound. In fact, the argument of the learned Advocate is precisely that which was adopted in the case of *Duncombe v. Brighton Club Co.*(1). A different view had been taken by the Exchequer Chamber in the earlier case of *Merchant Shipping Co. v. Armitage*(2). In the last-mentioned case, the Court came to the conclusion,

"That where a sum of money was payable under a charter-party after the right delivery of the cargo, in cash two months after the date of the ship's report inwards at the custom house, although the time was ascertained and became settled by the event, the money was not payable at a 'time certain' within the meaning of the statute."

In the former case, the majority of the Court came to the conclusion

"that although you had not the sum or the time actually mentioned in the written instrument, yet if the written instrument contained provisions which on the happening of an event rendered the time or the sum certain, that was sufficient within the meaning of the statute, and interest could be allowed."

It is in the words of Lord HERSCHELL that I have stated above the effect of the two decisions to which I have referred; see *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(3). Having quoted these cases, the learned Lord, though disposed to treat the *Armitage* case as of greater weight, refuses to express any decided opinion as to which of these views is the correct one. Lord MORRIS feels no doubt that the law is correctly stated in the *Armitage* case

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(1) (1875) L.R., 10 Q.B., 371.

(2) (1873) L.R., 9 Q.B., 99.

(3) [1893] A.C., 429 at 435.

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(see page 432). But Lord SHAND observes that the *Duncombe* case appeals more forcibly to his mind than the other case. We are not concerned with this conflict, for the Indian Courts are bound by the law settled beyond doubt, by two Privy Council cases, one of them being a very recent one. In *Maine and New Brunswick Electric Power Co. v. Hart*(1) (a case, the facts of which closely resemble the facts before us), the following passage contains a very clear statement of the law:—

“It is further to be observed that in *Juggomohun Ghose v. Manickchand*(2) their Lordships’ Board held under an Indian Statute (Act XXXII of 1839) identical in terms with the relevant section of Lord Tenterden’s Act, that a sum certain is not payable by the written instrument at a time certain if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when those events happen and the time for the happening of those events, if they ever do happen, may be indefinitely postponed.”

Judged by this test, in the present case, neither the sum nor the time is certain.

In *re Horner, Fooks v. Horner*(3) is not inconsistent with this principle, for the contingency there mentioned was the death of a certain person and

“death is not a contingent event—It is a certainty which must happen to all.”

The sum was there payable within six calendar months after the testator’s decease.

“A covenant to pay within six calendar months after death, is a covenant to pay on the last day of the six months.”

This case does not, therefore, help Mr. Venkatarama Sastri.

It is difficult to reconcile *Surja Narain v. Pratab Narain*(4) with the decision of the Privy Council. In

(1) [1929] A.C., 681 (J.C.).
(3) [1896] 2 Ch. D., 189.

(2) (1859) 7 M.L.A., 263.
(4) (1899) I.L.R., 26 Cal., 955.

that case a specified sum was agreed to be paid in the event of counsel being engaged. The learned Judges treated the time of payment as being certain, a view opposed to that taken in the two decisions of the Judicial Committee.

I agree with Mr. Justice PHILLIPS that a case has not arisen which gives the Court jurisdiction to allow interest under the Act.

The question then arises, are the defendants liable for interest independently of the Act? In other words, is interest payable under the proviso above quoted, which says “interest shall be payable in all cases in which it is now payable by law?” Before Lord Tenterden’s Act, interest was payable at common law and in equity in certain cases. The object of that Act was to make the law more liberal by statute in regard to the granting of interest [see the judgment of Lord WATSON in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(1)]. To carry out this object, a proviso was added, leaving untouched those cases in which there was already a right to interest when the Act was passed. The Indian Act, as its preamble shows, reproduces for this country the terms of Lord Tenterden’s Act. What then are the cases which are saved by the proviso? LINDLEY, L.J., in his judgment in *London, Chatham and Dover Railway Company v. South Eastern Railway Company*(2) attempts to state in what cases, before the Act, interest was granted first at common law and secondly in equity. The judgment does not, of course, profess to be exhaustive on the point, but the leading considerations are set forth in some detail. The learned Lord Justice refers to cases where a plaintiff for asserting his legal rights had to invoke the

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(1) [1893] A.C., 429 at 442.

(2) [1892] 1 Ch., 120.

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powers of the *Court of Chancery* and points out that that Court generally followed *the law in dealing with legal claims*. Such cases are those dealt with under the concurrent jurisdiction of the Court of Equity. Then the Lord Justice refers to purely equitable rights which fell within the exclusive jurisdiction of the Court. He thus mentions instances where interest was awarded before the statute at common law as well as in equity. Though, as I have just stated, the Court of Equity followed the law in dealing purely with legal claims, sometimes in order to prevent injustice, it applied to such claims principles such as,

"A Court of Equity will treat a wrong-doer as having done that which he ought to have done."

This then is the effect of the judgment of LINDLEY, L.J. Bearing this in mind, let us examine the contentions now advanced. When it is sought to bring a case within the proviso, the question that really arises is, would interest have been granted in such a case before the Act either at law or in equity? It is unnecessary to make a complete list of instances where interest was so awarded. It is sufficient to point out that before the Act, in the case of ordinary debts, interest was not payable at common law unless there was an agreement express or it could be implied as in the case of usage (see the judgment of LINDLEY, L.J., at page 140 and the judgment of BOWEN, L.J., at page 146). Vague notions as to what are equitable principles have led to some confusion; a rule may vaguely be just, but it is not necessarily a principle of equity. This distinction is most clearly brought out in the judgment of Lord HERSCHELL in the House of Lords in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(1), already cited. The

(1) [1898] A.C., 429.

Courts at one time granted interest in cases of debts on general grounds of justice; for example, in one case Lord MANSFIELD held that a debt carried interest where there was "long delay under vexatious and oppressive circumstances." In another case, BEST, C.J., observed that the Jury might give interest

"In the shape of damages for the unjust detention of the money."

This view of the law was not approved in later cases and interest was refused in cases of debts on any such broad equitable grounds. It was with the object of relaxing this law by statute, that Lord Tenterden's Act was passed. But the new rights created under that Act were within very narrow limits,—too narrow indeed, as is pointed out by Lord HERSCHELL, for the purposes of justice. Lord SHAND similarly regrets that the law, as it stands, allows injustice to prevail.

I have now dealt with the principles that guide the Courts in England. Is the law of this country different? That would depend upon what the law was before the passing of the Interest Act. Cases, where before the Act interest was granted, are saved by the proviso in question. But there is no warrant for saying that the Courts awarded interest on debts on grounds such as were adverted to by Lord MANSFIELD and BEST, C.J. The subject is fully and clearly dealt with in the judgment of Sir JOHN WALLIS, C.J., in *Raja of Pittapur v. Battalpragada Pallamraju*(1). The Madras cases on which Mr. Justice PHILLIPS relies must, with all respect, be held to be wrong. The learned Judge also refers to *Miller v. Barlow*(2). That is not a case of a debt at all. But as it is strongly relied on by him, it requires a closer examination. That was an action for

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(1) (1920) 40 M.L.J., 18.

(2) (1871) L.R., 8 P.C., 733.

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money had and received. A firm was adjudicated insolvent and the Official Assignee impeached a certain transaction which the insolvent firm had with the plaintiff. He then obtained an order from the Insolvency Court directing the plaintiff to hand over to him certain goods and monies. They were accordingly handed over. In the action that was brought, the plaintiff complained that the order was wrongly made and prayed for a declaration of his rights in the aforesaid goods and money. The question was "Was the Official Assignee liable to pay interest?" The effect of the judgment in the suit was that the order of the Insolvency Court was wrongly made. The money having been retained in the Official Assignee's hand by virtue of an order which was subsequently reversed, their Lordships held that the plaintiff was entitled to interest. The principle underlying this decision is further elucidated by another judgment delivered in the same year by the Privy Council in *Rodger v. The Comptoir D'Escompte De Paris*(1). The question directly arose in that case, whether, on the reversal of a judgment, a party is entitled to get interest on the amount that had been recovered from him under that wrong judgment. It was held that he was. These cases give effect to definite and well-recognized rules of equity. They have never been treated as authorities, in English Courts, for the position that interest can be allowed on a debt, on what are termed general equitable grounds.

The Privy Council case of *Maine and New Brunswick Electric Power Co. v. Hart*(2) to which I have already referred is a decisive authority also on this point. The facts there, as I have said, are very similar to the facts of the present case. Their Lordships, after disposing of

the contention that interest was payable under the statute, further held:

"There is no place in the matter for the exercise of equitable jurisdiction and therefore no rule of equity in regard to interest can have any application."

I am therefore clearly of the opinion that, under the proviso, the plaintiffs cannot claim interest on what are known as general equitable grounds.

Lastly, interest is claimed on the ground that it may be granted by way of damages under section 73 of the Indian Contract Act. This contention again is one which has been repeatedly overruled. In the judgment of LINDLEY, L.J., in the Court of Appeal, already referred to, it is expressly laid down that damages cannot be granted for non-payment of debts. The question is directly raised by Lord HERSCHELL in the House of Lords—Can interest be awarded by way of damages on the ground of wrongful detention of the debt? The question was, after full discussion, answered in the negative. Section 73 is merely declaratory of the common law as to damages (see Pollock and Mulla's Commentary). If the English rule as to damages has not had the effect of superseding Lord Tenterden's Act in regard to interest on debts, why should it be assumed that section 73 of the Contract Act has produced just the contrary result? I am not prepared to hold that the Legislature, by adding illustration (n) to section 73, intended to depart from the law which must be treated as having been settled beyond doubt. The view I take is in conformity with several cases, of which *Kamatammal v. Peeru Meera Levvai Rowthen*(1) may be taken as typical. I cannot therefore uphold the contention of Mr. Venkatarama Sastri.

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(1) (1871) L.R., 3 P.O., 465.

(2) [1929] A.C., 631 (J.C.).

(1) (1897) I.L.B., 20 Mad., 481.

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In the result, the claim to interest is disallowed except as regards what is claimed in O.S. No 65 of 1915 (S.A. No. 137 of 1922). In that case a special contention is put forward that, the rent being charged on land, interest becomes payable. This is taken to be settled law. See *Drax, In re; Savile v. Drax*(1). COLLINS, M.R., thus observed :

"It seems to me to be well established on the authorities, and the result of those authorities does not indeed appear to be disputed, that a Court of equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge" (page 798).

Mr. Sitarama Rao has not contested this proposition. In O.S. No. 65 of 1915, the judgment of Mr. Justice PHILLIPS is affirmed and the appeal is dismissed with costs. In the other cases, the learned Judge's judgment is set aside and the Appeals are allowed with costs.

MADHAVAN
NAIR, J.

MADHAVAN NAIR, J.—The defendants are the appellants. They are lessees of the plaintiff holding lands under perpetual lease deeds, the terms of which in respect to material particulars are alike in all cases except in Letters Patent Appeal No. 255 of 1925 which will be referred to later. Under the lease deeds, waste lands were leased out on condition that rent should be paid on "reclamations" as they are made. The marupat of the lease in L.P.A. No. 258 of 1925, Exhibit A, may be taken as typical to show the terms under which the lessees held their lands. Its main terms so far as these are relevant for these Letters Patent Appeals are as follows :—

" . . . the remaining sthalams . . . shall be held and be held as saswatham (permanently) without surrendering the same for ever and enjoyed by me and my sons

(1) [1908] 1 Ch. D., 781.

and grandsons for ever and ever in hereditary succession, and a proportionate pattom (rent) at the rate of $\frac{1}{4}$ th of a para of paddy for one para of the Nadan seed, will be paid by me to you from the year in which the assessment is levied by the Government."

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The suits out of which these Letters Patent Appeals arise were instituted by the plaintiff for the recovery of arrears of rent together with "interest" on the arrears. The District Munsif gave decrees to the plaintiff for the arrears claimed and also for the "interest" on such arrears. On appeal the District Judge disallowed the "interest" on the ground that such interest was not claimable under the Interest Act (XXXII of 1839). In the Second Appeals filed by the plaintiff, PHILLIPS, J., though he agreed with the District Judge that the Interest Act did not apply to these cases, reversed his decisions and held that the plaintiff was entitled to claim interest "on equitable principles". The learned Judge relied mainly on *Miller v. Barlow*(1) and the decision in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(2) in support of his conclusion.

The short question for determination in these Letters Patent Appeals is whether the plaintiff is entitled to claim "interest" on the arrears of rent decreed to him. The respondent supports the judgment of PHILLIPS, J., not only on the ground of "equitable principles" on which he has based his decision but also on two additional grounds, namely, that interest can be claimed under the Interest Act and also under section 73 of the Indian Contract Act. The appellants argue that none of these grounds affords any justification for awarding "interest".

I shall first deal with the arguments based upon "equitable principles". To understand the operation

(1) (1871) L.R. 8 P.O., 733.

(2) (1919) I.L.R., 42 Mad., 661.

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of these principles in relation to the law awarding "interest" it is necessary to consider whether they were given effect to generally in all cases on grounds of equity and good conscience or whether their application was strictly limited to any special class of cases. At common law in England "interest" was not payable on debts unless by agreement or by mercantile usage, nor could damages be given for non-payment of such debts. The law in this respect was altered by 3 and 4 William 4, c. 42 (which corresponds to the Interest Act, XXXII of 1839). In *London, Chatham and Dover Railway Company v. South Eastern Railway Company*(1), the leading decision on the subject, the law was thus stated by LINDLEY, L.J. :

"As regards interest it was settled by *Higgins v. Sargent*(2), *Page v. Newman*(3), *Foster v. Weston*(4), that at common law interest was not payable on ordinary debts unless by agreement or by mercantile usage; nor could damages be given for non-payment of such debts. The law in this respect was altered by 3 and 4 William 4, c. 42" (page 140). . . . "Except as altered by the Act, the 3 and 4 William 4, c. 42, the old law as to interest remains the same" (page 142).

This decision was affirmed by the House of Lords in *London, Chatham and Dover Railway Co. v. South Eastern Railway Co.*(5). According to this decision, under the English Law "interest" is not payable on debts nor could damages be given except in three cases—

- (1) where there is an agreement to pay interest;
- (2) where it is payable under the mercantile usage; and
- (3) where it is payable under the statute.

To this may be added a fourth case:—Certain other actions in which also Courts of Common Law gave

interest by way of damages, as for example, for breach of contract to give a bill of exchange, which, if given, would carry interest (see the judgment of KAY, L.J., at page 151). Before the Judicature Act, some cases in connexion with debts, etc., where the question of "interest" was involved, ordinarily triable in Courts of Common Law, were tried in the Court of Chancery as the plaintiff's right in such cases could not be enforced at law owing to the defective legal machinery. "The Court of Chancery followed the law in dealing with legal claims." In cases of purely *equitable demands*, for instance, in suits against trustees who misapplied trust moneys and in suits for equitable waste, the Court of Chancery usually decreed interest (see the observations of Lord LINDLEY at page 142). The cases in which interest is payable by the *rules of equity* are thus described in Halsbury's Laws of England, Vol. XXI, page 40:—

(1) money obtained by fraud and retained by fraud can be recovered with interest;

(2) interest may also be recovered in equity in some cases where a particular relationship exists between the creditor and the debtor, such as mortgagor and mortgagee, obligor and obligee on a bond, executor and beneficiary, principal and agent, principal and surety, trustee and *cestui que trust*, vendor and purchaser, or in the case of arrears of annuities;

(3) where a person who is an officer of the Court, such as sheriff, a solicitor or a receiver, wrongfully withholds money which he has obtained in the course of legal proceedings, he may be ordered to pay it with interest.

So, unless a claim for "interest" on "debts" fell within any one of the above seven cases—assuming that the classification is exhaustive, for it is possible

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(1) [1892] 1 Ch., 120.

(2) (1823) 2 B. & C., 348; 107 E.R., 414.

(3) (1829) 9 B. & C., 378; 100 E.R., 140.

(4) (1830) 6 Bing., 709; 180 E.R., 1454.

(5) [1893] A.C., 429.

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that further research may disclose more cases in "equity"—including in this number the four cases under "the common law" already mentioned, interest was not awarded under English Law. No authority has been cited to show that the abolition of the distinction between Courts of Common Law and Equity and their fusion by the Judicature Act resulted in enlarging the scope of cases in which interest could be claimed on debts or in increasing the power of Courts in awarding "interest." As a result of the fusion, the same Court was enabled to deal with "legal" as well as "equitable" claims and to award interest on "equitable principles" as well. The same Court being a Court of Law and Equity recognized not only "legal" claims to interest but also gave effect to such "equitable" considerations as would be recognized in Courts of Equity only.

As regards a party's claim to interest, apart from the Interest Act, the law in India may be taken to be the same as in England [see *Kamalammal v. Peeru Meera Lervai Rowthen*(1) and *Juggomohun Ghose v. Kasiree Chand*(2)]. I shall now consider how far the principles referred to above and given effect to by English Courts have been followed in the decisions of this Court. As numerous cases were discussed in detail before us and as the case was very fully argued by both sides, a consideration of the case-law at some length becomes necessary. From 1863, that is, *Kisara Rukkumma Rao v. Cripati Vijana Dikshatulu*(3), onwards, the decisions of our Court proceeded on the view that interest not payable under the terms of the contract could only be paid under the Act or as being in accordance with the usage as to the particular class of instruments [see

(1) (1897) I.L.R., 20 Mad., 481.

(2) (1862) 9 M.I.A., 260.

(3) (1863) 1 M.H.C.R., 369.

Kamalammal v. Peeru Meera Lervai Rowthen(1), *Subramania Aiyar v. Subramania Aiyar*(2), *Gopalaswamy Chettiar v. Ramier*(3) and *Nanu Nair v. Ashta Moorthi Nambudripad*(4)]. In 1919, in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(5), AYLING and SESHAGIRI AYYAR, JJ., for the first time held that the Interest Act is not exhaustive of all cases where interest is allowed and that even in cases where payment of interest is not justified under the Interest Act interest may be allowed on "equitable principles." In so doing they mainly relied upon the decision in *Miller v. Barlow*(6), in which the Judicial Committee pointed out that Indian Courts are Courts both of Law and Equity and that they can award as damages "interest" on equitable grounds. They also referred to the decisions of the Privy Council in *Hurroopersaud Roy v. Shama Persaud Roy*(7), *Hamira Bibi v. Zubaida Bibi*(8) and *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji*(9), and also to some decisions of the other High Courts in which interest was allowed apart from the Act. Though SESHAGIRI AYYAR, J., who delivered the judgment in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(5), expressed this view, it may be noticed that it is not consistent with the view in *Nanu Nair v. Ashta Moorthi Nambudripad*(4), to which he was a party and also with the subsequent decision in *Rajah of Pittapur v. Ballapragada Pallamraju*(10) to which also he was a party. In that case Sir JOHN WALLIS, C.J., followed the prior decisions of this Court and declined to award interest apart from the provisions of the Act. The learned Judge distinguished

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(1) (1897) I.L.R., 20 Mad., 481.
(2) (1909) 7 M.L.T., 108.
(3) (1919) I.L.R., 42 Mad., 661.
(7) (1878) I.L.R., 8 Calc., 654.
(9) (1915) I.L.R., 42 Calc., 914.

(9) (1908) I.L.R., 31 Mad., 250.
(4) (1915) 29 M.L.J., 773.
(6) (1871) L.R., 3 P.C., 738.
(8) (1916) I.L.R., 38 All., 581.
(10) (1920) 40 M.L.J. 18.

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the case in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(1), by pointing out that that was not a case of a contract and also observed, in the course of his judgment, that cases in which interest was allowed by the Privy Council in the absence of a contract and independently of the Act must be regarded as cases coming within the proviso to the Act, saving cases in which interest was payable by law when the Act was passed. SESHAGIRI AYYAR, J., who delivered a separate judgment agreed with the conclusion arrived at by the learned Chief Justice and pointed out that he and the other learned Judge in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(1) did not differ from the prior decisions of this Court. The view that interest might be awarded apart from the Act on broad equitable considerations first adumbrated in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(1), gradually began to find favour in this Court and that decision has been followed in three cases, namely, *Arunachalam Chettiar v. Raja Rajeswara Sethupathi*(2), by OLDFIELD and KRISHNAN, JJ., *Venkatachalam Chettiar v. Ponnuswami Iyengar*(3), by WALLACE, J., and *Krishnan Namboodiripad v. Komath Aumbu Kurup*(4), by CURGENVEN, J. It is not necessary to refer to the facts of these cases, as I shall presently consider how far and to what extent the cases relied on by SESHAGIRI AYYAR, J., in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(1), support the conclusion that apart from the Act, interest can be awarded on equitable considerations. Before proceeding further I may here state, to make the position clear, that so far as the point under discussion is concerned, if the true nature and scope of the equitable considerations affecting the award of interest is correctly understood, the question whether the Interest Act is exhaustive or

not, is not in itself a very important one, for, the cases in which "interest" could be awarded on equitable considerations may be brought within the proviso of the Interest Act, as observed by WALLIS, C.J., in which view the Interest Act may be said to be exhaustive, or those cases may be treated as a separate class of cases not coming within the Act strictly, in which view the Act will not be exhaustive. However that may be, the important question to consider is to what extent do equitable considerations afford justification for decreeing "interest." The main case relied on in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(1), and which was referred to in the present case also with great insistence is the decision in *Miller v. Barlow*(2). The facts of the case, which it may be observed is not one of contract, are somewhat complicated, but the head-note states them sufficiently to enable us to understand the scope of the decision so far as it relates to the point under discussion.

"Proceedings were taken under the Insolvency Act, 11 and 12 Vict., ch. 21, and the proceeds of certain goods claimed by the Official Assignee, paid by the Assignee into the Bank of Bengal. In a suit brought in the High Court at Calcutta, by A against the Official Assignee, claiming the proceeds of the goods paid into the Insolvent Court: —Held, on the Court making a decree in favour of the plaintiff, that the High Court being a Court of Law and Equity, had power to award interest on the amount, as against the Official Assignee."

On the facts the learned Judges came to the conclusion that "by the wrongful act of the defendant the plaintiff has been deprived of the money which was actually making interest". After observing thus, their Lordships proceed as follows:

"Their Lordships are of opinion, that under these circumstances a Court of Equity would clearly be entitled to give interest; and it is by no means clear that even in a Court of

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(1) (1919) I.L.R., 42 Mad., 661.

(2) (1921) 42 M.L.J., 74.

(3) (1924) 47 M.L.J., 312

(4) (1926) 51 M.L.J., 683.

(1) (1919) I.L.R., 42 Mad., 661.

(2) (1871) L.R., 3 P.C., 783.

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Law, although the ordinary rule is that in actions for money had and received interest is not given, the fact of the defendant having received interest would not be a sufficient ground for making the defendant liable to pay interest; and as the High Court have the powers both of a Court of Equity and a Court of Law, their Lordships are of opinion that interest has been properly given."

These observations make it clear that their Lordships never intended by this decision to lay down a general rule that interest may be awarded in all cases on account of equitable considerations; for they draw our attention to the special circumstance that "by the wrongful act of the defendant the plaintiff was deprived of money which was actually making interest" and they state also that in such circumstances a Court of Equity certainly, and even a Court of Law departing from its usual rule would probably, award interest. In this connexion it is important to note that in cases of this kind, where Officers of the Court withhold money they have wrongfully obtained in the course of legal proceedings, interest was always made payable by the rules of equity. The case we are dealing with falls within the last class of cases mentioned in Halsbury's Law of England, Vol. XXI, page 40, already referred to, where interest is payable by the rules of equity. Courts of Equity having been accustomed to give relief in such cases, their Lordships state that Indian Courts, being Courts of Equity as well as Courts of Law, may properly award interest. When we propose to apply equitable considerations in deciding the question whether a party may be awarded interest we have to ask ourselves the question whether a Court of Equity in such a case would usually award interest and unless a particular case falls within the well-recognized class of cases in which interest is demandable in equity, the Indian Courts, in my view, have no power to award interest in such a case on equitable grounds. If the

case is one in which Courts of Equity would ordinarily award interest, then, Courts of Law in this country, having the powers both of the Courts of Equity and of Law, can also award interest on equitable considerations. This seems to me to be the true scope of the decision in *Miller v. Barlow*(1) and understood in this light it is clear that that decision cannot be relied upon in support of the view that the plaintiff is entitled to interest in this case on broad equitable grounds; for, it is not shown that the nature of the claim made by the plaintiff is one which will bring the suit within the purview of a Court of Equity in which it will award interest. In a very recent case, on appeal from the Supreme Court of New Brunswick [see *Maine and New Brunswick Electric Power Co. v. Hart*(2) which will be referred to later on in connexion with the Interest Act also] their Lordships of the Privy Council had to consider whether any rule of equity entitles the plaintiff to interest and in considering that question they state the rule thus:—

"In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.

It must, however, be borne in mind that when once such a contract has been executed, then, apart from cases where rescission on the ground of fraud is sought, there remains nothing to attract the equitable jurisdiction, and the parties are left to their remedies at law."

Applying this principle to the case before them, their Lordships held that, where covenants between the parties when construed according to the ordinary rules of construction do not give the plaintiff interest, he cannot claim interest, unless it is given to him at common law or under Statute and apart from the case where rescission

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(1) (1871) L.B., 3 P.C., 783.

(2) [1929] A.C. 631, (J.C.).

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of payment on the ground of fraud is sought there is no place in the matter for the exercise of equitable jurisdiction and therefore no rule of equity in regard to interest can have any application. As the plaintiff, to use the language of their Lordships of the Privy Council, "has not established in this case the existence of a state of circumstances which attracts the equitable jurisdiction", I think he is not entitled to interest "on equitable grounds".

I shall now briefly consider the other Privy Council cases referred to by SESHAGIRI AYYAR, J., in *Abdul Saffur Rowther v. Hamida Bivi Ammal*(1) in support of his decision, namely, *Hurro Persaud Roy v. Shama persaud Roy*(2) *Hamira Bibi v. Zubaida Bibi*(3) and *Ahmed Musaji Saleji v. Hashim Ibrahim Saleji*(4). In *Hurro Persaud Roy v. Shama Persaud Roy*(2) interest was allowed on mesne profits. This decision, as explained by WALLIS, C.J., in *Raja of Pittapur v. Ballapragada Pollamraju*(5), was based on the long settled practice of the Court and as the learned Judge remarked must be regarded as a case coming within the proviso to the Act, save in cases in which interest is payable by law when the Act was passed. In *Hamira Bibi v. Zubaida Bibi*(3) which was a case of unpaid dower, the Judicial Committee allowed interest as "reasonable compensation" to a Muhammadan widow on account of the special features of the case and their Lordships observed that her right to claim "interest" was consistent with the rules recognized under the English as well as under the Muhammadan Law. It seems to me that this does not support the broad proposition that interest may be charged on "debts" in all cases on "general equitable

considerations." In *Ahmed Musaji Saleji v. Hashim Ebrahim Saleji*(1) interest was awarded on the well-settled principle "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." As I understand these Privy Council cases they do not support the general proposition for which they are cited in *Abdul Saffur Rowther v. Hamida Bivi Ammal* (2). In support of this portion of the argument Mr. Sastri cited a new case, namely, the decision in *Canadian Pacific Railway v. Toronto Corporation*(3). In that case interest on the arrears of rent was allowed by the Privy Council; but from the facts it will appear that the suit was one for "specific performance" and for the enforcement of a covenant in a lease. Having regard to its nature the suit fell within the special jurisdiction of the Equity Courts and apparently it was on that account that interest was allowed. In this connexion I may also refer to the decision in *Johnson v. Rex*(4), cited by Mr. Sitarama Rao. In that case their Lordships of the Privy Council held that interest on two sums, which one Johnson, a Government contractor in Sierra Leone, admittedly received from the Army Paymaster in excess of what was due to him and which he retained in his own hands for over a year, was not payable by him to the Crown. In so holding they gave effect to the law as settled by the judgment of the House of Lords in the case of

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(1) (1915) I.L.R., 42 Cal., 914.

(3) (1906) A.C., 33.

(2) (1919) I.L.R., 42 Mad., 661.

(4) [1904] A.C., 817.

(1) (1919) I.L.R., 42 Mad., 661.

(2) (1878) I.L.R., 3 Cal., 654.

(3) (1916) I.L.R., 38 All., 581.

(4) (1915) I.L.R., 42 Cal., 914.

(5) (1920) 40 M.L.J., 18.

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London, Chatham and Dover Railway Co. v. South Eastern Railway Co.(1). In the course of the judgment, their Lordships indicated the view that if the Crown had rested its case on fraud then interest would have been awarded, as interest is recoverable both at law and in equity on money obtained by fraud and retained by fraud. If fraud had been alleged and proved, the case would have come specially within the jurisdiction of the Equity Courts and would have fallen within the first class of cases mentioned in Halsbury's Laws of England, Vol. XXI, page 40. On this part of the case, my view is that the Interest Act is exhaustive and that only such equitable grounds as were generally recognized in Courts of Equity could be relied on in awarding interest on equitable grounds and that the case in *Abdul Suffur Rowther v. Hamida Bivi Ammal*(2), having regard to the principles which I have discussed here, has not been correctly decided. The remarks of Lord BLACKBURN as regards Lord Tenterden's Act in *Duncombe v. Brighton Ulub Co.*(3),

"The Statute ought to have said that wherever there is a debt at all it should bear interest, unless there is some strong reason to the contrary. But as the Statute stands, this is not the case",

may well be applied to the Indian enactment also. But however much we may deplore the present state of the law it seems to me that the decisions do not permit us to stretch the doctrine of "equitable grounds" to meet all the cases where we think interest should be awarded. In these circumstances, unless the plaintiff's claim to "Interest" comes within the Interest Act or any other rule of law, it cannot be supported.

(1) [1893] A.C., 429.

(2) (1919) I.L.R., 42 Mad., 661.

(3) (1875) L.R., 10 Q.B., 371.

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The next question for consideration is whether the plaintiff is entitled to claim interest under the Interest Act XXXII of 1839. That Act provides that

"Upon all debts, or sums certain payable at a certain time, the Court before which they may be recovered, may, if it shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest from the time when such debts or sums were payable, if such debts or sums be payable by virtue of some written instrument at a certain time . . ."

To attract the provisions of this Act to a written contract two conditions are necessary, (1) a certain sum must be payable and (2) this sum must be payable at a certain time, under the contract. It was pointed out in *Juggomohun Ghose v. Manickchand*(1) that

"the certainty required must exist at the time when the promise is made; and, therefore, that the Act does not . . . affect debts contingent in amount, and time of becoming due".

On this reasoning, their Lordships held that a "sum certain" is not payable by a written instrument at a "time certain" if its payment is contingent upon events which may never happen and the amount payable is capable of ascertainment only if and when these events happen and that the time for the happening of those events, if they ever do happen, may be indefinitely postponed.

This decision was followed by their Lordships in a very recent decision *Maine and New Brunswick Electric Power Co. v. Hart*(2), in deciding a case under section 24(1) of the New Brunswick Judicature Act of 1909, which in this respect is similar in terms to the Interest Act. The Indian enactment was framed in order to extend to India the provisions of Statute 3 and 4 William 4, c. 42, section 28 and substantially adopts the language of it. That these terms are

(1) (1859) 7 M.I.A., 263.

(2) [1929] A.C., 631 (J.C.).

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understood in the same way under the English enactment will appear from the decision in *London, Chatham Dover Railway Co. v. South Eastern Railway Co.*(1), which discusses the earlier English decisions on the same point, namely, *Merchant Shipping Company v. Armitage*(2), and *Duncombe v. Brighton Club Co.*(3). In that case, Lord HERSCHELL expressed the view that, where the time of payment is stated to be "as soon after the 1st of June as possible, and not later than the 15th of June" "it is a little difficult to say that that is a time certain even as regards the 15th of June". The decision in *In re Horner, Fooks v. Horner*(4), does not lay down any different principle; for the death of the testator, within six months after which the sum was made payable in that case, "is not a contingent event—for it (death) is a certainty which must happen to all; and so many days after death is a time certain for the purposes of the Statute." Having regard to these principles, can it be said that the amount sought to be recovered as rent in the present case is "a certain sum" recoverable at "a certain time" within the meaning of the Interest Act? I think not. I have already referred to the main terms of the document at the commencement of this judgment. According to these terms, as pointed out by PHILLIPS, J., in his judgment, the rent which the lessee has to pay varies with circumstances which are necessary to be proved, such as, the extent of the land cultivated in any particular year and also the amount of assessment levied by the Government in that year. It is also noticeable that no definite period is fixed for the payment of rent. In these circumstances it cannot be said in this case

(1) [1899] A.C., 429.
(3) (1875) L.B., 10 Q.B., 371.

(2) (1873) L.B., 9 Q.B., 99.
(4) [1896] 3 Ch. D., 188.

that "a sum certain" is payable at "a certain time" within the meaning of the Interest Act. I must, therefore, hold that the plaintiff is not entitled to invoke the provisions of the Act in support of his claim to interest.

The last question is whether the plaintiff is entitled to interest under section 73, illustration (n) of the Contract Act. This question of law arose for decision in *Kamalammal v. Peeru Meera Levvai Rowthen*(1). In that case, the plaintiff sued to recover some money due to her on an oral contract together with interest. No agreement or usage having a right to interest was alleged and no written demand or notice had been given under the Interest Act. It was held that the plaintiff was not entitled to interest. It was argued in that case that the plaintiff could claim interest under section 73 of the Contract Act coupled with illustration (n). The learned Judges held that to construe the section as giving a right to interest in those cases in which it cannot be awarded according to the provisions of Act XXXII of 1839 would be to hold that the latter enactment was virtually repealed by the former. Their Lordships were not prepared to hold that it was so repealed. They also pointed out that there was no real conflict between section 73 of the Contract Act and Act XXXII of 1839, since effect may well be given to section 73 by holding that the award of interest as compensation contemplated by that section has reference to cases in which such award can be made without infringing the provisions of the other Act. In other words, illustration (n) to section 73 merely states that, if a contract to pay a sum of money on a specified day is broken, nothing except interest up to the date of

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(1) (1897) I.L.R., 20 Mad., 481.

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payment can be claimed as damages, provided such interest can be claimed under the Interest Act or any other rule of law. After referring to the "Common Law Rule" regarding interest on debts, Pollock and Mulla make the following observations regarding the scope of illustration (n) to section 73 :—

"There does not seem to be any sufficient ground for reading into illustration (n) to the present section an intention to abolish this rule and supersede the Act of 1839. Indeed, the illustration does not say that the defendant is necessarily liable to pay interest, but only assumes that he may be so under the Act of 1839 or otherwise, and says that he is not in any event liable for more"

(See page 414, Pollock and Mulla, the Indian Contract Act, 5th Edition).

The decision in *Kamalammal v. Peeru Meera Levvai Rowthen*(1) has been dissented from in Calcutta [see *Surja Narain v. Pratap Narain*(2), per BANERJEE, J. and *Khetra Mohan Poddar v. Nishi Kumar Saha*(3)]. The view of the Calcutta High Court, says Sir Frederick Pollock, goes indeed beyond the English Common Law. The view of the Bombay High Court in *Saunadanappa v. Shivbasawa*(4), is also opposed to the decision in *Kamalammal v. Peeru Meera Levvai Rowthen*(1). In that case, it was held that

"neither the Interest Act nor the Contract Act affects the rule of Hindu Law, that in the case of a debt wrongfully withheld after demand of payment has been made, interest becomes payable from the date of demand by way of damages. That law was in force when the Interest Act was passed, and under the proviso to the section of the Act it has continued to be in force. The Indian Contract Act has not interfered with that law. On the other hand, that law is consistent with the provisions of the Act."

This view of the Bombay High Court which is somewhat novel was not pressed before us by the respondents' learned Advocate. In *Ghanshyam Singh v. Daulat Singh*(1), which was a suit by the landlord for arrears of rent together with interest, it was held that though the lessee was not entitled to "interest" under the North West Provinces Act, he was entitled to claim it under section 73 of the Contract Act; but the learned Judges do not discuss the scope of illustration (n) on which the judgment is based; nor do they refer to the Interest Act. The observations of the learned Judges in *Zwala Prasad v. Hoti Lal*(2) do not throw any clear light on this question. Two decisions of the Privy Council, namely, *Muhammad Mehndi Ali Khan v. Muhammad Yasin Khan*(3) and *Ganesh Bakhsh v. Harihar Bakhsh*(4) were referred to in this connexion to show that in one of the cases, namely, *Muhammad Mehndi Ali Khan v. Muhammad Yasin Khan*(3) their Lordships indicated, though very faintly, that their inclination is in favour of the view that interest cannot be awarded under section 73 of the Contract Act and that in the other, namely, *Ganesh Bakhsh v. Harihar Bakhsh*(4) their Lordships indicated, though inferentially, that their view is in favour of the contention that interest can be so awarded. But the judgments do not bear those interpretations; on the other hand they show that the question was not considered by their Lordships. In this state of authorities I must hold following the decision in *Kamalammal v. Peeru Meera Levvai Rowthen*(5), which has not been departed from in this Court in any of its subsequent decisions, that the plaintiff is not entitled to claim interest under section 73 of the Contract Act read with illustration (n).

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(1) (1897) I.L.R., 20 Mad., 481.
(3) (1917) 22 C.W.N., 488.

(2) (1899) I.L.R., 26 Cal., 955.
(4) (1907) I.L.R., 31 Bom., 854.

(1) (1896) I.L.R., 18 All., 240.
(3) (1896) I.L.R., 26 Cal., 523.

(2) (1923) I.L.R., 46 All., 625.
(4) (1904) I.L.R., 26 All., 299.
(5) (1897) I.L.R., 20 Mad., 481.

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For the above reasons, the decision of PHILLIPS, J. under appeal in Letters Patent Appeals Nos. 256 to 258 should be reversed and the plaintiff's suit so far as it relates to interest should be dismissed with costs.

Letters Patent Appeal No. 255 of 1925.

The lease deed in this appeal contains the following additional term :—

"If I allow the said Janmavakasa pattom (rent) to fall into arrears without paying the same at proper time, there is no hindrance by this Saswatha pattom for your duly recovering the said Janmavakasa pattom out of these properties or out of my other properties."

By this term, the leased properties and the other properties of the lessee are charged with the payment of rent due under the lease. Having regard to this fact, following the decision in *Drax, In re; Savile v. Drax*(1), I must hold that the landlord is entitled to claim interest on the arrears of the rent in this case. In *Drax, In re; Savile v. Drax*(1) the principle to be applied is thus stated by COLLINS, M.R., at page 793 :—

"It seems to me to be well established on the authorities, and the result of those authorities does not indeed appear to be disputed, that a Court of Equity has power to give interest, and in point of fact does so where a charge is created on land, although there are no words allowing interest in the instrument creating the charge. Indeed, we may go back to the principle laid down in many cases showing that, in point of fact, the Court of Equity does charge interest."

ROMER, L.J., and COZENS-HARDY, L.J., also express the same view. This principle is not disputed by Mr. Sitarama Rao. This Letters Patent Appeal is dismissed with costs.

K.R.

(1) [1903] 1 Ch., 781.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

T. N. ISMAIL HASSAM (PLAINTIFF), APPELLANT,

v.

T. S. HAJI MOOSA & Co. AND SIX OTHERS
(DEFENDANTS AND ATTACHING CREDITORS), RESPONDENTS.*

1929,
October 17.

*Suit on a mortgage praying for sale—Person not party to suit—
Right to intervene in execution of decree passed in suit.*

It is an established principle of law that no person, who is not a party to a suit on a mortgage praying for a sale, whatever the nature of the right such a person might claim, can intervene in the execution of the decree passed in that suit.

ON APPEAL from the judgment and orders of WALLER, J., dated 27th April 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 160 of 1927.

K. Krishnaswami Ayyangar (T. C. A. Bhashyam Ayyangar with him) for appellants.

C. Srinivasachari for first respondent.

K. S. Krishnaswami Ayyangar, A. V. Seshaiya, P. Sankaranarayana, A. Suryanarayana and K. M. Venkatavardachari for other respondents.

The JUDGMENT of the Court was delivered by

RAMESAM, J.—The facts out of which these appeals arose may be stated as follows :—A suit was filed (C.S. No. 160 of 1927) to recover Rs. 1,722-10-0 with interest by the plaintiff, Ismail Hassam, against two defendants on the following allegations. The amount claimed was due to the plaintiff primarily by the second defendant. But the second defendant being also indebted to the first defendant, he sent 19 bales of piece-goods

* Original Side Appeals Nos. 105 and 106 of 1928

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to the first defendant, instructing him to pay off the amount due to the plaintiff and out of the balance of the amount to pay himself. But the first defendant has not paid the money or sent any bales equivalent in value to the amount claimed by the plaintiff. This suit was decreed by BEASLEY, J., as he then was, on 28th January 1928. In the meantime, a commissioner was appointed to take charge of the goods, and afterwards he was directed to sell the goods. A certain amount was realized and is now in Court. Meanwhile certain other creditors of the second defendant, about five of them, obtained decrees in various Courts and obtained orders of attachment against the goods on dates beginning from 27th May 1927 onwards. They now claim to be paid the amounts of their decrees from out of the amount in Court representing the sale-proceeds of the bales. The plaintiff and the first defendant in the suit want to be paid their amounts out of the sale-proceeds, because they hold first and second charges over the goods under the decree of BEASLEY, J. These other creditors of the second defendant allege that the claims of the plaintiff and first defendant and their charges are bogus claims, a matter, which, of course, has not been gone into, and cannot be gone into, without a regular suit in which both sets of parties are impleaded. The only question that now arises is what is the order that should be passed, and who should be referred to a regular suit in which the substantial question between the parties should be tried, namely, how far the claims of plaintiff and first defendant are bogus claims. Our brother WALLER, J., passed an order directing that the surplus amount that may remain after deducting the sums due to the plaintiff and the first defendant should be paid to the various decree-holders from it. He also observed that the plaintiff and the first defendant should prefer

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claim petitions before the attaching Court. The present appeals before us are filed against this order of WALLER, J., and the second part of the order is particularly attacked before us. Now the plaint in C.S. No. 160 of 1927 mentions the main facts relating to the charge of the first defendant over the 19 bales, and paragraph 5 may be taken to be an allegation that the plaintiff himself has got a charge over some bales, the value of which is equivalent to his claim. The prayer is not worded as one claiming a charge decree. But the decree awarded by BEASLEY, J., expressly declares that the first defendant has got a first charge on the amount realized by the sale of the goods under the two security letters of his, dated 1st July and 21st October 1926. It also declares that the plaintiff will have a second charge on the sale-proceeds on another ground, which it is unnecessary to set forth in detail. We must take it that BEASLEY, J. construed the plaint in C.S. No. 160 of 1927 to be a plaint alleging a charge in favour of the plaintiff subject to a charge of the first defendant, and, acting on that basis, he has awarded a charge decree. Now, it is an established principle that no person who is not a party to a suit on a mortgage praying for a sale, whatever the nature of the right he might claim, can intervene in the execution of that decree. He may be a person claiming a paramount title to the property mortgaged, and he may allege that the mortgage or charge does not bind him, or such a person may be a creditor of the mortgagor, who alleges that the mortgage is a bogus mortgage as in this case. But, whatever the nature of the ground on which he wishes to resist the mortgage decree, he cannot intervene in the execution of that decree. In support of this principle, it is enough to refer to *Deefholts v.*

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Peters(1) and *Sanwal Das v. Bismillah Begam*(2). The principle of those decisions is this: that the charge decree-holder is entitled to the benefits of his charge decree in execution of the decree, and any other person who refuses to be bound by the decree, on whatsoever ground it may be, has got to file a regular suit for the proper relief. In the present case, the respondents, attaching creditors, would all be entitled to file suits—or they may jointly file a suit alleging that the claims of the plaintiff and the first defendant in C.S. No. 160 of 1927 are bogus claims, and if they succeed, they will be entitled to recover the full amounts of the decrees out of the amounts now to be drawn by the plaintiff and the first defendant in execution of C.S. No. 160 of 1927; but, until such a suit is filed by them and it is found in their favour, the charge decree must have its course. We, therefore, think that the order of our brother WALLER, J., refusing to pay down the amounts to the plaintiff and the first defendant cannot be sustained. Full effect must be given to the decree of BEASLEY, J., or, in other words, the amounts claimed by the plaintiff and the first defendant must be paid out of the amounts lying in Court. So far as the balance, of course, is concerned, there can be no question that it can be paid to the respondents. But, in view of the allegations of the respondents, we think that we ought to make the payment of the amount conditional on the plaintiff and the first defendant giving security. They will give security for the amounts they draw to the satisfaction of the Registrar according to the usual practice. The respondents will file their suit within three months after this date, and, if such a suit is not filed, the order directing the plaintiff and the first defendant to give

(1) (1887) I.L.R., 14 Cal., 631.

(2) (1897) I.L.R., 19 All., 480.

security will be vacated, and they will retain the amounts drawn unconditionally. But, if such a suit is filed, the security will enure to the benefit of the respondents' creditors, until that suit terminates in their favour. We modify the order of the learned Judge accordingly. In each of the appeals, the contesting creditors—respondents, who obtained money decrees, will pay the costs of the appellant proportionate to the interests they claim. We make no order as to costs in the original Court.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice, and Mr. Justice Krishnan Pandalai.

GUNDUTHALAYAN ALIAS THAILAN
(ACCUSED), APPELLANT.*

1929,
November 22.

Murder—Conviction for—Sentence lesser than death—Circumstance in which High Court will enhance sentence—Notice to show cause against enhancement—Practice relating to.

Where on a conviction for murder the Sessions Court awarded a sentence lesser than death, the High Court will not enhance the sentence, unless it is satisfied that, on the evidence in the case, the sentence of death is the only possible sentence which could have been passed by the Sessions Court.

The practice of issuing notice to show cause against enhancement of sentence at the time of the admission of a criminal appeal is not illegal, and is one which has been very frequently adopted in the Madras High Court. It would, however, be desirable that, when an appeal comes up for admission by an Appellate Court, the records should be sent for before causing a notice to show cause against enhancement of sentence to issue.

* Criminal Appeal No. 432 of 1929 and Criminal Revision Case No. 783 of 1929.

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APPEAL against the order of the Court of Session of the Salem Division in Case No. 18 of the Calendar for 1929 and case taken up in revision under section 439 of the Code of Criminal Procedure calling upon the accused to show cause why the sentence of transportation for life passed on him under section 302, Indian Penal Code, should not be enhanced to one of death.

N. S. Mani for accused.

Public Prosecutor (L. H. Bewes) for the Crown.

The JUDGMENT of the Court was delivered by

BEASLEY, C.J.

BEASLEY, C.J.—There were two charges against the accused in the Sessions Court of Salem, one of murder under section 302, Indian Penal Code, and the other of causing hurt with a dangerous weapon under section 324, Indian Penal Code. He was convicted of both the offences and was given a sentence of transportation for life in respect of the charge of murder and three months' rigorous imprisonment in respect of the other charge.

When the appeal came up for admission by the High Court, the learned Judge who had to consider it admitted the appeal, as of course is the invariable custom in cases of murder appeals, and at the same time ordered notice to issue to the accused to show cause why the sentence of transportation for life awarded to him should not be enhanced; so that, we have here his appeal against his conviction, and also his appearance on notice to show cause why the sentence passed on him should not be enhanced.

The facts of the case can be stated quite briefly, and they are that in the village of Pavalathampatti there was the usual festival in connection with the Pongal and the procession of bulls in front of the temple, and the custom, according to the evidence, is that the first honours should go to certain persons. In this case,

P.W. 10 was entitled to the first honours, according to the evidence, being so entitled on the hereditary principle. But the accused, who is a distant cousin, questioned P.W. 10's right to enjoy the first honours, there was a dispute about it, and the Goundan headmen thought that it would be better to adjourn the bull play for two days in order that the matter might be settled. Then (there is a conflict about this) the accused is said by the majority of the prosecution witnesses to have objected to any adjournment of the play saying that he was entitled to the honours; and there is evidence that the deceased man also objected to the adjournment saying that the matter might be decided on the spot, that the deceased remonstrated with the accused for interfering with the judgment of the headmen and that the result was a sort of a challenge to him; whereupon, the accused took out his knife and stabbed him on his left nipple inflicting a very serious injury from which he died. At this, P.W. 3 ran forward to interfere and he was also stabbed by the accused, and this forms the subject of the other charge against the accused, namely, causing hurt with a dangerous weapon. The dying man was taken to the Salem hospital. In the meantime, his father, P.W. 6, gave a report to the village munsif in which the accused was charged with the offences. The deceased also made a dying declaration, Exhibit C, to the Stationary Sub-Magistrate in which he sets out the dispute with regard to the honours and states that it was the accused who stabbed him. He died on the 17th, the date of the occurrence being the 15th. Although in his defence the accused denies that he ever stabbed the deceased and says that the crime was foisted on him, the evidence is quite clear and abundantly proves that it was the accused, and none other, who stabbed the deceased, and clearly justifies his conviction of the

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offence of murder, and Mr. Mani, who appears on his behalf, does not dispute the justice of his conviction. He, however, is concerned with the question of sentence, and argues that, under all the circumstances, the sentence passed by the learned Sessions Judge is the correct one, and that the learned Sessions Judge has properly exercised his discretion in awarding the lesser sentence. What the learned Sessions Judge says about it is contained in paragraph 6 of his judgment. He therein states, "As regards the punishment to be awarded, this appears to be an offence committed without pre-meditation. Some evidence has been adduced for the prosecution that there was ill-feeling between the accused and the deceased on account of a woman called Thailammal, who had been allowing the accused her favours, and whom the accused suspected of becoming intimate with the deceased. I do not attach much weight to this evidence and I do not think that any such enmity was the cause of the stabbing. I find, therefore, that the offence was committed without pre-meditation and on one of these unfortunate momentary impulses which seem to be so common amongst the inhabitants of this district. I consider, therefore, that the accused, who is a young man of 24, may be shown mercy; and the sentence of the Court is that he be sentenced to transportation for life upon the first count under section 302, Indian Penal Code." Those are the reasons given by the learned Sessions Judge, and we think that the proper test to be applied to these cases for enhancement of sentence is whether the only sentence which could have been passed on the evidence was the sentence of death. In a case before a Bench of the Bombay High Court, *Emperor v. Mangal*(1), Sir NORMAN MACLEOD, C.J., says this :

(1) (1924) I.L.R., 49 Bom., 450.

"There are many murder cases which come on appeal to this Court in which it has been evident that the Sessions Judges were too lenient and had exercised the discretion which they are given by law too much in favour of the accused. But, as I have already stated, we do not like to interfere except when we think that the sentence of death is the only possible sentence to be inflicted. In this case, although we think that the Sessions Judge ought to have sentenced the accused to death, we are not disposed to proceed with the notice to enhance the sentence."

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We are of the opinion that the reasons stated by Sir NORMAN MACLEOD for not interfering with the discretion of the Sessions Judge are sound, namely, that the High Court should not enhance the sentence, unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the learned Sessions Judge. In this case, although we think that the sentence that should have been passed upon the accused was one of death, we cannot say that it was the only possible sentence which could have been passed. Under these circumstances, we are not disposed to interfere with the punishment awarded by the learned Sessions Judge.

At the same time, we are quite satisfied that the accused was properly convicted of the offence of murder and of causing hurt with a dangerous weapon, and his appeal against his conviction must be dismissed.

Another matter to which our attention was directed by Mr. Mani was that the learned Judge who admitted the appeal ought not, at the time of admitting the appeal, to have caused notice to issue for enhancement of sentence, and that the proper procedure is for the Criminal Bench itself on hearing an appeal, if satisfied that there should be an enhancement of the sentence, to issue notice to show cause against enhancement, and he has referred us to the case in *Emperor v. Mangal*(1), to which we have already referred. But, in that case,

(1) (1924) I.L.R., 49 Bom., 450.

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the Bench of the Bombay High Court, whilst holding that this procedure adopted was quite legal, expressed the opinion that it was undesirable. We agree that the procedure is not illegal, and it is one which has been very frequently adopted in this Court. At the same time, we wish to say that, we think, that when an appeal comes up for admission by the Appellate Court, it would be desirable in future if, before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for. We think that would be more regular than merely reading the judgment of the learned Sessions Judge and issuing notice, as was done in this case, though, no doubt, sufficient of the facts appear in that judgment.

B.C.S.

APPELLATE CRIMINAL.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Krishnan Pandarai.*

1929,
December 9.

SANKARALINGA THEVAN, PRISONER (ACCUSED),
APPELLANT.*

*First information report—Statements in—Purposes for which
can be used—Variation between statement of witness in
first information report and statement in Sessions Court—
Effect of.*

Statements in the first information report can only be used for the purpose of contradicting or corroborating a witness and for no other purpose.

If a witness in the Sessions trial makes a statement different to that attributed to the witness in the first information report, that discredits the evidence of the witness to that extent in the

Sessions Court, but does not make the statement in the first information report the evidence upon that matter in the case.

TRIAL referred by the Court of Session of the Tinnevely Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 67 of the Calendar for 1929.

K. S. Jayarama Ayyar for *J. S. Vedamanikkam* for accused.

K. N. Ganpati for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

The JUDGMENT of the Court was delivered by

BEASLEY, C.J.—The appellant is convicted by the learned Sessions Judge of Tinnevely of the murder of his father Thandava Tevan and sentenced to death.

Thandava Tevan was undoubtedly murdered on the night of the 2nd June last. He was stabbed on the chest and died of that stab. He was aged 55 years. The accused, aged 24, is his only son. The deceased had a second wife, P.W. 2, who is the step-mother of the accused. Both the accused and his father owned a bandy and earned their livelihood by letting it on hire, and the motive for the murder is alleged by the prosecution to have been a quarrel between Thandava Tevan and his son on this night, with regard to the collection of money due from persons who had hired the bandy. As a result of this quarrel, it is alleged that the accused stabbed his father and ran away. He surrendered himself to the Magistrate of Srivaikuntam on the 14th June.

The evidence against the accused is purely circumstantial. There are no eye-witnesses to the occurrence. The evidence against him is that of P.Ws. 2 and 3, coupled with his absconding from the village.

P.W. 2's evidence is that, after she had served the evening meal to the deceased and the accused in the

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house which they all three occupied and the deceased and the accused had gone outside the house on to the pial, she bolted the door and remained inside. Some time later, she heard the father and son quarrelling with each other about the collection of bandy hire. The deceased was accusing the accused of not accounting for the money collected by him from persons, who had hired the bandy, and pointed out the difficulty thus occasioned in his maintaining the family. The accused retorted that he was not bound to account to him for the money, whereupon the deceased said that the accused should not touch the bandy from the next day, that he would have no food at his house and that he must earn his own living. Then, according to her evidence at the Sessions trial, there was a lull lasting about a naligai. At the end of that time she heard the cry of the deceased "I have been stabbed." She lighted a lamp, went outside and there found the deceased lying on the ground, holding his side where the wound was, and she supported him inside the house. Her foot, according to her, struck against a knife and its sheath on the floor. This knife and sheath, however, have not been proved to belong to the accused. Hearing the cries, people came to the spot, amongst them being P.Ws. 3 and 4, and two others who did not give evidence at the Sessions trial, and some women.

P.W. 3 lives in a house just to the south of the deceased only a few feet away, a lane separating the northern side of his house from that of the deceased. His evidence is that he saw the deceased and the accused sitting on the pials outside the house, the deceased sitting on the eastern pial and the accused on the western. He went inside his house, and later on, having occasion to go outside, he heard the discussion spoken to by P.W. 2 going on between the deceased and his

son. He says he recognized their voices. Then he went inside and slept, and after an interval, which he states to be three naligais, he woke up on hearing a cry "My son has stabbed," opened the door, and came out, and there saw the deceased lying wounded on the ground. P.W. 2 carried the deceased inside the house and put him on a cot.

Another witness is P.W. 4 who went to the scene of the occurrence on hearing cries. He immediately went to the Village Magistrate to make a report. He reached the Village Magistrate at about 2 a.m., and the Village Magistrate took a statement from him, Exhibit B, and then proceeded to the house of the deceased, where he took a statement from P.W. 2. The statements of P.Ws. 2 and 4 are incorporated in the first information report.

That is the whole of the evidence in the case, and we have got to consider whether, it being purely circumstantial evidence, it is sufficient to say that it proves the case against the accused beyond all reasonable doubt. The first point to be considered is, is it true that there was this dispute between the deceased and the accused on the pial that night? With regard to this, we have the evidence of P.Ws. 2 and 3, and we are satisfied that the evidence of P.W. 2 on this point is to be accepted and also that of P.W. 3. The next thing to be considered is—and it is the most important matter—whether there was any interval of time between the quarrel and the stabbing, and if so, what that interval was. P.W. 2 puts it at one naligai, and P.W. 3, on the other hand, puts it at three naligais. Even if it was one naligai, it is a sufficiently long interval, and the murder obviously could not have been in the heat of the moment. If the accused was the murderer, then he must have sat for at least a naligai thinking about the

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matter, giving himself time to cool down, or have gone away from the house and returned. But, at the same time, that interval of time does make it possible—we do not say probable—that some one else may have come to the spot and have committed the murder. If, on the other hand, the stabbing had followed the quarrel immediately, that, together with the absence from the village of the accused pointing to flight, would, in our view, establish the case beyond all reasonable doubt. The circumstantial evidence would then be very strong indeed. It has been contended before us that P.W. 2 was trying to lighten the case against the accused at the Sessions trial and was giving incorrect evidence when she put this interval of one naligai between the dispute and the stabbing, and the learned Sessions Judge has taken that view of her evidence. We have been asked to contrast that statement with the statement which was taken from her by the Village Magistrate, Exhibit E. After stating that the deceased told the accused that he should earn his living himself, she stated in Exhibit E that “at that time she heard the cry of ‘he has stabbed’, that she at once lighted the lamp from inside the house and came out with it—”. That statement obviously means that the stabbing immediately followed the quarrel, and, if we are entitled to treat that statement in the first information report as evidence upon this point of P.W. 2, then it is evidence of the very greatest importance. But the question is, are we entitled to make use of that evidence at all as substantive evidence? In our view, statements in the first information report can only be used for the purpose of contradicting or corroborating a witness and for no other purpose. If a witness in the Sessions trial makes a statement different to that attributed to the witness in the first information report, that discredits the evidence

of the witness to that extent in the Sessions Court but does not make the statement in the first information report the evidence upon that matter in the case. We have been referred to three cases upon this point. The first is *Autor Singh v. Emperor*(1). On a difference of opinion between two Judges on this precise point, it was decided that the first information, although a document of great importance, which is in practice always and very rightly produced and proved in criminal trials, is not a piece of substantive evidence, and it can be used only as a previous statement admissible to corroborate or contradict the author of it. In *Emperor v. Chittar Singh*(2), it was held that a report of the commission of an offence made at a thana or even the deposition of a witness previously made would be admissible for the purpose of corroborating a witness or of throwing doubt on his statement in Court, but would be inadmissible for the purpose of proving that the facts stated in it are correct. In *Azimaddy v. Emperor*(3), it was observed that first informations do not prove themselves but have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant, and the first information is to be tendered as corroboration under section 157 of the Evidence Act. In this view, with which we agree, there is no evidence that the stabbing took place immediately after the quarrel ended. On the contrary, the only evidence is that it took place either one naligai afterwards as P.W. 2 says or three naligais afterwards as P.W. 3 says. With regard to the evidence of the latter, we think that his statement that he heard a cry of “My son has stabbed” is not to be accepted, as in

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(1) (1918) 17 C.W.N., 1212.

(2) (1924) I.L.R., 47 All., 280.

(3) (1926) 44 C.L.J., 243 at 258

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his previous statement he stated the cry to be "I have been stabbed."

The defence set up by the accused, of course, is not a very satisfactory one, because he has pleaded that he was at a place some 40 miles away collecting outstandings, having been sent there by his father. He summoned five witnesses at the Sessions trial, but his pleader did not examine any of them. Previously, these witnesses were summoned to support his defence of *alibi*, but they did not go into the witness-box to do so. He, therefore, set up an *alibi* which has not been supported by any evidence.

This is a case of very grave suspicion, but it still leaves a loophole, and that is the loophole provided by the interval of time between the end of the quarrel and the stabbing. It is during that time that some one else might have murdered the deceased. In cases based only on circumstantial evidence, the circumstantial evidence should be so strong as to point very clearly to the guilt of the accused.

The appeal is allowed, and the conviction and sentence are set aside, and the accused is ordered to be set at liberty.

R.O.S.

PRIVY COUNCIL.*

RAJA OF RAMNAD (DEPENDANT), APPELLANT,

v.

MANGALAM AND OTHERS (PLAINTIFFS), RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Estates Land Act, Madras (I of 1908), ss. 4, 12, 27, 73—Terms of puttah—Custom—Relief from rent on land left fallow—Insufficiency of tank water—Dry crop on wet land—Experimental harvest by landholder—Tenant's right to trees—Temple service—Finding in First Appeal—Code of Civil Procedure (V of 1908), ss. 100, 101.

In the case of a tenancy under the Madras Estates Land Act, 1908:

Where there is a custom by which the tenant is relieved of rent in respect of land allowed to lie fallow, the custom is one of the conditions under which the tenant holds within the meaning of section 27 of the Act, and section 4, which entitles the landholder to collect rent in respect of all ryoti lands, is restricted in its operation by the custom.

Segu Rowthen v. Alagappa Chetty, (1914) 26 M.L.J., 269, and *Arunachellam Chettiar v. Muthayanai Thaven*, (1918) 26 M.L.J., 575, approved on that point.

If owing to insufficiency of water in the tank the tenant raises a dry crop on wet lands he is not liable to pay thereon rent at the *sarasari* wet rate (*Quære*, as to the rate he is liable to pay).

Having regard to section 73, the landholder cannot insert in the puttah a provision enabling him to harvest part of the land himself in order to determine his due proportion of the produce of the whole.

A finding upon first appeal that no rent or tax has been paid in respect of palmyra trees, except as to a specified number, is conclusive that the tenant is entitled under section 12 to use, enjoy and cut down the trees other than those so excepted.

* Present:—Lord TOMLIN, Sir LANCELOT SANDERSON, and Sir GEORGE LOWNDEN.

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So too, a finding in first appeal that although temple service had been rendered by the tenants, it was not proved to have been rendered as a condition of the tenure, the evidence being consistent with it having been rendered voluntarily, is conclusive against an obligation to render the service being included in the puttah.

Appeal by landholder from the decree of the High Court, (1917) I.L.R., 40 Mad., 640, dismissed.

CONSOLIDATED APPEAL (No. 54 of 1926) from several decrees and a judgment of the High Court (December 22, 1915) modifying decrees of the District Judge of Ramnad which modified decrees of the Special Deputy Collector, Ramnad.

The appeal arose out of several suits brought by the respondents, ryots in seven villages, claiming from the appellant as landholder proper puttahs under the Madras Estates Land Act, 1908; they contended that the puttahs tendered to them contained conditions not consistent with the Act.

The questions arising upon the appeal and the effect of the judgments in Madras appear from the judgment of the Judicial Committee.

The High Court (KUMARASWAMI SASTRI and PHILLIPS, JJ.), in holding that a custom whereby ryots do not pay rent upon land allowed to remain fallow was not inconsistent with section 4 of the Act, followed *Segu Rowthen v. Alagappa Chetty*(1), and *Arumachellam Chettiar v. Muthayanai Thaven*(2), and distinguished *Appalaswami v. Raja of Vizianagram*(3).

De Gruyther, K.C., and *Narasimham* for appellant.

Subba Row for respondent No. 15 was not called upon.

(1) (1914) 36 M.L.J., 360.

(2) (1918) 36 M.L.J., 578.

(3) (1918) 36 M.L.J., 60.

The JUDGMENT of their Lordships was delivered by Lord TOMLIN.—Their Lordships need not trouble the respondents' Counsel.

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This is an appeal which deals with the settlement of puttahs under the Madras Estates Land Act, I of 1908.

Before the subject-matter of the appeal is dealt with one preliminary observation can properly be made. This litigation has lasted from 1909 until the present time. Partly no doubt on this account the record has assumed substantial proportions. Their Lordships are indebted to Mr. De Gruyther for the lucid and concise way in which he has presented the case to them, thereby, in their Lordships' opinion, saving a great deal of public time.

Now, under the Act in question, where a difference arises between the landholder and the ryot as to the form which the puttah should take, procedure is provided by which the difference can be determined by the Collector. Sections 55, 56 and 57 of the Act contain the relevant provisions.

Section 55 relates to the case where the landholder fails to grant a puttah in such terms as the ryot is entitled to. There the ryot can sue for the proper puttah before the Collector.

Under section 56 when the ryot fails to accept the puttah tendered to him and to give a muchalka in exchange, the landholder may sue before the Collector to enforce the acceptance of such puttah.

Section 57 provides as follows:—

"In adjudicating suits under sections 55 and 56, the Collector shall first inquire whether the party sued is bound to grant or accept a puttah, and, unless this be proved, the suit shall be dismissed. If the plaintiff establishes that the party sued is bound to grant or accept a puttah, the Collector shall inquire whether the puttah demanded or tendered is a proper

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one. If it is found to be so, the Collector shall pass a decree directing the defendant to grant the puttah in exchange for a muchalka or accept the puttah and give muchalka in exchange. If the Collector is of opinion that the puttah demanded or tendered is not a proper one, he shall decide what the terms of the puttah should be, and shall embody such terms in his decree which shall be of the same force and effect as if a puttah and muchalka had been exchanged."

Under the procedure of the sections referred to these proceedings were launched. They came before the Special Deputy Collector. From him they passed to the District Judge. From the District Judge they proceeded to the High Court. Ultimately they are here before His Majesty in Council.

Now, six points have been placed before their Lordships by Mr. De Gruyther on behalf of the landholder as matters in respect of which he desires to complain of the conclusion reached by the High Court.

The first point is one which deals with the rent which the tenant has to pay in the case where he omits to cultivate some part of the land, that is, leaves it to lie fallow. Upon the puttah as actually framed in accordance with the conclusions of the Court below, the tenant is excused rent if the land is allowed to lie fallow.

The point turns upon the construction of sections 4 and 27 of the Act.

Section 4 of the Act is in these terms :

" Subject to the provisions of this Act, a landholder is entitled to collect rent in respect of all ryoti land in the occupation of a ryot."

Section 27 provides :—

" If a question arises as to the amount of rent payable by a ryot or the conditions under which he holds in any revenue year, he shall be presumed, until the contrary is shown, to hold

at the same rate and under the same conditions as in the last preceding revenue year."

In India it has been held that where there is a custom by which the tenant is relieved of rent in the case of land allowed to lie fallow, the custom is one of the conditions under which the tenant holds within the meaning of section 27, and that section 4, which entitles the landholder to collect rent in respect of all ryoti lands, is restricted in its operation by the existence of such a custom.

The District Judge in the present case has held that there was a custom to relieve the tenant of rent in respect of land allowed to lie fallow. Their Lordships are bound by the finding of fact of the District Judge as regards the existence of the custom.

In their Lordships' view, the custom is one of the conditions under which the ryot holds his land within the meaning of section 27 of the Act, and the operation of section 4 is restricted to the extent to which the tenant by the custom is relieved of his rent. Their Lordships are, therefore, of opinion that there is no ground upon which the decision of the Courts below on this point can be interfered with.

The second point arises in this way : The land, the subject of the tenure, falls into two categories known as dry land and wet land respectively. The rent fixed for wet land is a proportion of the produce paid in kind. The rent in respect of dry land is a rate paid in cash proportionate to the yield of the first and second crops. There are cases where wet land may be cultivated for dry crops, either because the water in the tank is not available or possibly at the caprice of the tenant, and the question is what rate the tenant should pay by way of rent in respect of any wet land which he cultivates dry.

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Now, the Collector held that: "In adverse seasons, when a dry crop is raised for want of sufficient supply in the tank, the charge of *sarasari* will be improper and only *varam* is then payable as wet land pays rent in kind."

Their Lordships understand this to mean that where some part of the wet land is cultivated dry by reason of insufficiency of water, it would be improper to charge for that portion, which is cultivated dry, a rent based on the value of the share of average produce attributable to the landholder arising from the land cultivated wet; and that the proper rent payable in those circumstances is the landholder's proportion in kind of the actual crop raised.

When the matter came before the District Judge he said this (page 184 of the record):—

"It is objected before me that the tenants never raised the contention that dry crops should be specially treated if the water supply was insufficient. The Deputy Collector in his judgment himself states that the plaintiffs' pleader did not object to paying *sarasari* for dry crops on *nanja* land." [That is wet land.] "I must uphold the contention of the appellant that in these circumstances it was not open to the Deputy Collector to decree any special rate when there was an insufficiency of water in the tank. *Sarasari* will therefore be allowed to be levied whenever dry crops are raised on *nanja* land without permission."

That is to say, his conclusion is that the tenant raising by reason of insufficiency of water dry crops on wet land has got to pay in cash the value of the landholder's proportion of the produce based upon the average production of the wet lands.

Then on page 159 of the record there is to be found the High Court's conclusion upon this matter:

"It is difficult to see on what principle the tenant should pay 'wet *sarasari*' if, owing to want of water in the tank, he is unable to raise a wet crop. The effect of the District Judge's

judgment will be to compel the tenant either to leave the land waste when there is insufficiency of water or to penalise him if he raises a dry crop as the only possible means of raising something on the land. It stands to reason that if a tenant, having water in the tank and therefore means of raising a wet crop, chooses to raise a dry crop, this should not affect the right of the landlord to charge wet rates, but where, owing to want of water, a wet crop could not be raised, there is no reason why the landlord should still be entitled to charge wet *sarasari* rates. We vary the decree of the District Judge by declaring that plaintiffs will be liable to pay *sarasari* wet rates if they raise dry crops while they could have raised wet crops and do pay the usual dry rates if they raised dry crops owing to insufficiency of water."

Now, it is said that the effect of that is not to restore the Special Deputy Collector's judgment, but to introduce a variation and to make the tenant, where water is insufficient, liable to pay for dry crops raised on wet lands only some rate in cash which has reference to the rates paid on dry lands. Without examining the decree actually passed the true effect of the decision cannot be ascertained.

The only decree of the High Court, printed in the record, does not deal with the point; as there were several suits, the matter may have been dealt with in some other decree, but their Lordships remain uninformed as to its contents. The appellant has failed to print it in his record or place it before the Board, and it is impossible for this Board to vary a decree the contents of which have not been placed before it, and are not known with certainty.

In these circumstances, in their Lordships' opinion, the appeal on this point must fail.

The third point is this: Apparently, it is the practice sometimes of landholders, in order to determine what is their proportion of the produce of a crop, to harvest, themselves, a section of the field by way of experiment,

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and then to require the tenant to hand over produce in regard to the whole field upon the basis of what the yield of the particular section harvested by the landholder has been.

In this case the landholder claimed that that was a right which he had, and that provisions in regard to it ought to be inserted in the puttah. The Collector and the District Judge both refused to insert it, and the High Court at page 154 of the record said this:—

“It is difficult to see what right the landlord has under the Act to enter upon the land of the tenant for the purpose of making what has been described by Mr. Srinivasa Ayyangar as an experimental harvest. The object seems to be to arrive at an arbitrary figure by harvesting a small portion of the crops and to throw upon the tenant the burden of showing that the actual crop was not equal to the experimental harvest. We are of opinion that such a right is clearly opposed to the provisions of section 73 of the Act and that both the lower Courts were right in disallowing this claim.”

Now, section 73 of the Act provides that:—

“(1) Where rent is taken by appraisement of the standing crop the ryot shall be entitled to the exclusive possession of the crop. (2) Where rent is taken by division of the produce, the ryot shall be entitled to the exclusive possession of the whole produce until it is divided, but shall not be entitled to remove any portion of the produce from the threshing floor at such a time or in such a manner as to prevent the due division thereof at the proper time. (3) In either case, the ryot shall be entitled to cut and harvest the produce in due course of husbandry without any interference on the part of the landholder. But before commencing to cut or gather the crop, the ryot shall give reasonable intimation to the landholder or his authorized agent of his intention to do so. (4) . . .”

In their Lordships' judgment, the claim of the landlord to have inserted in the puttah any provision, entitling him to make such an experimental harvesting as is suggested, is contrary to the provisions of the

section which has been read. The appeal on this head fails.

The next question relates to the tax or rent to be paid by the tenant to the landholder in respect of palmyra trees. The Collector and the District Judge have arrived at certain findings of fact in regard to palmyra trees, and they are these: That in two villages certain trees have been subjected to rent or tax, namely, 102 trees in one village, and 2 in another, but apart from those trees in those two villages, there has been no rent or tax paid in respect of any palmyra tree.

Section 12 of the Act provides that:—

“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 landholder, 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.”

Now, having regard to that section, it appears to their Lordships plain that the tenant is entitled to the trees, unless in case of trees planted before the passing of the Act there is established any custom or contract in writing which limits his right. The finding of the District Judge, by which this Board is bound, is in effect that there is no custom or contract in writing, for payment of rent or tax on palmyra trees except in so far as there has been a custom to pay rent or tax upon specific trees, namely, the 102 trees in one village and the 2 trees in another. In these circumstances, the appeal from that conclusion which has been affirmed by the High Court is, in their Lordships' opinion, hopeless.

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Then, the fifth point relates to temple service. The claim of the landholder is that certain temple service has been rendered from time to time by the tenants, and that they have rendered it as a condition of their tenure. The Collector and the District Judge have found that in fact, although service has been rendered from time to time by tenants, it is not proved that that service was rendered as a condition of their tenure, the evidence being consistent with that service having been rendered as voluntary service. This finding is conclusive.

In these circumstances, in their Lordships' opinion, the appeal on this point also fails.

The last point is upon the form of the decree. It arises in this way: the tenants sometimes cultivate part of the bed of the tanks where the tanks have in part run dry. The High Court has in its judgment at page 158 of the record said this: "We are of opinion that the plaintiff is bound to pay *sarasari* if he should put up ridges and cultivate *kulamkorvai* lands"—that is, lands in the beds of tanks.

Now, that is a decision in favour of the landholder. Against that the landholder naturally does not appeal, and there is no appeal on the part of the tenant; but the landholder says that when you turn to the actual decree, you find a divergence between the language of the decree and the language of the judgment. The language of the decree is to be found at page 161 of the record, and it is in these terms:—

"that for clause 4 in the lower Appellate Court's decree, the following clause, namely, 'that the tenants are liable to pay *sarasari*, if they should put up ridges and cultivate *kulamkorvai* lands with the aid of either rain water or tank water' be inserted therein."

It will be observed that the words "with the aid of either rain water or tank water" are words which do

not appear in the judgment and it is said that they in some way alter the sense, and that the decree diverges from the judgment.

In their Lordships' opinion, in the absence of any light as to what is the effect of those added words, it is impossible for them to come to the conclusion that the decree is in any way erroneous. But they do not intend by saying that to preclude the appellant, if so advised, from making any application which may be open to him in India to have the decree corrected if, in fact, there is any error in the decree, having regard to the terms of the judgment.

The appeal on this point, therefore, must also fail so far as this Board is concerned.

The result is that the appeal fails on all points, and must be dismissed with costs to the 15th respondent, who alone appeared, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman-Walker and Shephard*.

Solicitor for respondent No. 15: *H. S. L. Polak*.

A.M.T.

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APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.

1929,
November 7.

KUMARASWAMY ASARI AND TWO OTHERS
(NEW PARTIES PERMITTED TO APPEAL), APPELLANTS,

v.

LAKSHMANA GOUNDAN AND FOUR OTHERS
(DEFENDANTS 1, 3 AND 4 AND PLAINTIFFS 1 AND 3), RESPONDENTS.*

Religious endowment founded by a worshipper—Dedication of lands to—Proof of, by later usage, whether admissible—Trust, dedicating surplus income for private use of worshipper, whether valid.

A pujari, who founded a public temple about a hundred years ago, bought lands, a few in the name of the deity, and all the rest in his own name, with the offerings made by various devotees and used part of the income for the purpose of the temple utilizing the rest for his own benefit. This mode of expenditure continued during the lifetime of his son and grandson who also acted as pujaris.

In a suit brought by certain worshippers in 1916 for framing a scheme under section 92, Civil Procedure Code, in respect of the offerings and for a declaration that all the lands belonged to the temple,

Held, that in cases where there is no deed of endowment of lands, as in this case, or where it is ambiguous, usage is relevant evidence to determine whether the lands and the offerings were after their acquisition endowed entirely for the temple or were only burdened with the actual expenses thereof, the surplus being held by the pujari for his own benefit.

Held, further, that a trust, whether express or implied, by which a portion of the income from the trust property is directed for the purposes of a public temple and the surplus for the beneficial use of its pujari is not illegal.

* Appeal No. 439 of 1927.

APPEAL against the decrees of the Court of the Subordinate Judge of Salem in Original Suit No. 4 of 1916.

K. V. Krishnaswami Ayyar and *B. V. Viswanatha Ayyar* for appellants.—The properties standing in the name of the pujari have been purchased out of temple funds, namely, the surplus income arising out of offerings made by worshippers to the deity. At any rate the *onus* is on the pujari to show that the purchases were made out of his private funds and not out of temple funds. The relators are in effect applying for a tracing order; see *Godefroi on Trusts*, 5th Edition, pages 568 and 573; *Lewin on Trusts*, 13th Edition, pages 931 and 932; *Story on Equity*, 3rd English Edition, section 468; *Lupton v. White*(1), *Frith v. Cartland*(2), *Re Ambleside Charity*(3) and *Tulasamma v. Venkatasubbayya*(4).

[KUMARASWAMI SASTRI, J.—Cannot the Court infer that the intention of the founder was that the surplus income should be taken by the pujari?]

No. The moment the offerings are made, they become the property of the deity and the subsequent appropriation by the pujari of what belongs to the temple will only amount to a breach of trust. The pujari will be entitled to some remuneration for his services, but a general right to the surplus income of the temple cannot be recognized in law. Usage cannot be invoked to interpret the nature of the grant; *Puraviya Goundan v. Poonachi Goundan*(5) and *Srinivasacharyulu v. Pratyanga Rao*(6).

T. Rangachariar, A. Srirangachari and *S. Ramanujam* for first respondent:—There being no deed of endowment, usage should be taken to be indicative of the nature of the trust; see *Venkatachalapathi v. Subbarayadu*(7). There is nothing wrong in the archaka or pujari sharing with the deity the temple income; see A.S. No. 321 of 1924 (unreported), *Chinnatha Rowther v. Karunji Andi*(8), and *Attorney-General v. Bristol (Mayor of)*(9). The consciousness of the worshippers is also important. The pujaris have in this case been appropriating

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(1) (1808) 15 Ves. Jun., 432; 33 E.R., 817 at 819, 820.

(2) (1865) 2 Hem. & M., 417; 71 E.R., 525.

(3) (1870) 18 W.R., 663.

(4) (1925) I.L.R., 48 Mad., 597.

(5) (1920) 40 M.L.J., 289.

(6) (1920) 30 M.L.T., 101.

(7) (1920) I.L.R., 18 Mad., 298.

(8) (1926) M.W.N., 192.

(9) (1920) 2 Jac. & W., 294; 37 E.R., 640 at 649.

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to themselves the surplus income all along. The Court should not presume a breach of trust; *Attorney-General v. Sidney Sussex College*(1). On the other hand, long enjoyment is presumptive evidence of a right; *Tudor on Charities*, 4th Edition, page 115; *Attorney-General v. Corporation of Rochester*(2), *Attorney-General v. Skinner's Company*(3), *Abhiram Goswami v. Shyama Charan Nandi*(4) and *Rambrahma v. Kedar*(5). Assuming that the entire offerings belonged to the temple, the pujari should not be directed to account for past income; see *Attorney-General v. The Master, Wardens, etc. of the Wax Chandlers Company*(6), *Kelu Achan v. Sivarama Pattar Karikar*(7) and A.S. No. 153 of 1925 (unreported).

JUDGMENT.

This is an appeal against the judgment and decree of the Subordinate Judge of Salem in O.S. No. 4 of 1916, dated, the 30th November 1925. The suit relates to the temple of Sri Kandaswami in the village of Kalipatti in the Salem District. The temple was founded by one Lakshmana Goundan, the grandfather of the first defendant. He died about the year 1856 or 1857. The second defendant who was the son of the first defendant was added as a party. He has since died and his sons have been added as his legal representatives. The plaintiffs are Hindu worshippers of the temple. They instituted the suit for a scheme of management. The first defendant claimed that the temple was a private temple. The Subordinate Judge, Mr. Narayana Ayyar, found it to be a private temple. On appeal to the High Court, ABDUR RAHIM and OLDFIELD, JJ., differed, the former finding that the temple was a public temple and the latter holding it to be a private one. A decree was

(1) (1869) 4 Ch. App., 722 at p. 732.

(2) (1854) 5 De. G., M. & G., 797; 43 E.R., 1079 at p. 1089.

(3) (1838) 5 Sim., 596; 58 E.R., 463 at 470.

(4) (1909) I.L.R., 36 Cal., 1003 (P.O.). (5) (1922) 36 C.L.J., 478.

(6) (1873) 6 H.L., 1 at 14, 28.

(7) (1927) 118 I.C., 835.

therefore made dismissing the appeal, and from that decree the plaintiffs appealed under the Letters Patent, and three learned Judges who heard the appeal, SADASIVA AYYAR, SESHAGIRI AYYAR and BURN, JJ., delivered separate but concurring judgments finding that the temple was a public one. See *Subramania Ayyar v. Pujari Lakshmana Goundan*(1). Against this, an appeal was preferred to the Privy Council which decided that the temple was a public one. See *Pujari Lakshmana Goundan v. Subramania Ayyar*(2). The suit was therefore remanded for framing a scheme. It is against the scheme so framed that the present appeal is preferred and the main question at issue is whether the lands which now stand in the name of the first defendant should be treated as temple property or whether they should be held to belong to the first defendant. The learned Subordinate Judge, Mr. L. R. Anantanarayana Ayyar has held that they belong to the first defendant.

That the properties in dispute stand in the name of the first defendant is not denied. The argument of the learned Advocate for the appellants is briefly this. The temple having been found to be a public one, it must be presumed that all offerings made to the God were the property of the God and that as it is admitted that the suit properties must have come practically entirely out of the offerings to the God, they must be held to be the property of the God of which the first defendant was only a trustee. It is further argued that the learned Subordinate Judge wrongly threw the onus of proof under these circumstances on the plaintiffs. For the other side, it is contended that the temple having been admittedly a fairly recent one and there being no written deed of dedication, usage must determine the nature of

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(1) (1919) M.W.N., 899.

(2) (1924) M.W.N., 278 (P.O.).

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the trust and that, in fact, the gifts were offered on the understanding that, after defraying the expenses of the temple, the remainder should go to the founder and his heirs. It is also contended that the onus of proof that these lands which stand in the name of the first defendant are temple properties was rightly laid on the plaintiffs. The whole evidence being before us, the question of onus is not very important.

The history of this temple has been narrated in several judgments in the case and it may be summed up in the words of their Lordships of the Privy Council (1924 M.W.N., at page 279):—

“Lakshmana Goundan, the grandfather of the first defendant, lived in a small house which belonged to him in the village of Kalipatti. He was a devout Hindu and originally a poor man. He maintained in his house an idol of the goddess of Amman, which was the private idol of his family. He was also a devout worshipper at the public temple at Palni at which there was an idol of the God Subramaniaswami, and he made yearly pilgrimage to Palni with offerings to that God. It is said, and probably with truth, that he dreamt that he should install at his house at Kalipatti an idol of the God Subrahmaniaswami and that the God would come to his house and enable him to foretell events. He did install that idol at his house, adopted the ritual which was followed at Palni, and allowed Brahmans and other Hindus of various castes to worship the idol as if it was a public idol. He acted as the pujari of the idol and received, as the pujari, offerings made to the idol by worshippers and fees which he charged in respect of processions and other religious services. He obtained a great reputation as a holy man and as being enabled by the God to foretell events.”

Their Lordships then proceed to describe how the number of worshippers increased and extensions to the temple were made by Lakshmana Goundan. They proceed (at page 280)—

“On certain days in each week the Hindu public was admitted by him free of charge to worship in the greater part of

the temple, to one part only on payment of fees, and to the inner shrine apparently not at all. With the income which he derived from offerings and fees at the temple he efficiently maintained the temple as if it were a public temple and discharged all the expenses connected with the temple and the worship of the idol there. That may be assumed from the reputation which the temple acquired amongst Hindus. No accounts have been produced, probably he kept none, but it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died.”

The only fact that may be added to this is that apparently the date of his bringing the God from Palni was about 1821 and their Lordships find that the temple itself was founded between 1841 and 1856.

In dealing with this appeal, it has to be remembered that the sole point decided by the Privy Council was that the temple was a public and not a private one. The remarks beyond this point made by the learned Judges of this Court and which have been sought to be used as arguments, however valuable they may be, are *obiter*. Now, we think it is clear in a case of this sort, where the temple is of comparatively recent foundation and its origin well-known and where there is no deed of gift or dedication, the nature of the dedication must be determined by the usage. It has to be remembered that the idol was brought by Lakshmana Goundan from Palni to his house a considerable time, some twenty years or more, before the temple was built. The growth of the temple and of its importance was gradual. The allegation of the plaintiffs that there was a temple in the place before, has been found by all the Courts to be untrue. Mr. Justice SESHAGIRI AYYAR says (1919 M.W.N. at page 916):

“In the absence of any writing and in the absence of any evidence of persons who were alive in 1819, it is not possible

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to say when the dedication was made. It is the usage in the temple and it is the practice that has been observed that should guide us in determining this point. From this point of view, I have no hesitation in holding that the temple was dedicated at least during the lifetime of Lakshmana Goundan."

Mr. Justice BURN says, at page 917 :

"As might be expected in the circumstances, the progress of the building was gradual. The main features had, however, been completed by the time of Lakshmana Goundan's death in 1857."

It was sought to be argued (1) that usage could not be held to evidence the nature of the trust, and (2) that a trust by which the surplus money after paying for the maintenance of the temple would go to the pujari would not be a legal trust.

As regards the first point no satisfactory authority was quoted. The following cases were relied on:—*Puraviya Goundan v. Poonachi Goundan*(1). That was a case where there was no image of the Goddess in the temple and she was represented by *Akasa* or emptiness. It was nevertheless held that the offerings to the pujari in that case were made to the Goddess and that the lands endowed to the temple in that case were the property of the Goddess and not that of the pujari. But in that case the lands had been given to the temple by a poligar family. There was an inscription describing the dedication on the ceiling and the lands stood in the inam register in the name of the Goddess. The next case is *Srinivasacharyulu v. Pratyanga Rao*(2). There the grant was expressly to the God and the family of the defendants were appointed as archakas. They claimed that the lands belonged to them subject only to the burden of service in the temple. It was held that the grant being clearly to the God, the usage according to the defendants could not be invoked in

(1) (1920) 40 M.L.J., 289.

(2) (1920) 80 M.L.T., 101.

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interpreting the grant. That has no application to a case where the grantor himself founded the temple and there is no written deed of grant. In such cases the only means of determining the nature of the grant is by the usage. In *Attorney-General v. Sidney Sussex College*(1), Lord HATHERLEY, L.C., says :

"I think the appellants are entitled to apply that principle of the Court which says, that if there be any ambiguity, the course of construction and action upon the bequest may be called in aid, as inferring that the persons who are concerned in the trust have not been committing a breach of trust from the commencement downwards to the present time. The reason why the Court relies upon that rule with reference to charities, where there is anything doubtful in the construction of the will, is, that there have been persons alive who were competent to controvert any such conclusion, and it is not to be assumed that, where many persons were interested in controverting such a conclusion, a course of action has been adopted which has been a plain and clear breach of trust."

In *Attorney-General v. Bristol (Mayor of)*(2), Lord Chancellor ELDON remarks :

"The construction in these cases, I take it, must be considered to go upon intention, and the different rules furnished by the cases I have mentioned, are to be considered as indicia of the intention. Was it then the intention of the donor that *Bristol* should be a trustee As far as I have read these ancient cases, they state it to depend upon the intention of the donor, and that one way of finding out that intention is, to enquire, whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity."

In *Attorney-General v. The Corporation of Rochester*(3), Lord Justice TURNER says :

"Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument,

(1) (1869) L.R., 4 Ch.A., 722 at 732.

(2) (1820) 2 Jac. & W., 294; 37 E.R., 640 at 649.

(3) (1864) 5 De.G., M. & G., 797; 43 E.R., 1079 at 1080.

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but which may not be warranted upon another construction of the instrument, the Court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a period applied."

In *Attorney-General v. Skinner's Company*(1), Vice-Chancellor Sir L. SHADWELL quotes Lord HOLT to the following effect :

"I do agree there is no Statute of Limitation shall bar a charity; but in a thing that is obscure and dark, and there hath been an enjoyment for a long time, I think an enjoyment for a long time, without interruption, is a great evidence of a right; for quiet enjoyment for a long time does presume a rightful enjoyment."

Turning to the Indian cases, in *Abhiram Goswami v. Shyama Charan Nandi*(2), it was held that though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet, it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language. The rule therefore is quite clear that in the absence of a written grant or where the terms of the written grant are ambiguous or where there is no direct evidence of the terms, usage can be looked to to determine the nature of the grant.

As regards the second contention that such a grant as is contended for by the defendants in the present case is not a legal one, no authority has been quoted. Reliance is placed on certain remarks of SESHAGIRI AYYAR, J., to the following effect at page 915 :

"It would undoubtedly be regarded as a fraud practised upon the public that the income derived with reference to the sanctity and holiness of a shrine should be regarded as the

perquisites of the persons in charge, and it would strike at the very root of religion in India to hold that the person who is permitted by the worshippers to receive the offerings is the owner, and not simply the trustee, of the income."

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These must be considered as *obiter dicta* and in *Puraviya Goundan v. Poonachi Goundan*(1) OLDFIELD, J., criticizes them saying that on this basis

"it is difficult to see how the existence of any private temple at all can claim legal recognition."

There are many temples where the archakas after performing puja and maintaining the temple are entitled to the surplus. On the abstract question of law, we may quote Tudor on Charities, Chapter V, 4th Edition, page 115 :

"The surplus income, and the benefit of any subsequent increase, which the charities do not take, may be specifically disposed of either by the devisees being directed to retain it for their own benefit or by its being directed to be applied in other directions."

In *Rambrahma v. Kedar*(2), it was laid down that a charitable corporation, in so far as it is charitable, is the creature of the founder, and that the proof of intention of the founder of a religious institution becomes almost conclusive, where the usage is immemorial, though the intention may be presumed from a number of instances extending over a limited period, provided only that the existence of an invariable practice is made out by clear and unambiguous evidence; and that the Court will be slow to draw an inference which will defeat a right that has been exercised without question during a long period, and unless such inference is irresistible, the Court will presume everything that is reasonably possible to presume, in favour of such a right. In *Chinnatha Rowther v. Karunji Andi*(3), it was held that a member

(1) (1920) 40 M.L.J., 289 at 299.

(2) (1922) 36 C.L.J., 478.

(3) (1926) M.W.N., 192.

(1) (1933) 5 Sim., 596; 58 E.R., 463 at 470.

(2) (1909) I.L.R., 36 Cal., 1003 (P.O.).

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of a family of pujaris entitled to the surplus income of the suit properties belonging to a temple after meeting the puja and other expenses of the temple was entitled to maintain a suit to set aside certain alienations made by certain members of the family as not binding on the temple and to recover the properties on behalf of the trust.

In the present case it is not denied that the temple had been maintained and greatly improved by the founder and the first defendant. These improvements were made at a cost of between Rs. 50,000 and Rs. 1,00,000. We are quite clear that there would have been nothing illegal in the founder of the temple having created a trust to the effect that the temple should be maintained out of the offerings to the idol and that the balance should go to himself and his family, provided this did not offend against the law of perpetuities or such other provisions with which we are not concerned. Their Lordships of the Privy Council say, as quoted above :

"it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died."

They do not appear to think that this would be any violation of the trust merely because the temple is found to be a public one. In fact, the scheme now provides in section 24 :

"The pujari shall not ordinarily be paid any salary for his work and duties from temple funds but if after the temple liabilities are discharged in full, at the end of any year after audit it be found that there is a balance of income over expenditure, the pujari will be paid 50 per cent of that balance amount as his honorarium for that year."

This, according to the contention of the learned Advocate for the appellants, would be an illegal breach of the trust as he contends that all the money belongs to

the deity. It is difficult to see on his argument how the pujari could even maintain himself out of such gifts.

The origin of the temple has been recounted and we have to try and determine what was the intention of the original founder. Lakshmana Goundan was probably a very pious man, but the evidence is perfectly clear that he did not regard all the offerings made or money taken as the property of the deity. It has to be remembered that besides his position as a pujari, he was also considered as a seer. Their Lordships of the Privy Council say, as quoted above :

"it may be assumed that he applied the balance of the income he so obtained to the support of himself and his family and in acquiring for his own benefit and that of his family some immovable property which he possessed before he died."

This is not merely an assumption but it is proved to the hilt by evidence. [After discussing the evidence their Lordships continued:]

It is clear from the facts stated that Lakshmana Goundan did not dedicate the properties bought under Exhibits XXII and XXII (a), nor does it appear that when he took a mortgage of the lands under Exhibits XV and XV (a), he took that mortgage for the deity, though he seems afterwards to have dedicated these lands to the deity when they were sold to him.

As regards the attitude of the general public and the view they took of the offerings, the evidence is all one way. Until the final decision of the Privy Council that the temple was a public one, public officials and the villagers had regarded it as private. The income-tax authorities had taxed the first defendant one year on the temple income. [After discussing the evidence on this point their Lordships continued:]

However, the matter is not really material, as this is not a case of mixing trust money with private

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money. For this reason, we think that the cases quoted to us with regard to mahants or matathipathis or of trustees who mix private money with trust money have no bearing on the present question and it is not necessary to refer to them. We see no reason to suppose that the trust was not one by which the founder maintained the idol, and later on, the temple and retained the surplus offerings. He not only founded the temple, but admittedly, he and his successors have greatly enriched and enlarged it. There is no question of breach of trust on this score. We see no reason to hold that the lands in dispute were bought from trust money or in breach of any trust.

That being so, it is not necessary to go into the second ground urged on behalf of the respondents that even if there was a breach of trust, it would amount to back-accounting to enforce restoration of these lands and that this should not be done where the breach of trust had been due to a bona fide mistake. In this connexion, the *Attorney-General v. The Master, Wardens, etc., of the Wax Chandlers Company*(1) and *Kelu Achan v. Sivarama Pattar Karikar*(2) are quoted, but we consider it unnecessary to discuss the point.

Turning to the scheme itself, the appellants did not ask for the removal of the first defendant. Whatever may be his character otherwise, he has done a great deal for the temple and the remarks passed about him in various judgments show that the institution will probably suffer if he is not retained. It is however argued that owing to his conduct since he has been appointed as receiver, two co-trustees should be added. We think on the whole that this would not conduce to the smooth administration of the temple and that paragraphs

14 and 21 of the scheme will operate as a sufficient check upon the conduct of the first defendant. Paragraph 25 which provides for the modification of the scheme must be deleted, as it has been held that such an order is *ultra vires*. In other respects, we see no reason to modify the scheme.

The memorandum of cross-objections as regards jewels is not pressed.

In the result the appeal is dismissed and the judgment and decree of the lower Court with the modification noted above are confirmed. The Privy Council allowed the costs of the suit from the temple funds. We think, in the circumstances, the costs of this appeal on both sides also should be met from the temple funds.

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APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri
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THE FIRM OF SENAJI KAPURCHAND AT
BELLARY (PLAINTIFFS), RESPONDENTS*.

Limitation Act (IX of 1908), sec. 23, arts. 29, 36 and 49—Wrongful attachment before judgment of movables of defendant, whether a continuing wrong—Applicability of art. 29—Starting point of limitation—Time taken in appeal to get attachment set aside, whether can be excluded.

Article 29 of the Limitation Act (IX of 1908) applies to all cases of attachment before judgment where specific movable property is actually seized and the seizure is wrongful either

* Appeal No. 211 of 1925.

(1) (1873) 6 H.L., 1, 14 and 23.
(2) (1927) 118 I.C., 685.

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because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds; the article applies whether the property attached belongs to a defendant in the suit or to a third party.

The starting point of limitation is the date of actual seizure and the time taken in getting the seizure declared illegal either on appeal or by other means cannot be deducted.

Such wrongful seizure is not a continuing wrong within the meaning of section 23 of the Limitation Act.

APPEAL against the decree of the Court of the Subordinate Judge of Bellary in Original Suit No. 2 of 1924.

V. S. Narasimhachar for appellant.

O. Sambasiva Rao for respondent.

JUDGMENT.

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KUMARASWAMI SASTRI, J.—Defendants are the appellants. This appeal arises out of a suit filed by the plaintiff firm against the defendant firm claiming a sum of Rs. 10,000 as damages which the plaintiffs alleged they sustained by reason of the defendants having wrongfully attached before judgment the properties in the defendant firm.

The plaintiffs and the defendants were merchants who were carrying on business in partnership. The plaintiffs were carrying on business at Bellary and the defendants were carrying on business at Gadag. It is alleged that the plaintiffs filed a suit in the Bellary District Court for winding up the business and for taking accounts. The defendants brought a suit against the plaintiffs and two other firms in the Court of the First-class Subordinate Judge of Dharwar for a breach of contract claiming Rupees three lakhs twelve thousand odd. The defendants filed an affidavit on the 30th of March 1920 and applied for attachment before judgment of certain properties of the plaintiffs in Bellary and obtained a conditional order. The Subordinate Judge after hearing

the parties confirmed the attachment before judgment on the 21st of April 1920 and ordered the plaintiffs to give security on failure of which the attachment was to continue. It is alleged in the plaint that both in getting this order and in carrying out the attachment the defendants were guilty of various acts of misconduct. The plaintiffs appealed to the High Court of Bombay against the order of the Subordinate Judge and the High Court reversed the order of the Subordinate Judge holding that the defendants did not establish any proper grounds for the attachment before judgment. The judgment of the Bombay High Court is reported in *Sennaji Kapurchand v. Pannaji Devichand*(1).

The defendants filed a written statement stating that they acted bona fide. They denied that in carrying out the attachment they acted in any illegal manner as alleged in the plaint. They denied that the plaintiffs were entitled to any damages and stated that the suit was barred by limitation.

The Subordinate Judge held that the plaintiffs did not prove the various acts of misconduct alleged in the plaint, but he was of opinion that the plaintiffs were entitled to damages on the ground that the attachment was not obtained bona fide. He observed:

"In the result I find that the attachment made from the 10th to 12th April 1920 was malicious in the sense that it was sought not under an apprehension that the plaintiffs were closing the shop to defeat the debt due to the defendants but in order that it may be easy for the defendants to realize their moneys in case they obtained a decree."

As regards damages, he awarded Rs. 3,000 damages and directed the parties to pay and receive proportionate costs. As regards limitation, the point was considered by the District Judge before the suit was

(1) (1921) I.L.R., 46 Bom., 431.

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transferred to the Subordinate Judge and the District Judge on the authority of *Manavikraman v. Avisilan Koya*(1) was of opinion that, where the movables of the defendants were attached before judgment, the seizure cannot be regarded as wrongful and that article 29 did not apply. The District Judge applied article 49 and as the date of the seizure was the 9th of April 1920, i.e., within three years before the suit he held that the suit was in time. The Subordinate Judge said that that ruling concluded the matter but he also added that as it was necessary for the plaintiffs to prove that the prior proceedings terminated in their favour, limitation began to run from that date, that the attachment was a continuing wrong and that section 23 of the Limitation Act would apply. Hence the appeal.

In appeal, it is contended that the suit is barred by limitation and that the Judge was wrong in holding on the facts that the attachment before judgment was obtained maliciously and without reasonable cause and that in any event the damages are excessive.

As regards limitation, I am of opinion that the suit is barred by limitation. The order of the Subordinate Judge of Dharwar was on the 31st of March 1920 and the attachment is said to have been on the 10th and the 11th of April 1920. The suit was filed on the 26th of October 1921. The suit was one for damages for obtaining a wrongful attachment of the properties of the plaintiffs.

Article 29 of the Limitation Act runs as follows:

"For compensation for wrongful seizure of movable property under legal process—one year—the date of the seizure."

It is contended by the appellants that this case falls within article 29, that the suit is for compensation for

wrongful seizure of movable property under legal process, that the period is one year commencing from the date of the seizure, that according to the allegations in the plaint, the seizure was wrongful from the date when the property was seized, that the fact it was held to be wrongful by the High Court of Bombay on the 14th of September 1921 does not convert a proper seizure into an improper seizure and that consequently the date of the order of the High Court of Bombay has nothing to do with limitation. It is also argued that seizure which is wrongful is not a continuing wrong within section 23 of the Limitation Act.

For the respondents it is argued that there is a difference between cases where the property of the defendant is attached and cases where the property of third parties is attached, that article 29 only applies to cases where the property of third parties is attached, and that if the property of the defendant is attached the proper article would be article 36, which provides for compensation for any malfeasance, misfeasance or non-feasance independent of contract and not specially provided for by the Limitation Act and a period of two years is prescribed, the period commencing from the date when the malfeasance, misfeasance or non-feasance takes place, or article 49, which provides for compensation for wrongfully taking or injuring or wrongfully detaining movable property, where three years is the period of limitation beginning from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. It is also argued that wrongful attachment is a continuing wrong until the property is released from attachment in which case the suit was not barred by limitation as it is admittedly within one year of the release order of the High Court setting aside the attachment. It is

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also contended that as in actions for malicious attachment under legal process the termination of the proceedings is necessary, limitation begins to run only from the termination of the proceedings or the period when the proceedings were going on should be excluded in computing the one year.

The difficulty of applying either of the articles 36 or 49 is that before these articles can be attracted it has to be shown that the specific article 29 which applies to suits for compensation for wrongful seizure of movable property under legal process is not applicable. I do not think it can be held that wrongful seizure of movable property is a continuing wrong. No doubt the party is deprived of the possession and use of the property during the period it is taken out of his possession, but it seems to me that that does not make it a continuing wrong within the meaning of section 23.

No authority has been cited for holding that in such actions limitation does not begin to run until the plaintiff obtains a restoration of the property. I do not think the wrongfulness or otherwise of the seizure depends upon the adjudication of the Court on an objection taken by the person whose property is attached. If, unless certain facts are alleged and proved, the attachment is an invasion, the wrongful nature of the attachment does not depend upon the adjudication of the Court on the objection. It is not rightful when the Court makes an order on allegations which are subsequently found to be unproved and become wrongful only when the Court on investigation of the facts holds that the plaintiff had no justification in attaching the properties. It is wrongful *ab initio*.

As regards the argument that there is no cause of action until the attachment has been declared to be wrongful and that the plaintiff must allege and prove

the termination of the proceedings in his favour; the effect of upholding this contention would be to read into article 29 words that are not there. The period of limitation runs from the date of the seizure and not from the date when the seizure is declared wrongful. It should be noted that in other articles where termination of proceedings is necessary to give the plaintiff a cause of action, the Limitation Act specially provides for that contingency. For example, in article 19 which refers to compensation for false imprisonment, the period of limitation begins to run from the date when the imprisonment ends. In article 23 which refers to compensation for malicious prosecution, the period of limitation runs from the date when the plaintiff is acquitted or the prosecution is otherwise terminated. In article 42 which refers to compensation for injury caused by an injunction wrongfully obtained, the period of limitation is three years commencing from the time when the injunction ceases. The Legislature has however in dealing with compensation for wrongful seizure of movable property under legal process fixed the period as one year from the date of seizure. I may also point out that article 28 which refers to compensation for illegal, irregular or excessive distress gives one year from the date of the distress. Having regard to this marked distinction, I do not think I would be justified in reading into article 29 words which are not there. And even assuming for purposes of argument that it is necessary in case of compensation for wrongful attachment to allege and prove that the attachment proceedings have been terminated in favour of the plaintiff, it is difficult to see how the period during which the proceedings regarding the attachment are alleged to be pending can be excluded. Under section 9 when once time has begun to run, no subsequent disability or

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inability to sue stops it and none of the sections in Part III of the Limitation Act relating to computation of period of limitation have any application to cases like the present. I find it difficult to see why any distinction should be drawn between cases where the property of the defendant is attached and cases where the property of third parties is attached. Both the cases fall under article 29. There is wrongful seizure of movable property under legal process and the seizure is no less wrongful because it is the property of the defendant. The distinction to my mind is purely artificial. The hardship is the same.

Turning to the authorities, there are, no doubt, some cases which draw this distinction, but there are other decisions where article 29 has been applied to cases where the defendant's property has been distrained or attached.

In *Hughes v. The Chairman of the Municipal Commissioners of Howrah*(1), the suit was for the recovery of damages on account of a fine imposed by the Municipality of Howrah and the detention of an omnibus. The fine was set aside by the High Court and the detention pronounced to be wrongful. The question was as to when the cause of action arose and as to the period of limitation, the Calcutta Municipal Act giving a period of three months. Sir RICHARD COUCH, C.J., observed :

"The cause of action was the seizure of the omnibus, which took place on the 5th of July. Either that seizure was a lawful one by virtue of proceedings to recover the fine which had been legally imposed by the Municipal Commissioner, acting as a Magistrate, or it was a seizure without any justification, in which case there would be a cause of action. The Judge of the Small Cause Court is mistaken in supposing that the cause of action arose upon the order of the High Court being made . . . It is a mistake to suppose, as I observe is often done, that where a

(1) (1878) 19 W.R., 339.

proceeding is illegal and may be a cause of action, the cause of action does not arise until the proceeding has been set aside by the Court. There may be cases in which before an action can be brought it is necessary to have the proceedings set aside but where there is an entire want of jurisdiction, where the alleged wrong-doer is not acting judicially and would have no protection from his judicial capacity, it is not necessary to wait until his illegal and unfounded proceedings are set aside. In this case, if the plaintiff had any cause of action, it accrued upon the seizure of the omnibus, and he was bound to bring his suit within three months from the time of the seizure. He could not, under the circumstances, treat the continued detention of the omnibus as fresh causes of action from day to day."

In *Jaggivan Jatherdas v. Gulam Jilani Chaudhri*(1), it was held that a suit to recover money wrongfully taken under a decree is governed by article 29 of the Limitation Act of 1877 and that the same article applies to cases where compensation for the loss of interest on the money is claimed. This was a case where the property of the defendant was attached.

In *Surajmal v. Manekchand*(2), the suit was for damages for wrongful attachment and the question was which article was applicable. The property attached was the property of the plaintiff and not the property of a third person. It does not appear from the facts stated in the judgment that there was any actual seizure of the property. There seems to have been only a prohibitory order. BARRY, J., in considering the articles applicable observed :

"I do not think the present suit can be described without strain of words as one for specific movable property or for compensation for wrongfully taking or detaining the same. Nor can it be said that the rubies in suit were injured. The injury if any was done to the plaintiff by affecting his power of dealing with them. I therefore think article 36 would govern the case, unless there be any other article which could apply. Article 29 does not appear to do so, for it implies actual seizure under

(1) (1888) I.L.R., 8 Bom., 17.

(2) (1903) 6 Bom. L.R., 704.

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legal process. The only other article besides 36 that can be cited as appropriate is article 42 which relates to suits for compensation for injury caused by an injunction wrongfully obtained. *Nandkumar Shaha v. Gaur Sankar*(1) has been cited in this connexion; but that case dealt with an injunction under section 92 of Act VIII of 1859 which corresponds with section 492 of the present Code rather than with sections 484, 485, 486, and 268 under which the attachment now in question purports to have been made."

In *Murugesu Mudaliar v. Jattaram Davy*(2), certain properties in the hands of a third person were attached on the 12th of June 1895. The plaintiff filed a claim which was disallowed. Thereupon he filed a regular suit to establish his right which was decreed in his favour. He then filed a suit in 1899 for recovering damages. The defendants, among other pleas, contended that the suit was barred by limitation. The plaintiff contended that the period of limitation should be calculated from the time when his rights were finally declared by the High Court, or at any rate, that the time occupied in the proceedings connected with the Small Cause Court should be deducted under section 14 of the Limitation Act. It was held by Sir ARNOLD WHITE, C.J., and SUBRAHMANYA AYYAR, J., that the suit was barred and that the plaintiff was not entitled to have the time spent in prosecuting the previous suit deducted from the period of limitation. The learned Judges observed :

"In our judgment the plaintiff's cause of action accrued on the 12th June 1895. The present suit was instituted on the 26th April 1899. Unless, therefore by virtue of the earlier proceedings taken by the plaintiff he can claim the benefit of section 14 of the Limitation Act, the question whether the period of limitation is the one year's period prescribed by article 29 or the three years' period prescribed by article 49 is immaterial."

After holding that the period under section 14 cannot be excluded, the learned Judges observed.

"But it has been argued on behalf of the plaintiff that a distinction must be drawn between a claim for compensation for wrongful seizure of movable property where the compensation sought is merely the value of the goods seized, in which case it is argued that article 49 applies, and a claim for compensation by way of damages which are consequential on the wrongful seizure and are independent of any question of compensation for the value of the goods, in which case it has been argued the period of limitation is one year under article 29. There is no reason in principle for this distinction and, in our judgment, the legislature never intended that any such distinction should be drawn. Article 29 is quite general in its terms and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process. The case of *Manavikraman v. Avisilan Koya*(1) may be distinguished on the ground that, in that case, the wrong complained of was the institution of a suit without reasonable grounds followed by an attachment of the goods of the defendant in the suit; whereas in the present case the goods belonged to a person who was not a party to the suit in which the attachment was made."

In *Narasimha Rao v. Gangaraju*(2), it was held by Sir ARNOLD WHITE, C.J., and PINHEY, J., that article 29 of the second schedule to the Limitation Act applied to suits for damages for wrongful attachment. This was a case where the goods of a third person were attached. He preferred a claim which was dismissed but he succeeded in a suit under section 283 of the Civil Procedure Code. The attachment was on the 10th of December 1899. The suit was finally decided in plaintiff's favour on the 7th of February 1903 and the suit for damages was instituted in 1903. Sir ARNOLD WHITE, C.J., was of opinion that article 29 applied and he followed the decision in *Murugesu Mudaliar v. Jattaram Davy*(3).

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(1) (1895) I.L.R., 19 Mad., 80.

(2) (1908) I.L.R., 31 Mad., 431.

(3) (1900) I.L.R., 23 Mad., 621.

(1) (1870) 5 Beng. L.R., Appx. 4.

(2) (1900) I.L.R., 23 Mad., 621.

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The learned Chief Justice observed :

" The lower Courts have dealt with the case on the footing that the attached property was movable property and I deal with the case on the same footing. I am of opinion that the appropriate article is article 29, since this is the only article which refers specifically to wrongful seizure under legal process. This was the view taken by this Court in *Murugesu Mudaliar v. Jattaram Dary*. I do not think this article should be construed as limited to claims for consequential damages and as not applicable where the plaintiff seeks only to recover the value of property seized, or the sale-proceeds, if the property has been sold. This is obviously not the sense in which the word is used in articles 30 and 31, and I do not see why it should be construed in this restricted sense in article 29. If article 29 applies, the law is express and the time is one year from the date of the seizure. No doubt section 288 of the Code makes provision for a special procedure whereby a claimant to property which has been seized in execution may establish his right, but I fail to see how the provisions of this section can have the effect of postponing the time when limitation begins to run, or suspending the time which has begun to run, when the Limitation Act makes express provision in the matter. Further I can see no ground for holding that time does not run so long as the property remains in *custodia legis*. The damage to the plaintiff is the seizure of his property. True, he may eventually succeed in showing the property is his and in the meantime the property is safe, but he is none the less damaged by being deprived of the enjoyment of his own property."

SANKARAN NAIB, J., was of opinion that so long as the property remained in the custody of the Court the plaintiff cannot be said to have lost it and is therefore not entitled to any compensation for its loss, and that article 29 does not apply. He was of opinion that article 62 or article 120 applied. With this difference of opinion the matter came before PINNEY, J., who was of opinion that article 29 applied to the case. The learned Judge observed :

" If the seizure was not wrongful there was nothing wrongful in the payment. It is conceded that the seizure was wrongful. This is not a continuing wrong. Later manifestations of

the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action. The cause of action therefore was the original seizure and time began to run from that date. The article of schedule II of the Limitation Act that governs the case would appear to be either article 29 or article 49."

After referring to the view of the learned Chief Justice that the distinction between article 29 and article 49 is that the former article applies to a case of wrongful seizure made under legal process, whereas the latter applies when the wrongful seizure is made by a private person, the learned Judge observed :

" There is much to be said in support of this view, but it seems to me unnecessary, now, to decide which of the two articles applies, for the suit is admittedly barred whichever article is applied, if the wrongful seizure is taken as the starting point for limitation, and no allowance is made for the time spent in litigating the title under section 288, Code of Civil Procedure."

This case seems to me to be authority for two propositions :—

(1) That the starting point for limitation in case of wrongful seizure of goods under legal process is the wrongful seizure and not when the plaintiff obtains a declaration of his rights as to the property seized ; and

(2) That the time spent in the previous litigation cannot be excluded in computing the period of limitation.

Having regard to the reasoning of the learned Chief Justice and PINNEY, J., nothing turns on the fact that the property attached in the present case was the property of a third person and not the property of the plaintiff.

Madras Steam Navigation Co., Ltd. v. Shalimar Works, Ltd.(1) was a case where the property of the plaintiff was attached. The suit was for damages. It was held that a suit for damages for wrongful seizure

(1) (1914) F.L.R., 42 Calc., 85.

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under legal process was governed by article 29 of the Limitation Act.

In this case, the plaintiff was a company carrying on business in Calcutta and certain repairs to a steamer owned by the company were carried out by the defendants. The defendants filed a suit for the recovery of the money due to them and the ship was attached on the 4th of June 1910. The suit was dismissed for want of jurisdiction and the ship was released from attachment on the 31st of January 1912. The suit for damages for the wrongful attachment of the steamer was filed on the 4th of June 1912. Then the question arose as to whether the suit was barred by limitation. JENKINS, C.J., and STEPHEN, J., held that the suit was barred. As regards limitation, the learned Chief Justice after holding that the attachment cannot be said to be a nullity owing to want of jurisdiction to try the suit observed :

"It has been further contended that as this was a trespass to goods, article 36 should be applied ; but article 29 is specific and fits the case, and it is a rule of construction of long application that a general article does not govern where there is a particular article which covers the case. Nor do I think can article 49 be treated as governing this case rather than article 29. It was the seizure, if wrongful, that was the cause of action and the plaintiff cannot treat the suit as one for trespass apart from the seizure for the purpose of evading article 29. The conclusion then to which I come is, that this suit as framed is based on malice or its equivalent, that in the absence of proof of malice or its equivalent the suit if treated as one for trespass will not lie in the circumstances of this case ; and that if such a suit did lie it would fall under article 29 and would be barred."

In *Yellammal v. Ayyappa Naick*(1), it was held by a Full Bench of this Court that in order to attract the provisions of article 29 there should be actual seizure and that neither attachment of a debt nor voluntary

payment of it into Court would constitute seizure of movable property under legal process within the meaning of article 29 of the Limitation Act.

In *Pandiri Veeramma v. Mandavilli Subba Row*(1), movables already attached and seized at the instance of A were further attached by the issue of a prohibitory order at the instance of the defendant. A suit for damages was filed against the defendant who further attached the properties and it was held that a suit for damages for compensation for such attachment was governed by article 29 or 36 of the Limitation Act and not by article 42, 49 or 120. In dealing with the second attachment which was admittedly not by seizure, SADASIVA AYYAR, J., referred to *Yellammal v. Ayyappa Naick*(2), and his view seems to be that if there was actual seizure article 29 would apply. He was also of opinion that if there was actual seizure there was no continuing wrong.

In *Ram Narain v. Umrao Singh*(3), it was held that article 29 was the article to be applied to a suit for damages on account of an unlawful attachment before judgment of a shop belonging to the plaintiff, and that the attachment was not a continuing wrong within the meaning of section 23 of the Limitation Act.

I may in this connexion refer to *Sm. Sarat Kamini Dasi v. Nagendra Nath Pal*(4), where the question arose whether article 109 could be applied to cases where a mortgage sale which was held on the 6th of May 1913 was not confirmed till the 28th of January 1914 owing to an infructuous application to set it aside and a suit was filed on the 16th of September 1916 by the auction-purchaser to recover sums realized by the defendant as rents from the tenants of the land. It was held that

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(1) (1915) 31 M.L.J., 257.

(2) (1907) I.L.R., 29 All., 615.

(3) (1914) I.L.R., 38 Mad., 972.

(4) (1925) 29 C.W.N., 973.

(1) (1914) I.L.R., 38 Mad., 972.

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under article 109 limitation began to run from the date of the receipt of the rents and that the action was barred. In dealing with article 109, MUKERJI, J., observed:

"A careful study of the third column of the schedule reveals an outstanding fact which cannot be ignored, namely, that the starting point of limitation does not always synchronise with the cause of action; in many cases it does, but in others it dates from some specified events which again are either anterior or posterior to the accrual of the cause of action."

The learned Judge after referring to all the authorities and to the argument as regards suspension or extension of time, observed:

"In applying the principles of limitation, the Indian Courts are not permitted to travel beyond the articles and the exceptions and provisos embodied in the Act itself; and that apart from the provisions of the Act itself there is no principle which can legitimately be invoked to add to or supplement its provisions."

The argument that there is a difference between cases where the property attached belongs to the defendant and cases where the property attached belongs to a third party is based upon the decisions in *Manavikraman v. Avisilan Koya*(1), *Arjun v. Abdul*(2), *Manga v. Changa Mal*(3) and *Sokkalingam Chetti v. Krishnaswami Ayyar*(4).

I can find no principle on which a difference should be made whether the attachment was of the defendant's property or the property of a third person. And Mr. Sambasiva Rao for the respondent is unable to point to any ground on which such a distinction can be based.

In *Manavikraman v. Avisilan Koya*(1), the suit was in respect of timber attached before judgment in November 1888. The suit was dismissed in October 1889

and an appeal by the plaintiff was dismissed in July 1890. The defendant in that suit filed a suit in September 1892 against the plaintiff who obtained the attachment for damages occasioned by the attachment before judgment. The case was one where the property was claimed by two persons and for the purpose of preserving the property, the property was attached by the Court. But that makes no difference in principle. The learned Judge thought that article 36 applied and that the suit was barred by limitation. In dealing with the contention that article 29 would apply the learned Judges observed:

"We agree with them (courts below) that article 29 does not apply since this is not a case of wrongful seizure, but it is argued for the appellant that the case falls under article 36 and that the suit should be regarded as one for misfeasance independent of contract, and that it falls under the description of a tort for which a limitation of two years is generally provided. See the judgment of FARRAN, J., in *Essoo Bhayaji v. The S.S. 'Savitri'*(1)."

After discussing the scope of article 49 the learned Judges thought that article 36 should be applied.

In *Sokkalingam Chetti v. Krishnaswami Ayyar*(2), the learned Judges draw a distinction between cases where the property of a third person is attached and cases where the property of the defendant is attached, and were of opinion that article 29 of the Limitation Act was restricted to cases in which the seizure is intrinsically wrongful but did not apply to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentation to the Court. They think that article 36 would apply in cases where the property attached belongs to the defendant and

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(1) (1888) I.L.R., 19 Mad., 80.
(2) (1924) 22 All. L.J., 977.

(3) (1921) 35 C.L.J., 480.
(4) (1919) 33 M.L.J., 324.

(1) (1886) I.L.R., 11 Bom., 133.

(2) (1919) 38 M.L.J., 324.

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distinguish *Murugesu Mudaliar v. Jattaram Davy*(1), *Multan Chand Kanyalal v. Bank of Madras*(2), *Narasimha Rao v. Ganga Raju*(3), *Pandiri Veeramma v. Mandavilli Subbu Row*(4) and *Ram Narain v. Umrao Singh*(5) on that ground. As regards the decision in *Madras Steam Navigation Company, Ltd. v. Shalimar Works, Ltd.*(6), they think that the observations are *obiter*. With all respect, the case in 42 Calcutta which has the high authority of Sir LAWRENCE JENKINS, C.J., discusses all aspects of the matter.

In *Arjun v. Abdul* (7), the learned Judges held that a seizure cannot be said to be wrongful except where the writ was without jurisdiction or where the writ was executed against a person who was no party to the decree and where the goods were outside the scope of the suit. The learned Judges observed :

"In the present case the writ was issued by the Court and *prima facie* it was not a wrongful seizure. The writ was not without jurisdiction as the Court had jurisdiction over the subject-matter, nor was the writ executed against a person who was no party to the decree, nor with respect to goods outside the scope of the writ. In these circumstances, we think that article 29 is inapplicable to the case. This view is supported by the cases of *Manavikraman v. Avisilan Koya*(8) and *Sokkalinga Chetti v. Krishnaswami Ayyar*(9)."

Then they distinguish the other cases on the ground that the writ was issued against a stranger. As regards the 42 Calcutta case, they think that the observations are *obiter*. This decision, with all respect, gives no reason why there should be this distinction drawn; it simply purports to follow the 19 Madras case and the 1920 M.W.N. case.

(1) (1900) I.L.R., 23 Mad., 821.

(2) (1903) I.L.R., 27 Mad., 346.

(3) (1908) I.L.R., 31 Mad., 431.

(4) (1915) 31 M.L.J., 257.

(5) (1907) I.L.R., 29 All., 615.

(6) (1914) I.L.R., 42 Cal., 85.

(7) (1921) 35 C.L.J., 480.

(8) (1895) I.L.R., 19 Mad., 80.

(9) (1919) 38 M.L.J., 324.

In *Manga v. Changa Mal*(1), it was held that article 29 applied to a suit for compensation for wrongful seizure of movable property and that there could be no wrongful seizure because the attachment was made under legal process. The learned Judges thought that article 29 would apply only in cases where the seizure was without jurisdiction.

As observed in the (1873) 19 Weekly Reporter case and the other cases I have referred to, a seizure by the plaintiff on insufficient grounds is wrongful *ab initio* and cannot be said to become wrongful only when the Court adjudicates on the matter. The balance of authority is in favour of the view that article 29 would apply both to cases of seizure under orders passed by a Court without jurisdiction and to cases of seizure under orders passed by a Court having jurisdiction but on insufficient grounds. In fact in all the Madras cases referred to where it was held that article 29 applied the seizure was by a Court having jurisdiction but on insufficient grounds. And even in the 38 M.L.J. case this distinction was negatived.

I am of opinion that article 29 applies to all cases of attachment before judgment where specific property is seized and the seizure is wrongful either because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds, that it makes no difference whether the property attached belongs to the defendant or to a third party and that we are not at liberty having regard to the plain provisions of the article to read into the third column anything that would make the starting point a different one.

In this view it is unnecessary to consider the question as to whether the Court was right in awarding any damages in this case.

(1) (1924) 22 A.L.J., 977.

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I would allow the appeal and dismiss the plaintiff's suit with costs throughout.

REILLY, J.—On 30th March 1920 the defendants obtained from the Subordinate Judge of Dharwar a conditional order against the plaintiffs under rule 5 of Order XXXVIII, Code of Civil Procedure, for attachment of movables before judgment. The attachment was made on 9th, 10th and 11th April 1920. On 21st April 1920, after hearing the plaintiffs, the Subordinate Judge confirmed the attachment. The plaintiffs appealed to the High Court of Bombay, which ordered attachment to be raised as having been obtained by the defendants on insufficient grounds. That order was made on 16th September 1921. On 20th October 1921 the plaintiffs instituted this suit for damages on account of the attachment. The question before us is whether the suit is time-barred, having been brought more than a year after the attachment was effected.

The defendants, who are the appellants here, contend before us that the suit is covered by article 29 of Schedule I of the Limitation Act, which runs "for compensation for wrongful seizure of movable property under legal process". Taking those words in their plain meaning, they certainly cover the case. But it is contended for the plaintiffs that "wrongful" in this article has something narrower than its ordinary meaning—that it refers only to seizures wrongful because made under the order of a Court without jurisdiction in the matter or in respect of the property of a person who is not a party to the proceedings or in excess of the order of the Court. On the face of it that is an arbitrary restriction of the meaning of "wrongful" in the article. It cannot be denied that, if an attachment before judgment is obtained by misrepresentation or on insufficient grounds, it is wrongful in the ordinary sense of the word. If it

were not wrongful, no suit for damages in respect of it would lie, and that is not contended.

But it is argued that a restricted and artificial sense has been placed on the word "wrongful" in article 29 by judicial interpretation. The cases cited before us to show that are *Manavikraman v. Avisilan Koya*(1), *Sokkalingam Chetti v. Krishnaswami Ayyar*(2), *Arjun v. Abdul*(3), and *Manga v. Ohanga Mal*(4). The last three of these cases rest on the first. The second rests on the first, the third on the first and second, and the fourth on the first and second and third. But unfortunately there appears to have been some misapprehension about the first case. When we examine that case, we find it was not concerned, as was apparently thought by the learned Judges who referred to it in the later cases, with an attachment of a defendant's property obtained by a plaintiff before judgment under rule 5 or rule 6 of Order XXXVIII, Code of Civil Procedure, or the corresponding provisions of the previous Code. In that case a janmi in Malabar, the Nilambur Tirumulpad, had sued another janmi, the Manjeri Karanamulpad, and a Mappilla to recover possession of a hill; the Mappilla, claiming to have obtained a lease of the hill from the Karanamulpad, had cut some trees on it; the Tirumulpad, who claimed the trees as his own, obtained an order for the attachment of the logs pending the suit. That attachment was obviously not an attachment of the defendant's property to prevent him from disposing of it or removing it in order to obstruct or delay the plaintiff's remedy in execution if he should get a decree—that is an attachment such as is now made under Order XXXVIII, rule 5 or rule 6—but an attachment of part of the property in dispute between the parties for its preservation, such as is

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(1) (1895) 1 L.R., 19 Mad., 60.
(3) (1921) 95 C.L.J., 480.

(2) (1919) 38 M.L.J., 324.
(4) (1924) 22 All. L.J., 877.

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now made under Order XXXIX, rule 7. As the learned Judges point out in the opening of their judgment, the Tirumulpad had got the timber attached on the allegation that it was his. He failed in his suit and appeal. Then in the subsequent suit, which came before the High Court in *Manavikraman v. Avisilan Koya*(1), the Mappilla sued him for damages on account of the attachment of the timber, which had been found to be the property of the Mappilla. The learned Judges eventually found on second appeal that the Mappilla's suit for damages was time-barred; but incidentally they remarked that the attachment was not a case of "wrongful seizure" within the meaning of article 29. It is not necessary to discuss now whether that view was correct. But obviously that case, when examined, is no authority for the proposition that an entirely different kind of attachment, an attachment of a defendant's own admitted property, obtained before judgment by misrepresentation or on insufficient grounds, is not a wrongful seizure within the meaning of article 29. The three subsequent cases, which I have mentioned and in which it has been assumed that *Manavikraman v. Avisilan Koya*(1) dealt with the latter kind of attachment, have been built, if I may say so with respect, on a foundation which was not there.

On the other hand there are a number of cases which interpret article 29 according to the plain meaning of the words, e.g., *Murugesu Mudaliar v. Jattaram Davy*(2), *Narasimha Rao v. Gangaraju*(3), *Jagjivan Jasherdas v. Gulam Jilani Chaudri*(4), *Ram Narain v. Umrao Singh*(5), and *Madras Steam Navigation Co., Ltd. v. Shalimar Works, Ltd.*(6), *Jagjivan Jasherdas v. Gulam Jilani*

Chaudhri(1) was a case of money wrongly taken in execution. In *Murug sa Mudaliar v. Jattaram Davy*(2) the property of a third party was attached in execution. In *Narasimha Rao v. Gangaraju*(3) and *Ram Narain v. Umrao Singh*(4) the attachment was before judgment; but it was the property, not of the defendant, but of a third party which was attached. But, whether the attachment complained of is made before judgment or in execution, whether the property attached is that of a defendant or of a third party, if it is wrongful, in my opinion we cannot exclude it from the scope of article 29 unless compelled to do so by clear authority. In *Murugesu Mudaliar v. Jattaram Davy*(2) it was remarked *obiter*:

"Article 29 is quite general in its terms, and we think it was intended to apply to all cases where the alleged wrongful seizure was made under legal process."

In *Narasimha Rao v. Gangaraju*(3), where a third party sued to recover the proceeds of his property, which had been wrongfully attached before judgment and sold, though they disagreed on other points, WHITE, C.J., and SANKARAN NAIR, J., agreed that a suit for damages for wrongful attachment would come within article 29. In my opinion we are not compelled by authority to put any artificial or strained meaning on the words of article 29 and that article covers the present suit.

But it is contended for the plaintiffs that, even if that article covers the case, the suit was in time because the "date of seizure" mentioned in that article as the time from which the period begins to run does not mean in a case like this the date of the actual seizure but the date when the seizure was declared wrongful by a competent Court. In this case that would be the date of

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(1) (1895) I.L.R., 19 Mad., 80.

(3) (1908) I.L.R., 31 Mad., 431.

(5) (1907) I.L.R., 29 All., 615.

(2) (1900) I.L.R., 23 Mad., 621.

(4) (1893) I.L.R., 8 Bom., 17.

(6) (1914) I.L.R., 42 Cal., 85.

(1) (1893) I.L.R., 8 Bom., 17.

(3) (1908) I.L.R., 31 Mad., 431.

(2) (1900) I.L.R., 23 Mad., 621.

(4) (1907) I.L.R., 29 All., 615.

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the decision of the High Court of Bombay on appeal, viz. 16th September 1921. But that construction obviously does great violence to the language used in the article. Why should the Legislature have said one thing and have meant another, which could have been so easily expressed? If we compare article 29 with article 19 or article 23, it becomes still more difficult to believe that, when the explicit words "the date of the seizure" were used in article 29, they can have been intended to mean anything but the date of the actual seizure. The reason for trying to read another meaning into the words of the article is that in some cases, as in this case, there may be hardship because the plaintiff does not get a decision in his favour that the seizure was wrongful until after a year from the date of the seizure has expired. Such cases are unfortunate; but I do not see how they could justify us in departing from the plain meaning of the words in the article. There was similar hardship in *Murugesu Mudaliar v. Jattaram Davy*(1), apart from the time spent in seeking a wrong remedy, and in *Pandiri Veeranna v. Mandavilli Subba Rao*(2) in respect of the attachment at the instance of the first defendant in that case; but the learned Judges did not hesitate to apply the article literally on that account. In *Narasimha Rao v. Gangaraju*(3) all the learned Judges agreed that under article 29 time ran from the date of the actual seizure. In my opinion nothing but overwhelming authority or the clearest demonstration that the Legislature could not have meant what it said would justify us in reading into the words "the date of the seizure" in article 29 the additional words suggested for the plaintiffs. No such justification has been shown. If the period fixed in the article is

(1) (1900) I.L.R., 23 Mad., 621.

(2) (1916) 31 M.L.J., 257.

(3) (1908) I.L.R., 31 Mad., 481.

inconveniently short, that is a matter for the Legislature, not for us, to put right.

I agree that the plaintiffs' suit was time-barred under article 29 and that therefore this appeal should be allowed and the plaintiffs' suit dismissed with costs in both Courts.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Cornish.

THE NEDUNGADI BANK, LTD. (DEFENDANTS), APPELLANTS, 1929,
November 29.

v.

THE OFFICIAL ASSIGNEE OF MADRAS (PLAINTIFF),
RESPONDENT.*

Code of Civil Procedure (V of 1908), O. VI, r. 5—Defendant ordered to give further and better particulars of matter pleaded—Failure to comply—Jurisdiction of Court to strike out defence.

Where under Order VI, rule 5, of the Code of Civil Procedure a Court has ordered a defendant in a suit to give further and better particulars of a matter pleaded in his written statement, on failure by him to comply the Court has jurisdiction to direct that his defence be struck out.

APPEAL against the judgment and order of BEASLEY, C.J., dated 15th November 1929 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 3446 of 1929 in Civil Suit No. 244 of 1929.

S. Duraiswami Ayyar (with him P. Govinda Menon) for appellants.

Nugent Grant (with him K. Krishnaswami Ayyangar) for respondent.

* Original Side Appeal No. 98 of 1929.

JUDGMENT.

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REILLY, J.—In this suit the plaintiff is the Official Assignee, representing the estate of Dumaine & Co., who have been adjudged insolvents. Dumaine & Co., it appears, were exporters of groundnuts, and in the course of their business they pledged a large quantity of groundnuts to the Nedungadi Bank, who are the defendants, received loans on those groundnuts, sold the groundnuts to various persons in other countries and had them shipped by the defendants, who received the bills-of-lading and the bills-of-exchange drawn on the purchasers and applied the proceeds of the bills-of-exchange, after getting them discounted by another bank, towards the repayment of the loans they had made to Dumaine & Co., crediting the balance to Dumaine & Co. The Official Assignee in this suit alleges that the defendants have not accounted for 7,169 bags of groundnuts and prays that they may be delivered to him or their value, about Rs. 1,50,000, or in the alternative that this sum of Rs. 1,50,000 may be paid to him as damages for conversion. The defendants after some delay put in their written statement. The plaintiff applied for an order for particulars, which was made by the Master. Eventually, when this matter came up before the learned Chief Justice on 15th November 1929, the particulars had not been given in full, and the plaintiff applied that the defendants should be dealt with for contempt or that their defence should be struck out. The learned Chief Justice made an order that their defence should be struck out. The present appeal is against that order.

Mr. Doraiswami Ayyar, who appears for the defendants, contends, first, that the learned Chief Justice had no jurisdiction to make that order, and secondly, that it was not in the circumstances a proper

order to make. It will be convenient to deal with the question of jurisdiction first.

Rule 5 of Order VI, Code of Civil Procedure, provides that a further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading may in all cases be ordered upon such terms, as to costs and otherwise, as may be just. Mr. Doraiswami Ayyar contends that that rule does not empower the Court to strike out the defence, if the defendant does not give particulars when ordered to do so under the rule; and he has asked us to contrast that rule with rule 21 of Order XI, Code of Civil Procedure, which provides that, where any defendant fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall be liable to have his defence struck out. Mr. Doraiswami Ayyar argues that the penalty of having the defence struck out is explicitly provided for in rule 21 of Order XI, but that it is not mentioned in rule 5 of Order VI, and that, he urges, is very significant. There is a contrast between the two rules; but, as Mr. Grant, who appears for the plaintiff, has pointed out, Order XI does not deal with pleadings, and therefore it may have been thought necessary that, if the penalty for failure to answer interrogatories or to give discovery or inspection was to be provided in the shape of striking out pleadings, it should be explicitly set out, though that might not be necessary in an order dealing with pleadings and their amplification by particulars. It is interesting to notice that both rule 5 of Order VI and rule 21 of Order XI, Code of Civil Procedure, correspond to Rules of the Supreme Court in England. There is just the same contrast between rule 21 of Order XXXI and rule 7 of Order XIX of the Rules of the Supreme Court as there is between rule 21 of Order XI and rule 5 of

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Order VI of our Code, and yet the contrast was not held by the Court of Appeal to be of any significance in *Davey v. Bentinck*(1), which dealt with the dismissal of a suit for failure to give particulars and is equally applicable to striking out a defence for failure to give particulars. In that case a plaintiff was ordered to give particulars and a further order was made that, if he did not do so within a certain date, the suit would be dismissed. It was argued that rule 7 of Order XIX of the Rules of the Supreme Court, corresponding to rule 5 of Order VI, Code of Civil Procedure, did not justify the dismissal of the suit, because it only provided for particulars being called for upon such terms as to costs and otherwise as might be just, and the contention was that the terms could only be in respect of costs or some incidental matter. The Court of Appeal did not accept that contention. They held that under the Rules of the Supreme Court a condition might be added to the order for particulars that, if they were not given by a certain date, the suit should be dismissed. In this case it happened that, when the Master made an order for particulars, he fixed a date for those particulars to be given; but he did not say, in so many words, that, if the particulars were not given by that date, the defence would be struck out. Does that really make any difference in the matter? Mr. Doraiswami Ayyar's contention is that, because that threat was not added to the order, the defendants may take up the position that they were not warned that their defence would be struck out. But, if we examine the matter, I do not think that the absence of the threat or warning really makes any serious difference except in one respect. If the Master had said "Particulars must be given within

a certain time: otherwise the defence will be struck out", except on an appeal from his order there might have been great difficulty in extending the time for giving particulars; but, as he fixed the time without any such penalty being explicitly added, the Court of course could have extended the time. There is no doubt about that. As a matter of fact on appeal EDDY, J., did extend the time. I understand that, when the matter came up before the learned Chief Justice on 15th November 1929, an oral application was made to him that he should extend the time. Undoubtedly that could have been done. But, when a time was fixed and the defendants disregarded it, they knew that they did so at their peril. The time might be extended: the time might not be extended. And, if the time was not extended, what would be the result? The particulars, which the Master had found necessary and which EDDY, J., on appeal had found necessary for the case, would not have been given. That means that the written statement of the defendants was an incomplete, insufficient and ineffective defence, and the result would simply be that the position of the defendants would be practically equivalent to that of a defendant who had put in no defence. If that is the correct way of viewing the matter, when the learned Chief Justice did not extend the time any further, the position was that the defendants had not put in a proper defence, and the case would naturally and properly go to the undefended board. Does it make any difference that the learned Chief Justice has added the words "I should strike out the defendant's defence," which do not appear in rule 5 of Order VI of the Code. To my mind it makes no difference whatever.

There is only one Indian case, which has been quoted before us, dealing directly with this matter, *Gauri*

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Shankar v. Mussammat Manki Kunwar(1). In that case a Bench of the Allahabad High Court considered what the procedure in such a matter should be and gave directions to subordinate courts how they should act in connexion with orders for particulars. In the judgment of the learned Judges it is said that

"A Subordinate Judge should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application, such payment to be made on or before the delivery of the particulars. If the order is disobeyed and the plaintiff is in default, he should have his action stayed, and, if the defendant is in default, his defence should be struck out."

That appears pretty clear. But it has been suggested that what the learned Judges meant is only that, if the order for payment of costs is disobeyed, the defence of the defaulting party should be struck out. Let us examine that for a minute. What is contended is that, should the Court order particulars to be given and also order the defendant to pay costs at the time of filing his particulars, if he gives the particulars only but does not pay the costs, then his defence is to be struck out. Surely *a fortiori*, if he does not give the particulars at all, the learned Judges would be of opinion that his defence should be struck out. I have no doubt that the learned Judges held the view that, when a defendant has been ordered to give particulars by a certain time and does not give them by that time or within the extended time, if there is an extension, his defence should be struck out. With that opinion I agree. That being so, it appears to me that the learned Chief Justice certainly had jurisdiction to make the order which he has made in this case.

There remains the question whether it was an appropriate order or rather whether it was an order with which there is any sufficient reason for us to interfere in appeal.*

[His Lordship then discussed the evidence and concluded as follows.] In my opinion there is no sufficient reason for us to interfere with that order and this appeal should be dismissed with costs.

CORNISH, J.—I agree that this appeal should be dismissed. It has been contended that when an order is made under rule 5 of Order VI, Civil Procedure Code, for delivery of particulars, the Court has no jurisdiction to strike out the defence, unless it has been a term of the order that the party on making default shall be liable to have his defence struck out. No doubt rule 5 of Order VI contains no provision similar to the provision in rule 21 of Order XI that a defendant who does not comply with an order for discovery shall be liable to have his defence struck out. But no similar provision in rule 5 of Order VI is necessary, because rule 16 of Order VI (and Order VI is the order governing pleadings generally) contains the appropriate provision. Rule 16 of Order VI says that "the Court may at any stage of the proceedings order to be struck out any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of the suit." Now the whole object of obtaining particulars is to get a clearer or fuller statement of the opponent's case so that the party applying for particulars shall not have to go to trial embarrassed by the obscurity or incompleteness of the case which he has to meet upon the pleadings. It seems to me, therefore, that the party, who has been ordered to deliver particulars of his defence within a given time, and fails to do so, comes within the reach of

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rule 16 of Order VI, and runs the risk of having his defence struck out, unless he is able to satisfy the Court that he has some good excuse for not having complied with the Court's order. I think that in this the more correct form of application would have been to strike out paragraphs 4 and 8 of the written statement. But this is not a point of substance, for it happens that the effect of striking out the pleas in those paragraphs is to leave the defendants with no defence, so that the result is the same. In my view, therefore, the Court had power under Order VI, rule 5, to make the order striking out the defence. The power to strike out a defence is a discretionary power. On the materials placed before us, I am not prepared to say that the learned Chief Justice did not exercise his discretion rightly. But this aspect of the case has been fully dealt with by my learned brother, and it is not necessary for me to add anything to what he has said.

M. P. Sundararaja Ayyar: Attorney for respondent.

B.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Venkatasubba Rao and Mr.
Justice Madhavan Nair.*

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(DEFENDANT-RESPONDENT), APPELLANT,

1929,
September 4.

v.

A. ANANTHA SUBRAMANIA IYER (PLAINTIFF-
PETITIONER), RESPONDENT.*

Madras District Municipalities Act (V of 1920)—Election Rules, r. 6—Revising Board—Nomination by Collector—Refusal of a member to act—Power of Collector to appoint another from outside the body of members-in-waiting—Personal interest of a member of the Revising Board—Nature of—Revising Board, whether properly constituted, if a member is personally interested—Objection, waiver of—Decision of the Board in the case of difference of opinion—Decision of majority, without discussion with the member in the minority, if valid.

Where, after the Collector of a District had, under rule 6 of the rules for the preparation of electoral rolls in a municipality, under the District Municipalities Act (1920), nominated the members of a Revising Board as well as a body of members-in-waiting, one of the non-official members of the Revising Board declined to serve on it, the Collector was competent under the rules to nominate to the Board, in the place of the member who declined to serve, a person who was not one of the members-in-waiting.

Where a member of the Revising Board was disqualified by personal interest in the adjudication of a claim before it, the Board was not legally constituted, and its decision was invalid on that ground; *Frome United Breweries Co. v. Bath Justices*, [1926] A.C., 586, referred to.

Where, however, the claimant, knowing the facts and aware of the conduct of the member who had such personal interest,

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did not raise the objection of personal interest of such member as disqualifying him from sitting on the Board, during several previous hearings of the case before it, he must be deemed to have waived his objection on that ground, and would be debarred from raising the objection thereafter; *Frome United Breweries, Co., v. Bath Justices*, [1926] A.C., 586, relied on.

A final decision ought not to be pronounced, in a case in which the judges hearing the case differ, until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment; *Khelut Chunder Ghose v. Tarachurn Koondoo Chowdry*, (1866) 6 W.R., 269, and *Rohilkand Kumaon Bank v. Row* (1884) I.L.R., 6 All., 468, relied on.

Where, therefore, two of the members of the Revising Board delivered their judgment, without waiting to know what the third member's view was, and put it out of their power to reconsider or alter their decision or to be influenced by his view, and the latter delivered his judgment on a different date, after some further inquiry by himself,

Held that there was no valid decision of a properly constituted Board in the case.

APPEAL against the order of the Subordinate Judge of Trichinopoly in Interlocutory Application No. 824 of 1929, in Original Suit No. 61 of 1929.

Rule 6 of the Rules for the preparation of the electoral rolls in a municipality, made under the District Municipalities Act, 1920, appears from the judgment at pages (657 and 658). The rules are published in the *Fort St. George Gazette*, dated 23rd April 1929, Part I-A, page 215 (G.O. No. 1606, L. & M.), Notification No. 582.

T. Rangachari (with him *A. Srirangachari*) for appellant.—This is an appeal against an order granting a temporary injunction in a suit for a declaration, and for an injunction to prevent the chairman of a municipality from holding an election of a councillor without including the plaintiff as a voter. A temporary injunction cannot be granted unless a strong *prima facie* case is made out by the plaintiff. The plaintiff has no such case on the face of the plaint. Rules published under the District Municipalities Act, 1920, on the 1st

April 1920, on the contrary, expressly take away the jurisdiction of the Civil Court to question any order made by a revising authority constituted under the Act. The plaintiff sues for a declaration that an order by a Revising Board excluding him from voting is invalid. Such a suit does not lie in a Civil Court. The Revising Board was properly constituted, and the chairman was not personally interested, and was not incompetent to sit on the Board. As regards the objection that the District Collector had no power to nominate a member to the Revising Board in the place of the one refusing to act, rule 6 (b) of the rules for the preparation of electoral rolls clearly gives such a power. See Madras General Clauses Act (I of 1891), section 13. It is only when a Revising Board has been constituted and there is a temporary vacancy, that a member of the Board-in-waiting should be necessarily appointed. Here even the original Board was not properly constituted as a member nominated declined to serve on it.

The Revising Board is not a judicial body; preparing a roll of electors is an administrative and not a judicial act. See *Desi Chettiar v. Chinnasami Chettiar*(1), *Rex v. Howard*(2), and *Wildes v. Russell*(3).

As regards personal interest, it does not mean remote interest, but a particular, direct and immediate interest in the result. See *Emperor v. Cholappa*(4) and *In the matter of the petition of Ganeshi*(5). There has been a waiver of the objection on the ground of interest.

T. R. Ramachandra Ayyar (with him *S. Srinivasa Ayyar*) for respondent.—The judgment of only two of the members of the Revising Board is a nullity. The fact that a third member passed his judgment on a different day does not make it valid. They had no conference or discussion before they gave their respective judgments. The submission of the respondent to the jurisdiction does not validate it. The proceedings of the Revising Board are in the nature of judicial proceedings. See Madras General Clauses Act (I of 1891), section 3, clause 16 (definition of judicial proceedings). In the English cases quoted, the justices who referred to the Compensation Board could sit on it, if they were not interested. Asking a solicitor

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(1) (1928) 28 L.W., 642 at 644. (2) [1902] 2 K.B., 363.
(3) (1888) 1 C.P., 722 at 747. (4) (1906) 8 Bom. L.R., 947 (949).
(5) (1893) I.L.R., 15 All., 192 (F.B.).

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to appear and sending a clerk to instruct a solicitor for appearing before a Compensation Board—has been held in the English cases to be personal interest. In this case, the rule expressly says that a member with a personal interest should not sit to hear a case in which he is so interested (vide rule 6 (a) of the Election Rules). Hence there is a total want of jurisdiction, not merely an irregular invoking of jurisdiction, which can be cured by the consent of a party. See section 556 of the Criminal Procedure Code, 1882, as to personal interest. Want of jurisdiction may arise in three ways, viz., by reason of (1) personal disqualification, (2) subject-matter, and (3) preliminary pre-requisites not being complied with. Objection on the first-ground cannot be waived by consent of parties. See *The Colonial Bank of Australasia v. Willan*(1) and *Emperor v. Bisheshar Bhattacharya*(2). When, on grounds of public policy, a prohibition is made, it cannot be waived; *Labouchere v. Earl of Wharncliffe*(3). Rule 6 (a) is absolute; it does not say that, if the objection is not taken, it is waived. No question of waiver, therefore, arises in this case. See also *Girish Chunder Ghose v. The Queen-Empress*(4).

Two members out of a body of three members alone decided this case, the third refused to decide as he did not hear the case; the judgment of the first two is not valid: See *Frome United Breweries Co. v. Bath Justices*(5), and *Rohilkhand Kumaon Bank, Limited v. Row*(6). The decisions in *Rex v. Williams, Phillips Ex parte*(7) and in *Wakefield Board of Health v. West Riding and Grimsby Railway Company*(8), only hold that the English Statute lays down the common law rule as to personal interest, which can be waived. But where a statute (as here) expressly prohibits an interested person to be a judge, it is absolute and cannot be waived.

Next, the nomination by the District Collector of a fresh member outside the body of the members-in-waiting is incompetent under the Rules as to electoral rolls. He should have nominated one out of the Waiting-Board. General Clauses Act (I of 1891), section 13, does not apply, because it says

(1) (1874) L.R., 5 P.C., 417 at 422.

(2) (1910) I.L.R., 32 All., 635 (636).

(3) (1879) 13 Ch. Div., 346.

(4) (1933) I.L.R., 20 Cal., 857.

(5) [1926] A.C., 586 (802).

(6) (1884) I.L.R., 6 All., 468 (474).

(7) [1914] 1 K.B., 608.

(8) (1865) 6 B. & S., 794; 122 E.R., 1886.

'as occasion arises,' which did not arise in this case for a fresh appointment.

T. Rangachari replied.

The JUDGMENT of the Court was delivered by

VENKATASUBBA RAO, J.—The learned Sub-Judge has been tempted to give way to moral indignation and exhibit great heat. This is a drawback that has seriously impaired his judgment.

The question we have to decide is, have the rules for the preparation of electoral rolls been contravened to such an extent, as to render the proceedings of the "revising authority" wholly null and void? We state the question in this form having regard to rule 6 (b) which enacts, *inter alia*,

"The orders passed by the revising authority shall be final and shall not be liable to be questioned by any legal proceeding."

The plaintiff has therefore sought to show that the Board which decided against his claim was not properly constituted and that, in consequence, there was no decision which could become final, within the meaning of that provision. In view of the wording of this rule, we shall refrain, as far as possible, from referring in our judgment, to the various irregularities that have occurred, but do not affect the constitution of the Board or its jurisdiction.

Acting under rule 2, the chairman decided to omit the name of the plaintiff from the preliminary roll on the ground that, in regard to residence, he did not possess the necessary qualification. Rule 3 refers to claims and objections. When a person feels aggrieved by the omission of his name, he prefers what is called a claim; when, on the other hand, a person feels aggrieved by the improper inclusion of another person's name, he may prefer an objection. These are, for the present, the

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only parts of the rule with which we are concerned. We shall quote the very words, in so far as they are material, that relate to the preferring of an "objection."

"Any person whose name is on the roll and who objects to the inclusion of the name of any other person whose name is on the roll, may prefer an objection to the revising authority."

Under this rule, the plaintiff preferred a claim and that is quite normal. An objection was also preferred by one Srinivasa Ayyangar, an agent or a clerk of the chairman. As the rule stands, how can one object to the inclusion of a name, when that name has not been included? However, what really happened was, that Srinivasa Ayyangar filed an objection stating that the plaintiff was not possessed of necessary property qualification. Two questions were thus raised before the revising authority:—

(1) Was the plaintiff disqualified by reason of the fact that he was not residing within certain limits? (the ground taken by the Chairman), and

(2) Was the plaintiff disqualified by not owning certain property in his own right? (the ground taken by the Chairman's clerk).

Before proceeding with the narrative, we shall relate how the revising authority came into existence.

Rule 6 (a) says:—

"The revising authority for each electoral roll in a municipality shall consist of the chairman as president and two non-officials who are not members of the municipal council to be nominated by the Collector of the District. The Collector shall also appoint two non-officials and two or more officials (specifying the order in which they shall be entitled to act, the non-officials taking precedence over officials) as members-in-waiting to take the place of any member of the revising authority (including the president) who refuses to attend, or becomes incapable of attending a sitting, or who is personally or pecuniarily interested in, or gives evidence in respect of, any

claim or objection and is thereby rendered unfit to take part in the adjudication of such claim or objection."

The Collector nominated under this rule

- (1) The Chairman of the Municipality,
- (2) Mr. Rajagopala Nayudu, and
- (3) Mr. Balasubramania Ayyar

as members of the Revising Board. He appointed also as required by the rule certain members-in-waiting of whom two were non-officials and two officials. Of these four, we are concerned with one, namely: Mr. Kandaswami Udayar, a non-official.

Mr. Rajagopala Nayudu, on his being informed of the Collector's proceeding, declined to serve on the Board, stating that he did not wish "to be drawn into Srirangam politics", a very wise decision indeed, having regard to the facts revealed by this case. The Collector, on being informed of this, nominated Mr. Rangaswami Pillai in the place of the gentleman who declined to serve. The Board that heard the Plaintiff's claim consisted, as original members, of

- (1) The Chairman,
- (2) Mr. Balasubrahmaniam Ayyar, and
- (3) Mr. Rangaswami Pillai.

The plaintiff objects that the appointment of Mr. Rangaswami Pillai was *ultra vires*. He puts his case thus: The very object of there being members-in-waiting is, that they may be called on to act when such a contingency occurs as has now actually arisen. When Rajagopala Nayudu refused, it was a member of the Waiting-Board that should have stepped into his place. The Collector had, therefore, no power to make a fresh nomination and the appointment of Rangaswami Pillai was consequently invalid. This objection has been upheld by the lower Court, but is, in my opinion, untenable. The rule consists of two distinct parts,

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first, referring to the revising authority, the second, to the Waiting-Board. The members-in-waiting, on a true construction, are not included in the revising authority. The rule very clearly lays down that that body shall consist of certain (three) persons—none of them being a member-in-waiting. The second part of the rule provides that certain persons may be appointed to the Waiting-Board “to take the place of any member of the revising authority.” The fact that he takes the latter’s place does not alter his status and convert him into a regular member. A Waiting-Board is intended to be a reserve and can never become anything more than such reserve. Its members are outside the Board and they are to be called out in emergencies to act temporarily as substitutes. If it is borne in mind that a Revising Board is constituted to deal not with a single voter but with voters generally, the scheme of the section becomes quite apparent. For example, when the case of a particular voter is being considered, a member may refuse to attend that sitting. The voter may happen to be his relation, friend or enemy, or, he may have some interest in the property which the voter claims to be his. In such a case, he may very properly refuse to attend a sitting. But, does that fact *ipso facto* terminate his membership of the Board? He may nevertheless attend its other sittings and take part in them. The members of the Waiting-Board are intended to step in at such times, and when the original member returns, they step out and go back into the reserve. Under the rule, there cannot be a proper Revising Board of two members and in appointing the third, the Collector was perfectly right. The plaintiff’s objection, therefore, fails.

The plaintiff next objects that the Chairman was disqualified by interest from adjudicating upon his

claim. He alleges that he has been Vice-Chairman for some years and that there has been bitter enmity between him and the Chairman. The latter was intent on seeing that he was not re-elected and it was with that object that he caused his name to be omitted on the roll. Though the case has been argued very fully and elaborately, still we must not lose sight of the fact that what we are hearing is an appeal from an order granting a temporary injunction. But, on such materials as exist, we must make up our minds, whether the plaintiff has made out this charge. The lower Court in holding in favour of the plaintiff relies on several facts and circumstances, but we propose to confine ourselves to two or three facts which have, in our opinion, a decisive bearing on the question to be tried. The Chairman’s objection was, as we have already said, based on certain rules in regard to residence; in the soundness of that objection, however, he seemed to have had little faith. The plaintiff thereafter preferred his claim. It was too late for the Chairman to change his ground of attack. It was at this juncture that his clerk comes on the scene with what is called an objection. That related to quite a different ground, one based on want of property qualification. We have already pointed out that preferring an “objection” in the circumstances was out of the common. The question of the *locus standi* of Srinivasa Ayyangar was then raised. The Revising Board, by a majority, decided the point against him and held that he had no right to be heard. The Chairman dissented taking a different view. On the material before us, we cannot resist the conclusion that it was at his instance that his clerk preferred the objection. Mr. Rangachari, in his eloquent address, while admitting that this is a suspicious circumstance, urges that it may be capable of explanation. True, it may be; but the Chairman has

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had an opportunity both in the lower and in this Court and what explanation has been forthcoming? The case has been fought with great bitterness and every point argued very fully and we cannot help concluding that the Chairman has failed to remove the suspicion, because he has no satisfactory explanation to offer.

We now pass on to another circumstance which tells against the Chairman with equal, if not greater, force. On the 9th June, the ruling to which we have referred, regarding the *locus standi* of Srinivasa Ayyangar was given. Though it was held that he could not be heard, the Board decided to go *suo motu* into the merits of the objection. Thereafter there were some adjourned sittings with which we are not concerned. On the 14th, the Chairman makes a reference to the Government on a certain point and seeks its advice. He formulates the question thus:—Some persons without title to property, seek inclusion in the electoral roll on the ground that the tax bills stand in their names with the consent of the real owner. The transfer of a bill is not a transfer of property in the eye of the law. Attempts are frequently made by persons in such position to get their names improperly included in the electoral roll. He concludes his letter by saying

“It is necessary to put a stop to such malpractices. The Revising Board feels some difficulty in the matter and it is prayed that the Government may be pleased to favour us with their view early.”

A perusal of this leads one to think that the reference has been made by, or at the instance of, the Revising Board; but nothing of the sort; this was done as a matter of fact behind its back. Then again, was this reference made to the Government *bona fide* and in the ordinary course? The essence of the charge against the plaintiff was that the property belonged to his

father but that the tax bills stood in his name. He answered it somewhat thus: “True, my father’s name appears as that of the owner, but I am a member of a joint family. The bills were transferred to my name with the consent of every member of that family. This happened some years ago and since then I have been paying the taxes.” These facts are not mentioned in the reference. The Chairman states a hypothetical case having no relation to existing or actual facts. And how does he word his reference? He, in terms, suggests to the Government the answer which he wishes to get.

The reference is forwarded on the 14th and the Government sends its answer promptly on the 17th which is very laconic:

“The Government agree with the view expressed in the Chairman’s letter read above.”

Having obtained this answer (which is styled a Government Order), the Chairman reads it out at the next sitting on the 20th. We may here state that ultimately the point was found against the plaintiff by the votes of the Chairman and Mr. Rangaswami Pillai (the third member), Mr. Balasubramania Ayyar, dissenting. The plaintiff states that it was the reading of the Government Order at the sitting, that clinched the question, for Rangaswami Pillai would otherwise not have supported the Chairman. This may or may not be so; with that we are not concerned. The question is what does this conduct indicate? It is unnecessary to dwell further on the point. It is clear beyond doubt that, from the very start, the Chairman had a personal interest in the result and his conduct on the Board shows that there was not even a semblance of fairness in his dealing with the plaintiff’s claim. If the matter rested there, we would

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hold that the decision is invalidated on the ground of bias.

But the plaintiff is precluded from raising this plea, as, by his conduct, he waived the objection on the ground of interest. On his own showing, he was aware from the very beginning that he could not hope to get justice from the Chairman. It was on the 1st June that the Chairman's clerk came forward with his "objection." After that date, there were several sittings of the Board and the plaintiff never suggested that the Chairman was unfit to take part. On the 20th June, the Government Order was openly read out at the sitting of the Board. Even then, the plaintiff failed to urge that the Chairman was disqualified by interest. On that day, the case was argued and on a certain point judgment was reserved. It was on the 22nd for the first time that the plaintiff hinted that the Chairman was actuated by bias. The truth is, that the plaintiff expected that the decision of the majority would be in his favour and not till he realized that that expectation was unfounded that he demurred to the Chairman being a member of the Board.

On the question of interest, *Prome United Breweries Co. v. Bath Justices*(1) contains a very valuable exposition of the law by the House of Lords. In that case, certain licensing justices referred the question of renewal of a licence to the compensation authority and resolved at a further meeting that a solicitor should be instructed to appear before that body and oppose the renewal on their behalf. The solicitor duly appeared and opposed. Three of the justices who sat and voted as members of the compensation authority had been parties to the resolution authorizing the solicitor to appear on their

behalf. It was held that those three justices were disqualified from sitting on the compensation tribunal on the ground of bias and its decision was set aside. Mr. Rangachari contends that the act of the Revising Board in the present case was not a judicial but an administrative act. This case shows that interest or bias invalidates a decision irrespective of the fact whether the tribunal is performing a judicial act or not. Lord ATKINSON thinks that the subject-matter of the proceeding was judicial, as distinguished from administrative, and Viscount CAVE seems to agree with this view. Lord SUMNER, on the other hand, is of the opinion that the act is an administrative act, whereas Lord CARSON thinks that

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"Magistrates under the Licensing Acts are frequently compelled to mix up what might be called administrative with what might be called judicial action."

Administrative or judicial, the act was equally liable to be set aside if bias was proved on the part of the tribunal. On this point, all the four learned Lords were agreed. Mr. Rangachari contends that the duties imposed by the rules on the Chairman are such that a certain amount of bias is inevitable. A very similar argument was put forward in that case. Viscount CAVE meets it thus :—

"But, assuming this to be so, it by no means follows that a justice who was actively opposing the renewal of a licence can adjudicate upon the question of renewal . . . But the statute nowhere says that justices who elect to appear as opponents of the renewal and take active steps (such as instructing a solicitor) to make their opposition effective, may nevertheless act as judges in the dispute; and in the absence of a clear provision to that effect I think that the ordinary rule, that no one can be both party and judge in the same cause, holds good."

Lord CARSON expresses himself to the same effect :

"That, however, is not to my mind a reason for saying that the Magistrates are not to abstain from any action which

(1) [1926] A.C., 586.

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might indicate a likelihood of bias, and the fact that there is no lis or what might be called any case existing between parties affords no justification for not insisting upon the very elementary rule that a man cannot act as a judge and as an advocate in carrying out the duties cast upon him."

Ree v. Howard(1) does not lay down a different rule. What the powers and duties of the licensing justices were under certain statutes was there under consideration. It was held that, having regard to those statutes, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges, in the sense in which they are judges in such matters; the reason being they are empowered by law to fill the two capacities. This case does not decide that bias or interest on the part of the tribunal does not invalidate its decision. Now turning to the rule, with which we are concerned, it does no more than declare what would have been the law without it. We are not prepared to construe it as laying down, that some special kind of interest must be shown—some interest directly connected with the subject-matter of the claim or objection. *Wakefield Board of Health v. West Riding and Grimsby Railway Company*(2), is a useful case on the point. The word "justice" was there defined by a certain section and the definition included the words "who shall not be interested in the matter." COOKBURN, C.J., observes that the rule proceeded on the notion that railway officials did not know the law and therefore it was important to inform them what the law was. The addition of the words in question did not alter the law, for the Legislature inserted them under the belief, that if they did not include what would be implied, they would be taken to exclude it.

(1) [1902] 2 K.B., 868.

(2) (1865) 6 B. & S., 794, 122 E.R., 1286.

Also on the question of waiver, this case is an authority. The judgment lays down:—

"Nothing is better settled than this, that a party aware of the objection of interest cannot take the chance of a decision in his favour and afterwards raise the objection."

The Chief Justice adds that this is the settled rule, although the law, as an exception, may lay down by a positive enactment prohibiting an interested justice from acting in spite of assent. The present case clearly comes within the rule and not the exception.

The last objection of the plaintiff remains to be dealt with. We have already touched on what happened on the 20th June. On that day, the question was argued before the Board in regard to the plaintiff's ownership of the property and the case adjourned to the 21st, judgment being reserved on the point. The Chairman and Mr. Rangaswami Pillai prepared their judgment holding that the plaintiff was disqualified and forwarded it to Mr. Balasubramania Ayyar. He was unable to be present on the 21st and requested that the case might be postponed. The Chairman then fixed the hearing to 3 p.m. on Saturday the 22nd. Mr. Balasubramania Ayyar wrote pointing out that he had to attend the Bench Court on each Saturday at that hour and that Monday would suit him. He added

"I want to go through the notes of evidence in Mr. Ananthasubramania Ayyar's case and also examine him on some more points before I come to a decision."

He suggested finally that, if absolutely necessary, the Board might transact other business on that Saturday. What happened subsequently goes to the very root of the constitution of the Board. On the 22nd, the Chairman and Mr. Rangaswami Pillai met and they were joined by Mr. Kandaswami Udayar, who, as we have said, was a member-in-waiting. To the Board so

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constituted, the plaintiff objected. Then, Mr. Kandaswami Udayar declined to act recording

"I am of opinion, after perusing Mr. Balasubramania Iyer's letter, that this case should be heard by him."

—the only course open to an honest and sensible man; for, how could Mr. Kandaswami Udayar take part in pronouncing judgment on a matter not heard by him? But the other two chose, notwithstanding the absence of the third member, to deliver their judgment. In that judgment, which dealt only with what was known as property qualification, the plaintiff's right was negatived. Thereupon, Mr. Kandaswami Udayar again added a note saying

"As I have not heard this case, I am unable to express any opinion."

The case was then adjourned to the 24th. On that day, all the original three members of the Board met. The plaintiff then objected that the Chairman having interest, the Board was not properly constituted. The following ruling was then given by the Chairman and Mr. Rangaswami Pillai:—

"Further, when the hearing of the case is over and the majority judgment has been delivered, we cannot adjourn it now."

The fact is that after the 20th, there was no kind of combined or joint action on the part of the members of the Board. The mind of the first two members had been made up, they had delivered their judgment and so far as they were concerned, that judgment was final. What the opinion of their colleague was, mattered little to them. The latter, acting for himself, conducted some further enquiry, examined the plaintiff and wrote out a judgment in favour of the plaintiff. Are these irregularities mere defects of procedure, or, do they affect the very constitution of the Board? The observations of PEACOCK, C.J., in *Khelut Chunder Ghose v Tarachurn*

Koondoo Chowdry(1), quoted by the Court (consisting of three Judges) in *Rohilkhand Kumaon Bank, Ltd. v. Row*(2), are in point. A final decision ought not to be pronounced in a case in which the Judges differ until by conference and discussion of the points in difference they have endeavoured to arrive at a unanimous judgment. To the same effect are the observations of a Full Bench of nine Judges in another case which are also quoted in *Rohilkhand Kumaon Bank, Ltd. v. Row*(2). Applying this test, there was no proper judgment or decision in the case. The judgment pronounced was not that of the Board. There was no conference and discussion of the points in difference. The other two did not wait to know what the third member's view was. They put it out of their power, to reconsider or alter their decision or to be influenced by the other member's view. This objection of the plaintiff must be upheld. The fact that the plaintiff's claim was formally rejected by a separate order on the 24th is not relevant to the point under consideration. That order is signed by the Chairman and Mr. Rangaswami Pillai. Under that, appears a note that Mr. Balasubramania Ayyar delivered a separate judgment. It is immaterial whether the formal order rejecting the claim was made before or after the delivery of the judgment by the third member. As we have said, it is impossible to regard the decision as that of a properly constituted Board. This objection of the plaintiff, therefore, prevails.

We may observe, before closing, that the majority did not think it worth their while to go into the question of residence, at all, although the enquiry arose out of, and owed its origin to, this very objection. This, to our mind, is very significant.

(1) (1868) 6 W.R., 269.

(2) (1884) I.L.R., 6 All., 468.

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In the result, we concur in the conclusion of the learned Sub-Judge, though with many of his reasons we do not agree. The order granting the injunction is confirmed and the appeal is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and
Mr. Justice Madhavan Nair.

1929,
October 1.

GOWRI AMBAL ACHI (FIRST RESPONDENT), APPELLANT,

v.

P. A. L. V. V. R. RAMANATHAN CHETTIAR (PETITIONER),
RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 73 (1), provisos (a) and (b) and O. XXXIV, r. 14—Suit on a mortgage—Personal decree only passed, as mortgagor had no title to the property—Acquisition of title by mortgagor subsequent to the decree—Application by decree-holder to sell the property—Claim to a charge under sec. 43 of the Transfer of Property Act—Right of decree-holder to sell the property free of charge, claiming priority over other rateable decree-holders—Applicability of sec. 73 (1), proviso (b) where debt under the decree is same as under the charge.

In a suit for sale on a mortgage, the Court passed a money decree, as it held that the mortgagor had no title to the mortgage property. Subsequent to the decree, the mortgagor acquired title to the property. The decree-holder applied for execution of the decree, praying that that property might be sold in satisfaction of the charge claimed to have been obtained by him under section 43 of the Transfer of Property Act; and he further claimed on appeal, that the properties might be sold free of the charge under section 73 (1), proviso (b) of the Civil Procedure Code.

Held, that, in execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached;

that, assuming that the decree-holder executing his money decree obtained a charge for his debt under section 43 of the Transfer of Property Act, the proviso (b) to section 73 (1) of the Civil Procedure Code, did not apply to this case, as the money decree and the charge refer to the self-same debt of the decree-holder;

that the decree-holder was entitled to attach and sell the property in execution of his money decree; and that Order XXXIV, rule 14 was no bar to such execution sale in this case.

APPEAL against the order of the District Court of West Tanjore in E.P. No. 11 of 1927 in O.S. No. 5 of 1924.

S. Panchapagesa Sastri (with him *P. J. Kuppanna Rao*) for appellant.—This appeal arises out of an application for the execution of a money decree. Subsequent to the decree, the judgment-debtor obtained an interest in the property which she had originally mortgaged; it was decided in this suit that the mortgagor had, at the time of the mortgage, no interest in the property and consequently a money decree was passed. Section 43 of the Transfer of Property Act does not apply because there was no subsisting contract of mortgage. The decree negatived the contract. In execution, a money decree cannot be converted into a mortgage decree. Section 73 (1), proviso (a) or (b), does not apply to this case, as the decree and charge relate to the same debt of the decree-holder. Order XXXIV, rule 14 is also a bar to this application. In execution of this decree, an application for sale without attachment is incompetent.

B. Sitarama Rao (with him *N. S. Srinivasa Ayyar*) for respondent.—Section 43 of the Transfer of Property Act applies to this case. The decree-holder is entitled to a charge on the property, as the judgment-debtor got an interest therein subsequent to the decree: see *Azizuddin Sahib v. Sheik Budan Sahib* (1). The contract of mortgage subsisted, even though a personal decree was obtained by the decree-holder. Under section 43 of the Act and under section 73, proviso (b) of the Civil Procedure Code, the decree-holder is entitled to sell the property free of the charge. If the decree-holder gets a charge after his decree, Order XXXIV, rule 14, is no bar to his

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(1) (1895) I.L.R., 18 Mad., 492.

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enforcing it without another suit; *Official Receiver, Tanjore v. Nagaratna Mudaliar*(1), *Sunkunni Variar v. Vasudevan Nambudripad*(2), and *Ramaswami Naidu v. Subbaraya Tevar*(3). Order XXXIV, rule 14, Civil Procedure Code, is no bar to the realization in execution of a charge (1) created by the decree, (2) created by the parties after decree and (3) created by operation of law after the decree, as in this case. Security of property given in execution can be realized in execution without a suit under Order XXXIV, rule 14; see *Subramaniam Chettiar v. Raja of Ramnad*(4). Maintenance decrees can be enforced in execution without a suit, see *Sowbagia Ammal v. Manicka Mudaliar*(5). The previous decision in the suit was that there was a contract, but that it could not take effect on the property. The fact that a personal decree was passed does not put an end to the contract. Pending suit, after a preliminary decree and before final decree, section 43, Transfer of Property Act, was held to apply; *Muthuswami Pillai v. Sandana Velan*(6).

S. Panchapagesa Sastri in reply.—Section 73 (1), proviso (b) contemplates mortgages or charge-holders, who have their mortgage or charge in respect of another debt not being the decree debt under execution. The decree-holder is, under the guise of executing a personal decree, getting his mortgage debt paid. Under proviso (a) to section 73 (1), if he sells subject to his mortgage, he will not be entitled to be paid anything for his debt. If he is selling free of his charge, and he gets paid out of the sale-proceeds in priority, he is not executing his decree.

Section 43 of the Transfer of Property Act does not apply to this case. After judgment, the contract is merged in the judgment.

In 18 Mad., 492, the contract of mortgage subsisted, but in this case the mortgage was put in suit and negatived; the contract of transfer in this case did not subsist after the decree.

Even if section 43 of the Transfer of Property Act applied to this case, the decree-holder had an option and he gave up his rights. His conduct in enforcing a personal decree amounts to a waiver of his mortgage right. See *Maharaj Bahadur Singh v. A. H. Forbes*(7).

(1) (1925) 49 M.L.J., 613.

(3) (1925) 49 M.L.J., 490.

(5) (1917) 33 M.L.J., 601.

(2) (1926) 51 M.L.J., 239.

(4) (1917) I.L.R., 41 Mad., 327.

(6) (1926) 53 M.L.J., 218.

(7) (1929) 57 M.L.J., 184 (P.C.).

JUDGMENT.

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VENKATASUBBA RAO, J.—This case raises a point of some novelty. The respondent filed a suit to enforce a mortgage. He impleaded as defendants Gowriambal Achi, the present appellant, her son and grandson. I extract the following passage from the judgment passed in that suit in April 1924:—

"It appears to me that, as a suit to enforce a mortgage, the suit must fail. Gowriambal Achi has no title to the property. The properties were left by will absolutely to Gowriambal's mother. It was recited that on the latter's death Gowriambal was to succeed to any of the properties which her mother had not alienated. Gowriambal's mother is still alive, and Gowriambal may never succeed to any of this property. I do not see how Gowriambal by her deed can create any charge on the property."

On this reasoning, Mr. Stodart, the District Judge, passed the following decree:—

"I give the plaintiff a decree for the sum claimed Rs. 6,500 with simple interest at the contract rate, namely, 12 per cent on Rs. 6,168 . . . This is a simple money decree against the first defendant Gowriambal alone. The suit as against the second and third defendants is wholly dismissed."

We are not now called on to construe the will referred to in the passage above, nor is it a part of the record before us. Nor are we at present concerned with the question whether the judgment is right or not; for the plaintiff submitted to it and it became final between the parties.

Subsequent to the passing of the decree, Gowriambal Achi's mother died and the plaintiff assumed (whether rightly or wrongly, it is needless to enquire) that she became absolutely entitled to the properties covered by the mortgage. In that view, he applied to execute the money decree passed in his favour by attachment and sale of those properties. The defendant (Gowriambal Achi) opposed the plaintiff's application, urging that it

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contravened the provisions of Order XXXIV, rule 14, Civil Procedure Code, and that the plaintiff's remedy was by way of a regular suit. This objection was overruled and the plaintiff was allowed to execute his decree. The order, dated 10th November 1926, then made on Gowriambal Achi's petition requesting that the plaintiff's application might be rejected, may be reproduced :

"The decree is very clear. It was held that the mortgage was not enforceable, as the mortgagor, i.e., the judgment-debtor had no right to the property mortgaged. Only a simple money decree was passed. In execution of this simple money decree, the properties which were originally mortgaged and to which the judgment-debtor became entitled by inheritance subsequently are attached and are brought to sale. Order XXXIV, rule 14 has no application. There is no mortgage subsisting and the claim did not arise out of the mortgage. Decree-holder need not file a fresh suit. Petition is dismissed with costs."

The plaintiff now conceiving that a higher right accrued to him and that he had been mistaken in applying for attachment, presented a petition to the Court stating that his execution petition was not pressed. Thereupon, the Judge recording that the petition was not pressed made an order dismissing it. This happened on the 15th January 1927.

The next step taken by the plaintiff is the one with which we are concerned. He presented Execution Petition No. 11 of 1927 on which the order under appeal was made. In column 7 of that petition, the plaintiff gives the reason for his abandoning his previous execution application :

"But the said execution petition did not correctly set out the charge which this decree-holder had obtained over the immovable properties mentioned hereunder after the death of judgment-debtor's (first defendant's) mother by virtue of section 43 of the Transfer of Property Act. So the petition was not continued."

He then prays in column 10 that the amount due to him under the money decree may "be realized by the

sale of the judgment-debtor's immovable property." He adds a further prayer, which, in truth, is the same as the first, in different words

"that the properties hereunder mentioned may be sold in satisfaction of the charge which the decree-holder has obtained over the properties since the judgment-debtor became absolutely entitled to the same."

Now, the basis of this application is the right which, under section 43 of the Transfer of Property Act, the plaintiff conceived he obtained, by reason of the power to perform the contract, subsequently acquired by Gowri Ambal Achi. The learned Judge held that execution could be granted in the form prayed for and made an order accordingly. It is this order that is attacked in this appeal.

The plaintiff's application was clearly misconceived. In execution of a money decree, the judgment-debtor's property cannot be sold without its being first attached. No doubt, the plaintiff's contention is that the mortgage in his favour can take effect as against the property acquired by the defendant subsequent to the decree. But this does not enable him to bring the property straightway to sale, when the decree he seeks to execute is an ordinary money decree. The order of the lower Court cannot therefore be sustained; nor, as I understand Mr. Sitarama Rao, the respondent's counsel, does he seriously contend that it is right.

He is therefore driven to present his case thus. He says in effect: treat my application as one for attachment but coupled with a prayer under section 73 (1), proviso (b) of the Civil Procedure Code. I should be disposed to comply with this request if his application was legally competent. The reason for the present course he adopts is this. If the Court makes a bare order of attachment, the respondent thinks, in the

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circumstances, it confers no benefit on him ; and it is in that view he abandoned his previous execution application. The fact is, there are other creditors of the defendant who have either attached or threaten to attach these properties. That being so, the plaintiff's right, in the event of a sale taking place, is merely to share the proceeds rateably. The plaintiff, therefore, in order to obviate this result, has had to invoke the aid of section 73 (1), proviso (b) of the Civil Procedure Code.

The first clause of section 73 lays down the conditions for rateable distribution. Then follow two provisos :—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;

(b) where any property liable to be sold in execution of a decree is subject to mortgage or charge, the Court may with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold.

The plaintiff puts his case thus : The property he seeks to attach has become under section 43 of the Transfer of Property Act subject to his mortgage. He agrees to its being sold free of that mortgage. In that event, his mortgage right becomes transferred to the sale-proceeds which he can then draw out from Court. The argument is ingenious, but totally unsound. In my opinion, to a case like the present, these provisos do not apply at all.

It is first contended by Mr. Panchapagesa Sastri for Gowri Ambal Achi that these rules have not been enacted as independent or substantive provisions but only as provisos, and unless, therefore, the case is one of rateable distribution under the main part of the section, these rules do not apply at all ; in other words,

when there are no rival decree-holders, a case cannot arise which calls into play the rules enacted in the provisos. I doubt if this contention is correct, though I express no decisive opinion on the point. Supposing there is a single decree-holder who attaches a property, why should a person holding a mortgage upon it not be entitled to the benefit of this proviso ? By enacting the rule in the form of a proviso, is it intended to deprive such a person of this right ? But, as I have said, I do not propose to pursue this enquiry.

The case now arises, however, in a different form. The provisos, of course, apply when there are several decree-holders ; this is not disputed. It may be granted that they also apply when there is a single decree-holder and another person who is a mortgagee. I am also prepared to assume that they are applicable when the decree-holder and the mortgagee happen to be the same person provided the decree debt and the mortgage debt are two distinct and different debts. But in this case, whether you refer the debt to the decree or to the mortgage, it is the self-same debt. To such a case, the rules in question cannot be reasonably applied. Can the application by the plaintiff be termed in any sense an execution application at all ? To execute a decree is to carry that decree into effect for obtaining satisfaction of it. In this case, the plaintiff, under the guise of executing his decree, gets his mortgage satisfied. This is just a pretence of execution, for if along with the mortgage the decree also gets satisfied, the result is but fortuitous and incidental. A case of this kind is of rare occurrence. The case that most nearly resembles this is that which comes within the mischief against which Order XXXIV, rule 14, is directed. A mortgages his property to B to secure repayment of a sum of money. B sues A to recover that sum and obtains a personal

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decree against A. B then applies for attachment and sale of A's interest in the mortgaged property in execution of the money decree and the sale must be refused under this rule. The abovementioned case is of the usual kind; but owing to the peculiar facts before us, as I shall show presently, that rule does not here operate as a bar and the sale can be allowed. But when the two debts are identical, in other words, when there is a single debt, does it make sense to say, that the decree-holder can sell the property either subject to his mortgage or free of it? Let us suppose that he sells the property subject to his mortgage and that it fetches say a thousand rupees at the sale. Can he touch a rupee of this money? Obviously not, for the decree debt springs from the mortgage and the sale being admittedly subject to it, he has no right to proceed against any part of the money. Let us next suppose that he sells the property free of his mortgage and that it realizes a sum which exceeds the mortgage amount. Has he any right to any part of the excess sum? The answer is again in the negative. In short, the decree-holder diverts the execution proceedings from their true object and turns them to a wrong end. This, the Courts will not permit, and I am therefore clearly of the opinion that the second proviso to section 73 (1) does not apply.

The question then remains, can the plaintiff merely attach the property and bring it to sale? As I have already pointed out, he made a previous application to that effect and it was granted. That is a decision between the parties and is binding upon them. Apart from that, Order XXXIV, rule 14, does not stand in the plaintiff's way. In the suit, it has been decided that there is no mortgage at all and it therefore follows that the decree is not "for the payment of money in satisfaction of a claim arising under the mortgage." This

decision, right or wrong, binds the parties and for the present purpose it may be conclusively taken that the claim is not one that arises *under* the mortgage. This point is conceded by Mr. Panchapagesa Sastri and requires no further discussion. But the plaintiff, as I have already shown, is not satisfied with a bare order that he can attach and sell the property. But, if he is so advised, he may apply to the lower Court for such an order and as the application cannot be opposed (as Mr. Panchapagesa Sastri concedes), that Court may grant it and direct attachment and sale in the usual course.

In the result neither of the applications of the plaintiff (the one made to the lower Court or the one made to us), is competent and the appeal is allowed, but, in the circumstances, we make no order as to costs.

Before closing, I may add that, in the view I have taken, it is unnecessary to discuss whether section 43, Transfer of Property Act, applies to the facts or not. That is a point which must be left to be considered in any regular suit which the plaintiff may choose to file.

MADHAVAN NAIR, J.—I agree.

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APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Anantakrishna Ayyar.*

1929,
December 5.

NARAYANA CHETTIAR (FOURTH DEFENDANT), APPELLANT,

v.

KADIR SAHIB AND OTHERS (PLAINTIFF AND DEFENDANTS 2
AND 3, ETC.), RESPONDENTS.*

*Indian Tariff Act (VIII of 1894), sec. 10 (b), construction of—
Sale of salt—Payment of price including excise duty by
purchaser to seller—Reduction of duty subsequent to trans-
action—Refund of excess duty to seller—Right of purchaser
to sue the seller for the refund of duty received by the latter
in the absence of contract to pay amount refunded—
Right of purchaser under sec. 10 (b).*

Where a contract for the purchase of salt contained no provision regarding subsequent reduction of the excise duty, and the purchaser paid the seller the price including the duty, payable on the salt at the time of sale, and the Government, subsequent to the transaction, reduced the duty and gave to the seller a refund of the amount of such reduction, the purchaser is entitled to sue to recover such amount from the seller under section 10 (b) of the Indian Tariff Act (VIII of 1894), even though there is no express provision in section 10 (b) for the institution of a suit by the purchaser.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Appeal Suit No. 47 of 1926, preferred against the decree of the Court of the District Munsif of Tinnevely, in Original Suit No. 321 of 1924.

Section 10 of the Indian Tariff Act (VIII of 1894) runs as follows:—

In the event of any duty of customs or excise on any article being imposed, increased or decreased or remitted after the

making of any contract for the sale of such article without stipulation as to the payment of duty where duty was not chargeable at the time of making of the contract, or for the sale of such article duty-paid where duty was chargeable at that time,—

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be [or any part thereof], is paid, the seller may add so much to the contract-price as will be [equivalent to the amount paid in respect of such duty] or increase of duty, and he shall be entitled to be paid and to sue and recover such addition, and

(b) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the purchaser may deduct so much from the contract-price as will be equivalent to the decrease of duty, or remitted duty, and he shall not be liable to pay, or be sued, for, or in respect of, such deduction.

V. Rajagopala Ayyar for appellant.

T. M. Krishnasami Ayyar for first respondent.

P. N. Marthandam for third respondent.

T. E. Ramabhadrachariyar for fourth respondent.

The JUDGMENT of the Court was delivered by

ANANTAKRISHNA AYYAR, J.—The fourth defendant is the appellant in this second appeal. The plaintiff is a salt merchant trading at Erode. The defendants, it was alleged, were trading at Tinnevely in salt. The plaintiff purchased from the firm of the defendants, in March 1922, 400 bags of salt. The salt was sent by the defendants to the several places mentioned by the plaintiff. The plaintiff paid the defendants the price of the salt which included the excise duty of Rs. 2,000 charged on the 400 bags calculated at Rs. 5 per bag according to the rate of excise duty prevalent at the time. The transaction took place on the 5th March 1922. Subsequently the Government of India reduced the excise duty on salt from Rs. 5 to Rs. 2-8-0 per bag. It was to have effect from a date prior to the 5th March 1922. The

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defendants' firm accordingly obtained refund from the Government of Rs. 1,000 representing the difference in the excise duty at the rate of Rs. 2-8-0 per bag in respect of the 400 bags. This amount was received by the firm of the defendants on 1st April 1922. The plaintiff instituted the original suit in the Court of the District Munsif of Tinnevely claiming the sum of Rs. 1,000 which the defendants got from the Government, with interest thereon. The plaintiff also alleged in the plaint that there was a specific agreement between the parties at the time of the transaction that in case the Government should reduce the excise duty on salt, then the plaintiff should have the benefit of the said reduction and the defendants who dealt directly with the Government should, on obtaining such refund, pay the same over to the plaintiff. The defendants in their written statement denied the specific agreement set up by the plaintiff. The fourth defendant pleaded that he was not a partner in the firm of the first defendant. With reference to the general allegation in the plaint that under the Indian Tariff Act the plaintiff was entitled to this sum of Rs. 1,000 even though the specific agreement set up by him be not proved, the defendants contended that, on a proper construction of section 10 of the Indian Tariff Act, the plaintiff was not entitled to the refund of the same. Both the lower Courts held that the fourth defendant was a partner in the firm of the first defendant. They also found against the specific agreement set up by the plaintiff with reference to the revision of the salt duty at the instance of the Government. Both the lower Courts, therefore, decreed the claim of the plaintiff on the ground that, on a proper construction of section 10 of the Indian Tariff Act (VIII of 1894), in cases where subsequent to the contract of sale there is a reduction of duty on salt, the purchaser is entitled to the benefit

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of such reduction. The lower appellate Court further found that the defendants must be taken to have purchased the salt from the Government as agent of the plaintiff, and in that view also the defendants were bound to refund to the plaintiff the sum of Rs. 1,000 which they got from the Government. This second appeal has been preferred by the fourth defendant, and, on his behalf, his learned Advocate raised two contentions before us. The first was that the lower appellate Court was in error in having allowed the plaintiff to set up a new case of agency, whereas in the plaint the case set up was one of sale. The learned Advocate drew our attention to the plaint, where there are no allegations regarding any agency, and also to the circumstance that no issue had been raised with reference to this question of agency.

The second contention that he raised related to the construction of section 10 of the Indian Tariff Act. He drew our attention to the corresponding section of the English Finance Act of 1901 and he argued that, though the Act purports to revise the terms of the contract between the parties, the Legislature has taken, as the critical period with reference to which adjustment has to be made, the time of delivery of the goods. He drew our attention to section 10 of the English Act where the word "delivery" is used. He also drew our attention to section 20 of the Customs Consolidation Act of 1876 where the words used are "time of clearance or delivery." He also drew our attention to certain decisions where the Court while dealing with the Indian Act used the word "delivery" in the course of the judgment. We, however, feel ourselves unable to accept this contention of the learned Advocate. Section 10 of the Indian Act, which evidently was taken from the English Act, does not use the word "delivery" or "clearance". The difference in language and omission of these words, is

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rather significant. It may be that, as a matter of convenience, the point of time relating to delivery may be a convenient point with reference to which adjustment of rights of parties could be regulated. But we feel ourselves bound in construing section 10 of the Indian Act to be guided by the express terms of the Act. As the terms "delivery" or "clearance" have been, as we take it, intentionally omitted in the Indian Act, we are led to infer that there has been some change of policy in the Indian Act from that of the English Act. The learned Advocate for the appellant then argued that the test to be applied is whether the transaction between the parties had been, as he said, "closed" or not. Here again the wording of the section does not, in our view, lend support to this contention. As we read clause (a) of section 10, that gives to the seller, in cases where the duty has been enhanced after sale, the right to recover such additional duty from the purchaser. This clearly, in our opinion, contemplates a case where the accounts between the parties had been settled and the purchaser had paid the seller the whole of the price agreed between the parties. If with reference to clause (a) a seller is entitled under this Act to recover from the purchaser, even though the transaction had been "closed", the amount of the extra duty that he had to pay, one fails to see why a different policy must be taken to have been adopted with reference to clause (b) of the same section. Clause (b) of the section gives the purchaser the benefit of any decrease of duty. It declares that the purchaser may deduct so much from the contract-price as will be equivalent to the decrease of duty or remitted duty; and it proceeds further to enact that "he shall not be liable to pay or be sued for in respect of such deduction". The learned Advocate drew our attention to the change of language used in clauses (a)

and (b) of the section, and he argued that, while it is specifically mentioned in clause (a) that the seller in case of increase of duty is given the right to sue for and recover such addition from the purchaser, clause (b), according to his suggestion, does not specifically entitle the purchaser to sue for and recover the difference. But clause (b) contains the words "But a purchaser shall not be liable to pay or be sued for in respect of such deduction." It contemplates a case where, when a suit is instituted against him, he can plead that in respect of this difference he is not liable. In our opinion the words "he shall not be liable to pay" also cover a case where he (the purchaser) might have already paid the whole of the amount originally agreed to. When the Act declares that he shall not be liable to pay a particular amount, it would follow that, if he had in fact paid the same, the general law would allow him to recover back what he had paid but was not bound to pay. We think that no sufficient grounds have been shown why the section should be construed in favour of the seller in one way, but against the purchaser in another way. We think that, reading clauses (a) and (b), it is reasonably clear that the intention of the Legislature was to revise the terms of the contract between the parties so as to give to the one or to the other the benefit of the increase or the decrease of duty in such cases.

With reference to the decisions that were quoted before us, we may at once say that no direct case, in which the question that has been raised before us arose for decision, has been quoted to us. The decision in *Probhudas v. Ganidada*(1) was a case where the question arose whether a purchaser would be entitled

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(1) (1925) I.L.R., 52 Cal., 644.

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to the benefit of the revision of tariff valuation. The Privy Council held that revision of tariff valuation was quite different from revision of tariff duty. That was also the case in *Hajee Shakoo Gani v. Sabapathi Pillai*(1), though the actual decision in that case should not be taken to lay down correct law after the decision of the Privy Council in *Probhudas v. Ganidada*(2). With reference to the use of the word "delivery" in those two cases, we think that the word "delivery" should not be taken to have been used with a view to be an authoritative ruling on section 10 of the Indian Tariff Act on the question now before us. We are governed by the wording of the Indian Act. In the case of *Hajee Shakoo Gani v. Sabapathi Pillai*(1), the learned Chief Justice remarked that the Indian statute drafted bodily in section 10 the wording of the English Act. But a reference to the wording of section 10 of the Indian Act would make it clear that, except in a very general way, that observation is not strictly correct with reference to the particular question we have to decide in the present case. In any event we feel ourselves bound to construe section 10 of the Indian Act according to its wording; and for the reasons we have mentioned we feel ourselves unable to accept the contention raised by the learned Advocate for the appellant on this point. On the question of delivery being the test, there is one other point which would be against the view suggested by the learned Advocate for the appellant. It is not uncommon that, according to mercantile contracts, deliveries are stipulated for, and in fact made, long before the time when the price is to be paid. In cases, therefore, where delivery is made earlier and the price is agreed to be paid later—say, a month after the

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date of delivery—under section 10 (a) of the Act, the seller would be entitled to claim the increased duty, which in the meantime had been imposed by the Legislature. This also goes against the contention of the learned Advocate for the appellant, that the time of delivery is to be taken as the critical point in construing section 10 of the Indian Act.

For these reasons we think that the purchaser was entitled to the benefit of the reduction in the duty in the present case.

No question of limitation arises because the suit was filed within three years from the date of the defendants' getting the refund from the Government. Under the Act, whenever a seller receives a refund of such duty, he has to pay the same to the purchaser; and that being so, we find that the plaintiff had a cause of action in this suit and that the defendants were bound to refund to the plaintiff the sum of Rs. 1,000. For these reasons we hold that the lower Appellate Court was right in its construction of section 10.

On the question of agency found by the lower Appellate Court, we are clear that it was not open to it to allow a new case of agency to be set up by the plaintiff for the first time in appeal, and we do not agree with the learned Advocate for the respondents that the judgment of the lower Appellate Court could be sustained on that ground.

We, however, agree with the lower Appellate Court as regards the construction of section 10.

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

K.R.

(1) (1923) I.L.R., 47 Mad., 222.

(2) (1925) I.L.R., 52 Cal., 844.

APPELLATE CRIMINAL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Krishnan Pandalai.

1929,
October 25.

V. SEENIAH NAYUDU (COMPLAINANT), PETITIONER,

v.

ABDUL WAHAB SAHIB (ACCUSED), RESPONDENT.*

Code of Criminal Procedure, 1898, sec. 250—Appeal from an order under — Whether an appeal under ss. 250 and 407— Sec. 428—Jurisdiction of appellate Court to take additional evidence—Failure to record reasons—Invalidity of proceedings.

An appeal from an order under section 250 of the Code of Criminal Procedure is an appeal under and by virtue of sections 250 and 407 of the Code, and the Court hearing the appeal has jurisdiction under section 428 of the Code to take additional evidence, if it thinks it to be necessary, and failure to record its reasons as required by section 428 will invalidate the proceedings, only if such omission has occasioned a failure of justice.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment, dated 13th August 1928, of the Court of the Subdivisional First-class Magistrate of Chittoor in Criminal Appeal No. 18 of 1928, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Chittoor in Calendar Case No. 55 of 1928.

S. Nagaraja Ayyar for petitioner.

K. Venkataraghavachari for Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

KRISHNAN PANDALAI, J.—This is a petition to revise the order of the Subdivisional Magistrate of Chittoor dismissing the appeal to him from an order of the Stationary Sub-Magistrate of Chittoor, whereby the petitioner, who was the complainant in a case of assault before that Magistrate, was ordered to pay under section 250 of the Criminal Procedure Code, Rs. 100, by way of compensation to the accused, as, in his opinion, the complaint was false and vexatious.

Two points are taken in this petition, viz., (1) that the appellate Magistrate acted without jurisdiction in taking further evidence purporting to act under section 428 of the Criminal Procedure Code, because, according to the appellant's advocate, the appeal was not one under Chapter XXXI of the Criminal Procedure Code to which alone section 428 applies, and (2) that the appellate Magistrate acted illegally in omitting to record reasons for taking further evidence as he was required to do under section 428.

As to the first objection, reliance is placed upon the decision of Mr. Justice DEVADOSS in *Sami Vannia Nainar v. Penasami Naidu*(1), in which that learned Judge held that in an appeal under section 476 (b), Criminal Procedure Code, the appellate Court has no jurisdiction to take additional evidence whether the party objected to the reception of such evidence or not. I do not think that that decision is applicable to this case. The ground of that decision was that an appeal under section 476 (b) of the Criminal Procedure Code was not one under Chapter XXXI of that Code. That decision was itself based upon an earlier decision in *Krishna Reddi v. Emperor*(2) to the same effect. The reason of that

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(1) (1927) I.L.R., 51 Mad., 603.

(2) (1909) I.L.R., 33 Mad., 90.

* Criminal Revision Case No. 156 of 1929.

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decision is seen from the terms of section 476 (b) itself, which says that any person on whose application a Court has refused to make a complaint under section 476 or against whom such a complaint has been made may appeal to the Court to which such Court is subordinate.

Upon the terms of that section, it is clear that not only the right of appeal but the forum to which the appeal should be preferred are clearly prescribed. That section is in other words self-sufficient, and any appeal under that section, is not one under Chapter XXXI. In this case, however, that is not so. Section 250 (3) says that a complainant or informant who has been ordered by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from that order, as if such complainant or informant had been convicted on a trial held by such Magistrate. Now it is contended on those words that the appeal is under that section, on the analogy of the decision above referred to. But the analogy is not complete, because all that section 250 (3) says is that a complainant against whom an order for compensation is made is, so far as the right to appeal is concerned, put on the same footing as if he had been convicted and sentenced to pay a fine by that Magistrate. To find out in what Court the appeal is to be filed, we have to resort to the general chapter on appeals and that is Chapter XXXI and the section applicable to this case is section 407. It follows, therefore, that it is incomplete to say that an appeal from an order under section 250 is an appeal under that section; for, to make the statement complete it must be said that the appeal is by virtue of sections 250 and 407. I am, therefore, of the opinion that this particular appeal was none the less under Chapter XXXI of the Criminal Procedure Code, because the right of appeal was

generally conferred by an earlier section not within that chapter. If the appeal was in the terms of section 428 "under this chapter", all the powers conferred by that section were immediately attracted to this appeal, and the Subdivisional Magistrate had ample power to take additional evidence. That disposes of the first contention.

The second objection is also not supportable. It is no doubt the case that the Subdivisional Magistrate omitted to record reasons, as he ought to have done, when he thought it necessary to take further evidence, but that by no means invalidates his proceedings, because by section 537 of the Criminal Procedure Code an omission of that character will invalidate the proceedings, only if the omission has occasioned a failure of justice. There is nothing to show that any failure of justice was caused in this case by the omission to record reasons by the Subdivisional Magistrate.

Both the objections in this petition, therefore, fail, and the petition must be dismissed.

BRASLEY, C.J.—I agree.

B.O.S.

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PRIVY COUNCIL.*

1930,
June 30.NARAYANASWAMI AYYAR AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

RAMA AYYAR AND OTHERS (PLAINTIFFS), RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu Law—Widow—Relinquishment of estate—Intervening reversionary interest of daughters—Structures erected on another's land—Belief in validity of title—Transfer of Property Act (IV of 1882), sec. 51.

A transfer by a Hindu widow of her husband's estate to two sons of daughters cannot be justified as a valid surrender or relinquishment of the estate, if at the time of the transfer, the daughters are alive and have reversionary interests, and are not proved to have consented to the transfer.

Rangasami Gounden v. Nachiappa Gounden, (1918) I.L.R., 42 Mad., 523; L.R., 46 I.A., 72, referred to.

[It was not necessary to consider whether consent by them would validate the transfer.]

Decree affirmed giving a transferee, who had effected improvements believing in good faith that he was owner, the alternative rights mentioned in section 51 of the Transfer of Property Act, 1882, and in respect of improvements effected at a later date, when he had not proved that he so believed, liberty to remove the materials subject to conditions.

APPEAL (No. 1 of 1928) from a decree of the High Court, Madras, (October 15, 1925) reversing a decree of the Subordinate Judge of Mayavaram (September 30, 1921).

The principal respondents, as reversioners of their grandfather after the death of his last surviving daughter who was their mother, sued the appellants alleging that an alienation in 1867 of their grandfather's property by his widow to the sons of his daughters was

invalid, and claiming possession. The principal defendants by their written statements pleaded that the alienation was binding as a surrender of the estate, and that it had been accepted and acted upon by all the surviving members of the family, including the plaintiffs; alternatively, they alleged that they had made improvements to buildings upon the alienated land in the *bona fide* belief that they were owners, and were entitled to compensation under section 51 of the Transfer of Property Act, 1882.

The Subordinate Judge dismissed the suit holding that the alienation was valid as a surrender to all the grandsons, also as a family arrangement made *bona fide*.

Upon an appeal by the plaintiffs to the High Court, the judgment of the Court was delivered by RAMESAM, J., REILLY, J., concurring, on August 15, 1924. The learned Judges held, for reasons which appear from the judgment of the Judicial Committee, that the alienation was not valid as a surrender by the widow; also that it could not be justified as a family arrangement. They remitted the case for findings as to the claim for compensation, and upon the findings, made a decree setting aside the judgment, decreeing that the defendants were entitled to Rs. 5,800 compensation in respect of the improvements made in 1898; that the plaintiffs, within a time to be fixed, should either pay that sum and take the land and buildings, or sell the land to the defendants for Rs. 1,500 the agreed value of the land, and that if the improvements made by the defendants in 1903 could be definitely ascertained, and could be removed without diminution in the value of the remainder, the defendants should be at liberty to remove them within a month of their being so ascertained.

DeGruyther K.C., and *Narasimham* for appellants.—The transfers of 1867 were valid surrenders of the estate. Although

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* Present :—Lord THANNERTON, Sir LANCELOT SANDERSON, AND Sir GEORGE LOWNDERS.

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the daughters did not join in the transfers, the evidence shows that they acquiesced in them; the effect was that their reversionary interests were included in the transfers. Although the transfers were only to the eldest son of each daughter, the evidence shows that the intention was that all the grandsons should benefit. Reference was made to *Nobokishore Sarma Roy v. Hari Nath Sarma Roy*(1), *Rangasami Gounden v. Nachiappa Gounden*(2), *Sureshwar Misser v. Maheshrani Misrain*(3); and on the question of compensation, which it was contended was insufficient, to the Transfer of Property Act, 1882, section 51, and *Vallabhdas Naranji v. Development Officer, Bandra*(4).

Dube for respondents was not called upon.

SIR LANCELOT
SANDERSON.

The JUDGMENT of their Lordships was delivered by SIR LANCELOT SANDERSON.—This is an appeal by the defendants (1 to 8 and 10 in the suit) from a decree, dated the 15th October 1925, and two judgments, dated the 15th August 1924, and the 15th October 1925, of the High Court of Judicature at Madras, reversing a decree, dated the 30th September 1921, made by the Subordinate Judge of Mayavaram. The first four respondents are plaintiffs in the suit and the remainder of the respondents are *pro forma* defendants.

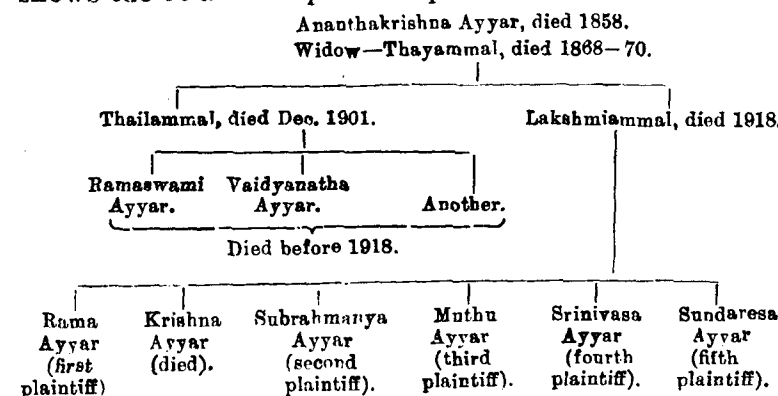
The suit was brought by five surviving sons of one Lakshmiammal. Since the institution of the suit one of the sons, Subrahmanya Ayyar, died; the third and fourth plaintiffs are his legal representatives.

The two questions in this appeal are whether a transaction entered into by Thayammal, the widow of one Ananthakrishna Ayyar, in the year 1867, constituted a valid "surrender" under the Hindu Law, and if not, what would be the proper compensation payable to the

defendants 1, 3 and 4 in respect of a building which had been erected by the vendees on part of the land.

The suit was brought by the plaintiffs as reversioners of Ananthakrishna Ayyar for possession of his properties after the death of the last intermediate female in 1918. The material facts are as follows:—

Ananthakrishna Ayyar died in 1856 leaving a widow Thayammal and two daughters Thailammal and Lakshmiammal. The widow died about 1868—70. Her first daughter died in December 1901. She had three sons, all of whom died before 1918 leaving no issue. The second daughter died in 1918 leaving the five plaintiffs surviving her. They are, therefore, reversioners to the estate of Ananthakrishna Ayyar and are *prima facie* entitled to his properties. The following pedigree shows the relationship of the parties:—



The facts on which the defendants resist the suit are as follows:—On the 22nd July 1867, the widow Thayammal executed four documents (Exhibits III, IV, V, VI). By Exhibit III, she purported to sell her house to her eldest grandson, Ramaswami Ayyar, for Rs. 400. The object of this sale was ostensibly to pay off Rs. 300 promised to Lakshmiammal at the time of her marriage and Rs. 100 similarly to Thailammal. By Exhibit V, she conveyed lands in Radhanallur worth Rs. 380 and movables of the value of Rs. 20 to the same Ramaswami

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(1) (1884) I.L.R., 10 Cal., 1102.

(2) (1918) I.L.R., 42 Mad., 523; L.R., 46 I.A., 72.

(3) (1920) I.L.R., 48 Cal., 100; L.R., 47 I.A., 232.

(4) (1929) I.L.R., 53 Bom., 589, 593, 594; L.R., 56 I.A., 259, 263.

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Ayyar in consideration of his having performed the funeral ceremonies of Ananthakrishna Ayyar and of his undertaking to perform her funeral ceremonies. In Anaithandavapuram she had half *pangu* of lands. She gave away one-fourth *pangu* to Ramaswami Ayyar by Exhibit VI and the other one-fourth *pangu* to Rama Ayyar (the eldest son of the second daughter) by Exhibit IV. The defendants contend that these documents amount to a surrender by Thayammal accelerating the reversion: that they also amount to a *bona fide* family settlement and that no reversion devolved on the plaintiffs in 1918.

By two deeds of sale, dated the 19th July 1884, Ramaswami Ayyar and his brother Vaidyanatha sold the house and lands in Anaithandavapuram to one Muthu Ayyar, the father of the defendants 1 and 2, and the lands in Radhanallur were sold to Ramaswami Ayyar, the father of the seventh defendant.

From that time, the vendees and their representatives were in peaceful possession and enjoyment of the house and the land in Anaithandavapuram village, while the plaintiffs-respondents were in possession and enjoyment of their share of the lands in accordance with the documents of 1867. The vendees demolished the old dilapidated house and erected a new and substantial building on its site.

On the 22nd December 1901, Thailammal died. Lakshmiammal then instituted Original Suit No. 12 of 1902 on the file of the Kumbakonam Subordinate Judge's Court for the recovery of the house and the land from the vendees of Ramaswami (her sister's son). Lakshmiammal's sons (except Rama Ayyar, the eldest son) also brought an action for a declaration that the alienation in favour of the appellants was not binding on them after the death of their mother, Lakshmiammal. The said two suits were tried together and the evidence for both suits was by consent recorded in the first suit.

On the 9th December 1903, the mother's suit was withdrawn unconditionally. The sons' suit was eventually dismissed on the ground of limitation, and the dismissal was affirmed by the High Court on appeal.

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Lakshmiammal died on the 14th January 1918, and on the 27th July the plaintiffs-respondents and their deceased brother brought the present suit to recover possession of the lands mentioned in the plaint, of which the defendants were in possession, with other incidental reliefs. The learned Subordinate Judge dismissed the suit. The plaintiffs appealed to the High Court, which allowed the appeal and directed the learned Subordinate Judge to submit findings on certain issues which had not theretofore been decided.

On the further hearing of the appeal, and on consideration of the findings as to the said issues, the High Court decided that the vendee under the deed executed by Ramaswami Ayyar and Vaidyanatha, and dated the 19th July 1884, who was the father of the first defendant, *bona fide* believed that he was the owner of the property in 1898 when he executed an improvement in the building of the value of Rs. 4,000: that an improvement made in 1903 was on a different footing, inasmuch as the suits for the recovery of the property by Thayammal's daughter and grandsons had been filed and were then pending, and that the further expenditure of Rs. 1,500 was made before the suits were disposed of. The learned Judges held that it had not been shown that at that time the vendee *bona fide* believed that he was the owner of the property: they therefore decided that as regards the last-mentioned sum, the defendants were not entitled to compensation.

After estimating the increase in value since the improvements were made, the High Court fixed the compensation payable by the plaintiffs 1, 3, 4 and 5 to the defendants 1, 3 and 4 at the sum of Rs. 5,800.

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The High Court accordingly made a decree directing that the plaintiffs should be put in possession of the properties mentioned in the plaint, and declaring that the defendants 1, 3 and 4 were entitled to compensation in the sum of Rs. 5,800 for the value of improvements effected in 1898, and that the plaintiffs 1, 3, 4 and 5 should either pay the said sum within the time to be fixed by the lower Court and take the land and building, or sell the land to the defendants 1, 3 and 4 for the sum of Rs. 1,500, which was the agreed value of the land. A further order was made as to the removal of materials used in the improvement made in 1903 upon the terms and conditions therein contained.

The learned Judges of the High Court decided that there was no valid surrender by Thayammal, the widow of Ananthakrishna, on several grounds. They regarded it as an insuperable objection that the alleged renunciation in 1867 by the widow was not in favour of all the then reversioners: that there was a transfer of one set of properties to one group of reversioners (at the best), and of another set to another group, and that it was necessary to introduce a fictitious partition to read the transactions as a surrender: that there could not be a surrender in shares of three-fifths and two-fifths, and that apparently certain minors were unrepresented. Their Lordships do not think it necessary to express any opinion on any of the above-mentioned points, inasmuch as, in their opinion, the appeal should be disposed of upon another ground mentioned by the learned Judges.

The learned Judges of the High Court decided that there was not sufficient evidence to justify them in holding that the daughters Thailammal and Lakshmi-ammal surrendered their interests. Their Lordships are in agreement with the High Court's decision in respect of this matter.

It was argued, however, that the learned Judges had not considered the proper question, viz., whether the above-mentioned daughters had in fact consented to and acquiesced in the execution of the four deeds by their mother Thayammal in July 1867.

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Their Lordships have examined the evidence relating to this question, and they are satisfied that it falls far short of proving the alleged consent and acquiescence on the part of the two daughters.

There is not sufficient evidence to show that they or either of them knew the contents or appreciated the effect of the provisions of the deeds of the 22nd July 1867.

This appeal, therefore, must be decided on the assumption that the above-mentioned daughters of Ananthakrishna did not agree to surrender their interests in the properties of their father, and that they did not consent to and acquiesce in the deeds of the 22nd July 1867.

The principle applicable to the power of surrender by a Hindu widow is well settled and may be stated as follows:—

“A Hindu widow can renounce in favour of the nearest reversioner if there be only one, or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can, so to speak, by voluntary act operate her own death. The landmark of decision as to this may be taken as the case of *Behari Lal v. Madho Lal Ahir Gayawal*(1), where, in delivering the judgment of the Board, Lord MORRIS said: ‘It may be accepted that according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee.’”

(1) (1891) I.L.R., 19 Cal., 236; L.R., 19 I.A., 30.

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See the judgment of the Board delivered by Lord DUNEDIN in *Rangasami Gounden v. Nachiappa Gounden*(1).

It is clear that the widow, Thayammal, by executing the deeds in July 1867, and disposing of her property thereby, did not renounce her interest in favour of the nearest reversioners. Her two daughters, Thailammal and Lakshmiammal, were the nearest reversioners, and they took no interest in the properties under the said deeds.

The conditions, therefore, necessary to create a valid surrender by the widow, Thayammal, were not present.

It was, however, argued on behalf of the appellants that the surrender by the widow was valid, because the daughters, Thailammal and Lakshmiammal, consented to the transactions carried out by the deeds of July, 1867, so as to efface their own interests, and that consequently not only the interests of the widow, but also the interests of her daughters in the property, were effaced.

Their Lordships are relieved from the necessity of expressing any opinion on the important question of law involved in this contention, in view of their above-mentioned conclusion that it was not proved that the daughters, Thailammal and Lakshmiammal, did in fact consent or acquiesce in the said transactions.

That conclusion is sufficient to dispose of the first part of the appeal, and for that reason, and without expressing any opinion on the other points hereinbefore referred to, their Lordships agree with the High Court that there was no valid surrender by the widow Thayammal of her interest in the properties of her deceased husband.

(1) (1918) I.L.R., 42 Mad., 523, 532; I.R., 46 I.A., 72, 79.

The only other question relates to the amount of compensation fixed by the High Court in respect of the improvements, viz., Rs. 5,800.

The appellants contended that the compensation for the house should have been at least on the basis of the Commissioners' valuation, viz., Rs. 10,000.

The High Court took Rs. 8,000 as the value of the whole structure; they held that the defendants, who were entitled to compensation in respect of the Rs. 4,000 out of Rs. 5,500 spent by their father, are entitled to eight-elevenths of Rs. 8,000—or roughly, Rs. 5,800.

Their Lordships are of opinion that the said sum of Rs. 5,800 is sufficient compensation. Indeed, they are not sure that the said sum is not too much, for the Rs. 8,000 was arrived at by the High Court by allowing an increase in value to the extent of about 50 per cent upon the total expenditure of Rs. 5,500, whereas the High Court had decided—and their Lordships agree with the decision—that it was not shown that the father of the first defendant *bona fide* believed he was the owner of the property when he expended the sum of Rs. 1,500 (part of the total of Rs. 5,500) in 1903.

There is, however, no cross appeal in respect of this matter, and the sum awarded by the High Court must stand.

For these reasons their Lordships are of opinion that the appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman-Walker and Shephard*.

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

A.M.T.

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SPECIAL BENCH.

Before Mr. Justice Kumaraswami Sastri, Mr. Justice
Ourgenvén and Mr. Justice Pakenham Walsh.

1929,
October 18.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
PETITIONER,

v.

A. SUPPAN CHETTIAR AND COMPANY, BODINAYA-
KANUR, RESPONDENTS.*

*Indian Income-tax Act (XI of 1922), sec. 10 (2) (vi) and proviso
(b)—Allowance for depreciation of buildings, machinery,
etc., in one of several businesses carried on by assessee—
Right of assessee to deduct such allowance from profits or
gains of other businesses—Effect of the proviso on the main
section—"Business" in sec. 10 (1), construction of.*

Where an assessee owns a number of businesses, and the profits and gains of one of them are insufficient to cover the full allowance for depreciation of the machinery, plant, etc., used for the purposes of that business, admissible under section 10 (2) (vi) of the Income-tax Act, the excess of the allowance for depreciation can be set off against the profits and gains of the other businesses.

"Depreciation" under section 10 (2) (vi), stands on the same footing as the other charges mentioned in section 10; and, under the well-known principle of construction of provisos, the proviso (b) to section 10 (2) (vi) should not be so construed as to withdraw by mere implication any part of what the main provision in the section has given. *West Derby Union v. Metropolitan Life Assurance Society*, [1897] A.C., 647, relied on.

Further, the words "any business," occurring in section 10 (1), having been construed to include all businesses put together in *Commissioner of Income-tax v. Arunachalam Chettiar*, (1923) I.L.R., 47 Mad., 660, the words "profits or gains" in proviso

(b) to section 10 (2) (vi) should be held to mean the aggregate profits or gains of all the businesses together.

REFERENCE to the High Court, under section 66 (1) of the Indian Income-tax Act, made by the Commissioner of Income-tax, Madras, in O.P. No. 244 of 1928.

T. M. Krishnaswami Ayyar (with him *M. Subbaraya Ayyar* and *T. P. Gopalakrishna Ayyar*) for assessee.—Where one person carries on several businesses, he can set off depreciation in one business against profits or gains in the other businesses, under section 10 (2) (vi). The point is expressly decided in *Karam Ilahi Muhammad Shafi v. Commissioner of Income-tax, Delhi*(1). "Any business" in section 10 (1) has been construed as including all businesses, and the income of any business means income from each and every business: *Commissioner of Income-tax v. Arunachalam Chettiar*(2). Loss in one business can be set off against gains in any other business. "Business" is defined in section 2, clause (4), and "total income" in section 2, clause (15). Section 24 of the Income-tax Act shows that loss in one business can be deducted from profits in another business of the assessee. Proviso (b) to section 10 (2) (vi), does not cut down the profits out of which the deduction is allowed in the former part of the section. A proviso to a section, cannot be so construed. See the decision of the House of Lords in *West Derby Union v. Metropolitan Life Assurance Society*(3). The opening words of section 10 (1) point out the fund out of which allowances are to be deducted. The other heads of allowances specified in section 10 (2) are so deductible. The remedy provided in the proviso is cumulative. "Depreciation" of machinery, etc., is loss. The depreciation in one business can be deducted from profits in other businesses. See *Highland Railway Co. v. Special Commissioners of Income-tax*(4), and *Spanish Prospecting Company, Limited, In re*(5).

M. Patanjali Sastri for Commissioner of Income-tax.—In section 10 (2), "such profits" should be construed as meaning profits of the business for which the computation is made. Depreciation is loss of capital and is on a separate footing from loss of profits or income. Originally there was no provision for deduction for depreciation in the English Act of 1848 (*Customs*

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(1) (1929) I.L.R., 11 Lah., 38.

(2) (1923) I.L.R., 47 Mad., 660.

(3) [1897] A.C., 647 at 651.

(4) (1885) 2 T.C., 151 (158).

(5) [1911] 1 Ch. D., 92 at 99.

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and Inland Revenue Act); later on, a statute, 41 and 42 Vict., c. 15, introduced such a provision in 1878. All the other items in section 2 up to clause (vi), are allowances for *expenses* incurred in the businesses; it is only in clause 6, that we come to allowances for *depreciation in capital*, for which a special provision is made in proviso (b) to clause (vi); this allowance is to be recouped in the special way provided in proviso (b). Depreciation of stock, machinery, etc., affecting capital, is different from expenses incurred in earning an income. The fact that a special provision is given under proviso (b) to clause (vi) in section 10, shows that depreciation is not loss like other items in the section.

The decision in *Karam Ilahi Muhammad Shafi v. Commissioner of Income-tax, Delhi*(1) goes too far. It includes all income including even rent, salary, etc. The decision in *Commissioner of Income-tax v. Arunachalam Chettiar*(2) does not help this case. The fundamental theory of Income-tax law is that the loss in one year cannot be carried over to another year. Section 10 (2) (vi), proviso (b), is a specific remedy for depreciation of capital. Compare the English Act, 41 and 42 Vict., c. 15; rules 1 and 2 in Schedule II. Income-tax Manual, page 58, rule 18, shows that depreciation deducted by an assessee should be added by Income-tax authorities. *Highland Railway Co. v. Special Commissioners of Income-tax*(3) was a case of one business only. As regards *West Derby Union v. Metropolitan Life Assurance Society*(4), the English Act gives the provision corresponding to section 10 (2) (vi), proviso (b), as an independent section.

JUDGMENT.

The question which the Commissioner refers to us is

"Whether where an assessee owns a number of businesses A, B, C and D, the profits and gains of business A are insufficient to cover the full depreciation admissible under section 10 (2) (vi) of the Act on the machinery, plant, etc., used for the purpose of that business, the excess depreciation can be set off against the profits and gains of the other businesses B, C and D?"

(1) (1929) I.L.R., 11 Lah., 48.
(2) (1885) 2 T.C., 151 (158).

(3) (1923) I.L.R., 47 Mad., 660.
(4) [1897] A.C., 647 at 651.

The assessee is an unregistered firm carrying on the businesses of (1) grocery and rice, (2) money-lending, (3) soda factory, (4) rice mill, (5) foreign liquor shops, and (6) motor service. The profits of the last-named, the motor service, for the year to which the assessment relates, amounted only to Rs. 253, whereas the firm claimed an allowance of Rs. 10,542 on account of depreciation. Under section 10 (2) (vi) of the Act, in computing the profits or gains of a business, allowance may be made, within certain prescribed limits, in respect of depreciation of buildings, machinery, etc., and the question we have to answer is whether, taking this case as an example of the general proposition addressed to us, the allowance may be set off against not only the small profit of Rs. 253 earned by the motor service but against the profits earned by the other five businesses.

Section 10, which deals with the assessment of a business to tax, provides that the profits or gains shall be computed after making allowances in respect of charges classified into nine divisions, examples of which are rent, cost of repairs, interest on borrowed capital, etc. Admittedly, in respect of each of these charges except depreciation it is open to the assessee to include the whole sum which it represents in his balance-sheet, with the result, it may be, that a *minus* balance or loss on the business, is shown. Then, if he has more than one business or even more than one head of income as described in section 6, he is entitled under section 24 to set off the loss in the business against any profits or gains received under another head. In other words, if the charge is any one of those named in section 10 other than depreciation, the question which the Commissioner refers to us must, upon the plain terms of the Act, be answered in the affirmative. It is said, however, that allowance for depreciation stands upon a different

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footing from the other allowances, and, as an indication of this, our attention is directed to proviso (b) under clause (vi) of section 10 (2). It lays down that—

“Where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or, if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years.”

Taking the words “profits or gains chargeable for that year” to refer only to the profits or gains of the business in which the depreciation occurs, it is contended that this proviso allows only one way of treating the charge; that so much of it as cannot be neutralised by profits must not figure as an actual loss, but must be carried forward into the next year's account. But neither from the language used nor from any general considerations arising from the nature of the charge are we satisfied that this construction is correct. But for the proviso, depreciation stands upon the same footing, and should, so far as any intention to the contrary appears, be dealt with in the same way, as the other charges enumerated in the section; and it is a well-known principle of construction [see *West Derby Union v. Metropolitan Life Assurance Society*(1)] that a proviso should not by mere implication withdraw any part of what the main provision has given. We do not think, therefore, that upon the terms of the section an assessee is precluded from adding the whole charge for depreciation to his other business charges, even though the result is to show a loss, and then claiming under

section 24 to set off the loss against profit from some other source. Nor have we been shown that there is anything in the nature of this allowance for depreciation to render such a course inadmissible. The learned Advocate for the Crown argues that it is not a business expense or loss, but rather a sum set apart to make good a loss of capital. There is an observation in *Spanish Prospecting Company, Limited, In re*(1), that depreciation is a business loss. That, however, was not an income-tax case, and, no doubt, there may be a business loss of capital as well as of profits. We do not propose to pursue this line of inquiry further, as we have heard nothing in any sense conclusive upon the point. But it may be observed that a close analogy exists between money spent upon repairs to buildings, machinery, etc., and money set apart in respect of depreciation of such things, and that, so far as we can discover, there is no reason to treat differently the allowances in respect of these two classes of expenditure.

We have dealt with the question on the footing that the words “business” and “any business” occurring in section 10 (1) relate only to the business in which the depreciation occurred, in this case the motor service. If, however, we construe “any business” as meaning all the businesses put together, which was the construction put upon it in *Commissioner of Income-tax v. Arunachalam Chettiar*(2), then in proviso (b) “profits or gains” will mean the aggregate profits or gains of all the businesses together, and we need look no further for an answer to the question proposed to us.

This construction has been adopted in a case recently decided by the Lahore High Court, *Karam*

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

(2) (1923) I.L.B., 47 Mad., 660.

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Ilaki Muhammad Shafi v. Commissioner of Income-tax, Delhi(1), where the same question arose in a slightly more extreme form and was decided in the same manner.

Our answer to the question referred to us is in the affirmative. The respondent will receive the costs of this application. Vakil's fee Rs. 250. Deposit to be returned. O.P. No. 16 of 1929 is not pressed and is dismissed with costs. Vakil's fee Rs. 100.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and
Mr. Justice Cornish.

SAIT ASURAM SADA SUK BHATTADU (THIRD
COUNTER-PETITIONER), APPELLANT,

v.

THE SUB-COLLECTOR OF RAJAHMUNDY AND ANOTHER
(PETITIONER AND SECOND COUNTER-PETITIONER),
RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), sec. 144—Restitution—
Security bond for return of principal amount only—Stay of
execution—Amount deposited in Court, drawn by appel-
lant—Liability to interest on principal amount on resti-
tution, in the absence of provision therefor in the bond.*

In an application under section 144, Civil Procedure Code, (1908), for restitution of an amount paid into Court by the respondents and taken out by the appellant on his giving a security bond for repayment of such amount which did not contain a provision for interest on such amount,

Held, that the party who drew out the money was liable to pay interest in restitution on the principal amount under

section 144 of the Code, even though the security bond did not contain a provision for payment of interest; *Indra Chand Bothra v. Mr. A. H. Forbes*, (1917) 2 Pat. L.J., 149 and *The Collector of Ahmedabad v. Lariji Mulji*, (1911) I.L.R., 35 Bom., 255, followed; *Alagappa Chettiar v. Muthukumara Chettiar*, (1918) I.L.R., 41 Mad., 316, referred to.

APPEAL against the order of the District Court of East Gōdāvari at Rajahmundry in E.P. No. 20 of 1927 in O.P. No. 16 of 1922.

G. Lakshmanan for appellant.—The appellant is a mortgagee of the properties, acquired under the Land Acquisition Act; he applied and was joined as a party respondent in one of the connected appeals in the High Court in a land acquisition case. He executed a security bond and drew the money deposited by the Government. There was no stipulation in the bond for paying interest on restitution of the amount taken by him. Hence there is no liability on him to pay interest. Section 144, Civil Procedure Code does not apply, where a security bond has been taken. Apart from the bond there is no ground of liability. Appellant is not liable for the costs, as he was not a party to the decree of the lower Court, and there is no liability on the appellant under the decree. The decision in *Alagappa Chettiar v. Muthukumara Chettiar*(1) is not under section 144, Civil Procedure Code.

Government Pleader (P. Venkataramana Rao) for respondent.—Section 144, Civil Procedure Code applies to this case; interest is payable under section 144, though a bond has been taken for the restitution of the principal amount. The bond does not prohibit an order for interest under section 144, Civil Procedure Code. The point is covered by authority; see *Indra Chand Bothra v. Mr. A. H. Forbes*(2), *Alagappa Chettiar v. Muthukumara Chettiar*(1), and *The Collector of Ahmedabad v. Lariji Mulji*(3).

As for the liability for costs, the appellant is liable to pay what is payable under the decree by the first and the second claimants in the case. The latter were liable to have the costs set off under Order XXI, rule 2, Civil Procedure Code. The appellant claims only through the claimants 1 and 2.

(1) (1917) I.L.R., 41 Mad., 316.

(2) (1917) 2 Pat. L.J., 149.

(3) (1911) I.L.R., 35 Bom., 255.

(1) (1929) I.L.R., 11 Lah., 88.

* Appeal against Order No. 115 of 1928.

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JUDGMENT.

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MADHAVAN NAIR, J.—This appeal arises out of an application under sections 144 and 151, Civil Procedure Code, for restitution against the third respondent in A.S. No. 256 of 1924 before this Court and also for the recovery of costs that were ordered to be paid by the claimants 1 and 2 in the two connected appeals Nos. 256 of 1924 and 324 of 1924. The facts of the case are stated in detail by the learned District Judge and need not be re-stated.

It appears that a sum of Rs. 22,614-12-0 was ordered to be paid in excess by the District Judge to the claimants in a certain land acquisition proceeding on a reference to him under the Land Acquisition Act. Against the order to pay the excess amount two appeals were preferred to the High Court, one A.S. No. 324 of 1924 by the claimants in that proceeding and another A.S. No. 256 of 1924 by the Government. In A.S. No. 256 of 1924, the Government filed an application for stay of execution of the order that the third respondent may be allowed on furnishing security to take the amount of money that would be deposited by the Government in the lower Court. This order was passed on 24th September 1924, and the money was deposited by the Government on 9th October 1924. The security bond which was executed by the third respondent, the appellant before us, is Exhibit A. In that security bond, the appellant undertakes that

“if A.S. No. 256 of 1924 on the file of the Madras High Court should be partly or wholly decided in favour of the appellant and the third respondent deposits in the Court the said sum of Rs. 22,614-12-0 or any part thereof as he may be required to pay back under the decree of the High Court, this bond shall be void and of no effect, otherwise it shall remain in force.”

He withdrew the money from the Court after executing this security bond. The High Court dismissed A.S. No. 324 of 1924 filed by the claimants who were respondents 1 and 2 and allowed the appeal by the Government, A.S. No. 256 of 1924 to a certain extent, with the result that the amount to be deposited by the Government as compensation for the lands of respondents 1 and 2 was reduced by Rs. 17,148-15-10 and the respondents 1 and 2 were made liable to pay the Government by way of costs Rs. 1,601-1-2 and Rs. 756-12-5. There was no decree against or in favour of the third respondent. Now, the Government have filed the present application for recovery of the amount of Rs. 17,148-15-10 *plus* interest upon that amount as well as the two sums ordered as costs from the third respondent. The third respondent does not deny his liability to pay the amount of Rs. 17,148-15-10; but his case is that he should not be called upon to pay interest upon that amount nor should be asked to pay the costs. The learned District Judge has disallowed both these contentions. In the present appeal, the appellant urges both these grounds.

As regards interest, the argument of the learned Advocate for the appellant is that under the security bond executed by the third respondent he undertook to pay the total amount. There is no provision made for the payment of interest and, therefore, he is not bound to pay interest to the Government. The question is, whether there is the limitation of the liability to pay interest introduced in this security bond. The proceeding is admittedly one under section 144, Civil Procedure Code, and the Court has discretion to order the payment of interest on the amount which the parties are bound to pay back to the Government by way of restitution under that section. We do not think that

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the security bond in any way limits the liability for the payment of interest which the Court has got power to order as against the third respondent. In the decision reported in *Indra Chand Bothra v. Mr. A. H. Forbes*(1), it was held that—

“under section 144 of the Code of Civil Procedure, the Court may in its discretion award such interest as it chooses, and the fact that the principal only is secured by a bond under the order of the Court at the time of the withdrawal of the sum originally decreed, does not affect the liability of the person ordered to make restitution to pay interest in accordance with the section.”

This case was followed by this Court in the decision in *Alagappa Ohettiar v. Muthukumara Ohettiar*(2). No doubt, the decision of our Court was not one under section 144, Civil Procedure Code, but the learned Judges followed the principle underlying that section. The learned Judge of this Court, SRINIVASA AYYANGAR, J., decided against the contention that the party should be ordered to pay interest on the ground that the undertaking given by the party did not provide for the payment of interest in that case. The learned Judges in the Letters Patent Appeals, following the decision in *Indra Chand Bothra v. Mr. A. H. Forbes*(1), set aside the decision. The decision in *The Collector of Ahmedabad v. Lavji Mulji*(3), referred to by the learned Government Pleader, comes nearer to the point as it relates to the payment of compensation under the Land Acquisition Proceedings, though there was no security bond executed in that case. In that case, as in the one before us, the High Court reduced the amount of compensation payable to the claimant and, when the Government applied to recover from the claimant interest upon the excess

amount drawn by him from the Court, that claim was allowed. It was held—

“that the interest claimed should be awarded, inasmuch as the claimant had had the benefit of the money belonging to the Government in excess of that to which the High Court held him to be entitled, and the benefit was represented not only by the excess wrongly taken by the claimant from the District Court but also the amount of interest which the excess carried.”

We are prepared to apply the principle underlying these decisions to the present case. One special feature of this case may be noticed and that is, that the Government asked for an order staying execution of the decree and deposited the money when the order in favour of the third respondent was made here. In these circumstances, we think the order as regards interest should be upheld.

The next argument of the appellant is that he should not be asked to pay costs, because he was not a party to the suit and there was no order against him.

It is true that there was no decree against him as regards costs; but, for the purpose of the present case, we think he stands in the shoes of claimants 1 and 2, and the amount which was ordered to be paid by the High Court was in favour of the claimants. As a matter of fact, the appellant before us has no claim to the money except through the claimants 1 and 2 and, for the purpose of the proceedings under the Land Acquisition Act and these connected proceedings for restitution, his interest must be considered to be identical with the interest of claimants 1 and 2. And, further, in the security bond he undertook to deposit in Court whatever money he might be required to pay back under the decree of the High Court; that is to say, he made himself liable to the decree of the High Court and the

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(1) (1917) 2 Pat. L.J., 149.

(2) (1917) I.L.R., 41 Mad., 318. (3) (1911) I.L.R., 35 Bom., 255.

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decree of the High Court made the claimants 1 and 2 in the two appeals before it liable for costs of the Government. In these circumstances, we uphold the order as regards costs as well.

In the result, the Civil Miscellaneous Appeal is dismissed with costs.

CORNISH, J.—I agree.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1929,
October 17.

O. M. SUBRAMANIAN (PLAINTIFF), APPELLANT,

v.

C. APPADURAI MUDALI AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Original Side Fee Rules, O. VI, r. 1 (b) and (c)—Suit on Original Side—Posted for final disposal—Some defendants admit claim, others ex parte—Plaintiff calls one defendant to prove claim against ex parte defendants—Whether suit “disposed of”—Applicability of clause (b) in r. 1.

Where a suit on the Original Side of the High Court came on for final disposal, and the first and the second defendants admitted the plaintiff's claim, and the third and the fourth defendants were *ex parte*, and the plaintiff had to call the first defendant to prove his claim against the third and the fourth defendants, and the suit was decreed, *held*, that the suit was not “disposed of” within the meaning of Order VI, rule 1 (c) of the Original Side Fee Rules, but that the suit was decided “*ex parte*” with reference to some of the defendants, and “on confession of judgment” with reference to the other defendants, and that therefore the plaintiff would be entitled to tax his costs only under clause (b) of the above rule.

* Original Side Appeal No. 33 of 1929.

ON APPEAL from the order of KUMARASWAMI SASTRI, J.,
dated the 28th February 1929, and passed in the
exercise of the Ordinary Original Civil Jurisdiction of
the High Court in C.S. No. 165 of 1928.

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The relevant portion of Order VI, rule 1, of the High Court Fees Rules, 1925, is as follows:—

The fees to be allowed on the Original Side of the High Court, Madras, to an adversary's *vakil* in suits for money, effects, or other personal property, or for land or other immoveable property of any description, in cases where such *vakil* appears, acts, and pleads, shall be on the following scale:—

(a) * * * *

(b) where the suit is decreed or decided *ex parte*, or on confession of judgment, or is dismissed for default after the requisite pleadings have been filed, or is withdrawn, or compromised after the defence is put in:—

[The scale].

(c) when a suit is set down in the final disposal board and disposed of, or is settled, withdrawn, or compromised after a partial or complete trial but before delivery of judgment, fees are payable on the following scale:—

[The scale]

S. Krishnamurti Ayyar for appellant.

T. D. Srinivasachari for respondents.

JUDGMENT.

The rules are no doubt inartistically framed, but they have been interpreted, vide *Official Trustee of Madras v. Kamalamma*(1), where “disposed of” is construed to mean adjudication after trial. If the words mean disposal in any manner whatever, the words following are unnecessary. We have got here a confession of judgment though at a very late stage, and clause (b) applies; and clause (b), on its face, is not

(1) (1926) 24 L.W., 808.

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confined to cases which have not reached the final disposal board.

If the result is somewhat unsatisfactory, it is a matter for recasting of the rules.

The learned Judge is right and the appeal is dismissed with costs.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1929,
November 8.

ELUMALAI NAICKER AND ANOTHER (PLAINTIFFS),
APPELLANTS,

v.

KUPPAMMAL AND FIVE OTHERS (DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 35—Next friend or guardian of minor party to a proceeding—Jurisdiction of Court to direct next friend or guardian to pay costs—Scope of sec. 35—Next friend or guardian instituting suit in forma pauperis—Liability to pay Court-fee to Government.

A Court has jurisdiction to direct the next friend or guardian of a minor who is a party to a proceeding to pay the costs of such a proceeding.

Section 35 of the Code of Civil Procedure (Act V of 1908) which refers to costs of and incident to all suits is wide enough to cover even Court fees; and a person, who as next friend or guardian of a minor institutes a suit in *forma pauperis*, may, on the disposal of the suit, be directed to pay the Court-fee to Government.

APPEAL against the judgment and decree of VENKATASUBBA RAO, J., dated 1st November 1927 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 395 of 1925.

K. S. Krishnaswami Ayyangar (V. V. Devanathan with him) for appellants.

V. S. Govindachari (V. Krishnamachari with him) for respondents.

Advocate-General (A. Krishnaswami Ayyar) for the Crown.

The JUDGMENT of the Court was delivered by

RAMESAM, J.—This appeal arises out of a suit for RAMESAM, J. partition of the estate of one Munuswami Naicker. The facts out of which this suit arises may be shortly stated. One Veeraswami Naicker, a resident of Teynampet, was the common ancestor of the parties. He was carrying on business of supplying milk to European houses and he died about 1867 or 1868. He left four sons, namely, Deva Naicker, Govinda Naicker, Logappa Naicker, and Narayanaswami Naicker. The milk business was carried on for some time and then Deva Naicker took to abkari or toddy business. He seems to have prospered in this business. He died in 1893, leaving two sons, Munuswami Naicker and Parthasarathy Naicker. The former died on 16th February 1924, possessed of properties worth nearly three lakhs of rupees. His widow is the first defendant, the daughter, the second defendant, and the son-in-law, the third defendant. He left a will and the defendants have taken out probate. Narayanaswami Naicker's son is Kuppaswami Naicker, the fourth defendant. His son Elumalai is the first plaintiff. Logappa Naicker left no issue but left only his widow Kanniammal, who is P.W. 4. Govinda Naicker left a son Munuswami Naicker, who is P.W. 5. The plaintiff's case is that Deva Naicker and his three brothers were all members of a joint family for some time and that Govinda Naicker and Logappa Naicker gave up their shares in the family, but Deva Naicker and Narayanaswami Naicker continued to be members

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of a joint family. Some time in 1904 Narayana swami Naicker left Teynampet on account of some misunderstandings, for Rayapuram, but Kuppaswami, the fourth defendant, continued to be joint with Munuswami. The plaintiff brings the suit for a partition and division of property and recovery of his half-share, the other half-share belonging to his father, the fourth defendant. Obviously, the fourth defendant supports the plaintiff and has probably instigated the suit. The other members of the family, P.Ws. 4 and 5, also support the plaintiff. It is clear that they have all got the feeling that the property of Munuswami Naicker has gone out to strangers without benefiting themselves. The learned trial Judge dismissed the suit and the plaintiff appeals.

[His Lordship discussed the evidence and concluded as follows:] We entirely agree with the conclusions drawn by the trial Judge. We also agree with the trial Judge in the estimate of the oral evidence in the case. We think that there was no joint family from the time when Deva Naicker started the toddy business and that there was scarcely any nucleus for the acquisition of joint-family property and the subject matter of the suit was the self-acquisition of Munuswami Naicker. The appeal fails and is dismissed with costs of respondents 1 to 3.

The learned Advocate for the appellant raised a question as to the propriety of the order made by the trial Judge relating to payment of Court-fees by the next friend of the plaintiff, the suit being filed in *forma pauperis* in the lower Court. He contended that under Order XXXIII, rule 11, Schedule 1, Civil Procedure Code, it is only the plaintiff that is liable for the Court-fee and no order can be made against the next friend. But we think that Order XXXIII, rule 11, should be read along with section 35 of the Code. Section 35

gives a very wide discretion to the Court to make any order relating to costs. In a recent decision of myself and my brother JACKSON, J., we held that the Court had jurisdiction to direct the next friend or guardian to pay the costs of the proceeding in the place of the minor. In that decision we referred to other decisions of this Court and also to an English decision. It is true that the Allahabad High Court has taken a different view in *Siht Ahmad v. Amina Khatun*(1). But we adhere to the decision in *Yellama v. Suryanarayanamurthy*(2). But it is contended by the learned Advocate for the appellant that even if section 35 applies, it cannot help the present case as the order relates to Court-fee and not to costs. He relies on the observations in *Collector of Trichinopoly v. Sivaramakrishna Sastrigal*(3), where it was said that Court-fee when paid to Government is revenue and not costs. It is true that when Court-fee is paid to Government, it is paid to Government as revenue and not as costs. But this consideration is not enough to dispose of the matter. The plaintiff who pays Court-fees incurs them as expenses or costs of the suit. In ordinary cases the plaintiff incurs these costs in the beginning, while in pauper suits these costs are incurred at the end of the suit. If the plaintiff fails, he bears his own costs, that is, he is to pay Court-fees to Government. But if he succeeds, the defendant should pay the Court-fees to Government. This is merely another way of saying that the plaintiff pays the Court-fees in the first instance but recovers them from the defendant. This can be only on the footing that Court-fees are included in the costs payable by the defendant. Again, after a pauper plaintiff loses the suit and has

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(1) (1928) I.L.R., 50 All., 733. (2) (1929) M.W.N., 545.
(3) (1899) I.L.R., 23 Mad., 73 at 81.

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paid Court-fees to Government under Order XXXIII, rule 11, Schedule 1, Civil Procedure Code, suppose he files an appeal and succeeds in it, he will then recover the amount of Court-fees from the defendant. This can be so only on the footing that it is part of his costs. It is therefore clear that though, when the Government takes the amount, it takes it as revenue, so far as the person who pays the amount is concerned, he incurs it as costs of the suit, and section 35, Civil Procedure Code, which refers to the costs of and incident to all suits is wide enough to cover even Court-fees.

We may also refer to rule 14 of Order XXXII (clause 2), Schedule 1, Civil Procedure Code, which provides that when a minor on attaining majority wishes that a suit instituted in his name by his next friend should not continue, the Court may order the next friend to pay costs of all the parties in respect of the application. This we take to mean that the Court may order the next friend to pay the costs of the minor including the Court-fees, seeing that between the next friend and the minor the Court-fee is regarded as the costs of the suit. As to the argument based on the literal wording of Order XXXIII, rule 11, Schedule 1, Civil Procedure Code, the reply is that that rule was intended to lay down that the defendant is not liable but the plaintiff's next friend is liable. Which person is liable, whether the minor or the next friend, is a matter governed by the general discretion given to the Court under section 35 of the Civil Procedure Code. We therefore disallow the argument of the learned Advocate and confirm the order of the learned trial Judge. The appellant will pay the costs of the Government which is fixed at Rs. 175. The respondents will be at liberty to recover the costs from the next friend or from the minor appellant as they choose.

There is one other matter to be dealt with. The fifth defendant is a mortgagee of Munuswami Naicker. He was impleaded on certain allegations which are found in paragraph 3 of the plaint. The validity of the mortgage was not questioned. In the schedule to the plaint the value is given as Rs. 19,000. In the written statement the fifth defendant said that Rs. 30,000 was due on the mortgage. The plaintiff made the statement in paragraph 3 probably as a conjecture and not with a view to question the validity of the mortgage. After the 10th issue was framed, it does not appear that the plaintiff at any time raised any contention regarding either the validity of the mortgage or the amount due on it. But as he has chosen to implead the fifth defendant, we think that he ought to pay the costs of the fifth defendant in the Court below as in an undefended suit. To this extent we modify the decree regarding costs of the fifth defendant in the Court below. In appeal there is really no ground raised against him except as to costs. It is unnecessary for him to appear so far as the merits of the appeal are concerned. We direct him to bear his own costs.

Government Solicitor (C. Moresby) for the Crown.

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Before Mr. Justice Reilly and Mr. Justice Cornish.

V. M. RAGHAVULU NAIDU AND SON (PLAINTIFFS),
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v.

THE CORPORATION OF MADRAS (DEFENDANT),
RESPONDENT.*

Madras City Municipal Act (IV of 1919), sec. 129—Duty of Corporation under the section to refund a portion of timber-tax—By-law made by Corporation entitling it to refuse refund unless refund applied for in particular way or particular time—Validity of.

The Corporation of Madras, on whom under section 129 of the Madras City Municipal Act (IV of 1919) a duty is imposed to make a refund of nine-tenths of the tax collected on imported timber, if the timber is exported from the city, cannot make a by-law, entitling the Corporation to refuse the refund, unless the person demanding the refund applies for it in a particular way or at a particular time.

Per REILLY, J.—The Corporation has no power in a case, where the Corporation has a duty to pay, and the exporter has a right to claim, a refund, to promulgate any by-law, enforceable by a penalty compelling an exporter to do any particular thing in order to get the refund.

APPEAL from the judgment and decree, dated 30th March 1928, and passed by BEASLEY, J. (now Chief Justice) in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 356 of 1927.

Sir C. P. Ramaswami Ayyar (*V. Ramaswami Ayyar* with him) for appellants.

Vere Mockett for respondent.

JUDGMENT.

REILLY, J.—The plaintiffs in this case are a firm of timber merchants trading in Madras. They claimed from the Corporation of Madras refunds of timber tax on a large number of lots of timber, on which they alleged that they had paid timber tax when importing them into Madras, and which they alleged they had afterwards exported from Madras. The Corporation, who are the defendants in this case, refused to make the refunds. The plaintiffs then sued the Corporation for the total of the refunds claimed by them. The suit was heard by the learned Chief Justice as Mr. Justice BEASLEY and he dismissed it. The plaintiffs appeal.

In their written statement the defendants maintain that the plaintiffs did not satisfy them that these lots of timber were timber on which tax had been paid when imported into Madras, and that the plaintiffs did not comply with certain by-laws made by the Corporation, and that therefore they were not entitled to the refunds claimed. Under section 98 of the Madras City Municipal Act the Corporation may levy a tax on timber brought into the city. Under section 129 of that Act the tax shall be levied at such rates and in such manner as may be determined by the Council of the Corporation, provided that the rates shall not exceed Rs. 5 a ton, and provided that, when any timber in respect of which tax has been paid is exported beyond the city, nine-tenths of the tax levied thereon shall be refunded. The plaintiffs, as I have said, applied for these refunds on the ground that they had exported timber on which they had already paid tax when it was imported. The ground of refusal on the part of the Corporation which occupied attention at the trial of the suit and at the hearing of this appeal is that the plaintiffs did not make their application for refund 48 hours before the timber

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was exported, as required by a certain by-law made by the Corporation. That by-law is By-law No. 8, published in a notification with other by-laws in the *Fort St. George Gazette* on the 27th September 1921. It runs :—

“Such application (that is an application for refund of timber tax) shall be made at least 48 hours before the date of the intended export beyond the limits of the city and shall be accompanied by the original receipt granted on import thereof.”

That last word “thereof” is a little peculiar; but we need not spend any time on that. The defendants say that they can enforce that by-law, which according to them is a valid by-law, by refusing to give the refund if it is not complied with. The plaintiffs contend that the by-law, in the sense in which the defendants wish to enforce it, is beyond the power of the Corporation to make.

Now that by-law with the other by-laws in the notification I have mentioned purports to have been made under sections 129 (3) and 349 (2) of the Madras City Municipal Act. I think it is quite clear that that by-law cannot have been made and could not be made under section 129 (3) of the Act, which runs :—

The Council may make by-laws for the seizure and sale of timber in respect of which the tax due is not paid.

Could it have been made under section 349 (2)? The learned Chief Justice is of opinion that it could be made validly under that section. With respect I feel bound to differ from him on that point. Subsidiary legislation by by-law, if it is to be valid, must come clearly within the powers given to the body making it by their controlling statute. Section 349 (2) of the Act runs :—

“The Council may make by-laws, not inconsistent with this Act or with any other law, to provide for the regulation of

the time and mode of collecting the taxes, duties and tolls under this Act.”

The learned Chief Justice says in his judgment :—
“In my view the words ‘collecting the taxes, duties and tolls under this Act’ must include the question of refunds of the tax so collected.” With that opinion I am unable to agree. The collection of taxes to my mind is one thing: the refund of taxes is quite another thing. In respect of many taxes which are collected there is no right in anybody to claim a refund. If the Legislature gives any subordinate body the power to impose a tax, that is a power to require some person to pay the tax. The duty in that case is upon the tax-payer. If the Legislature gives the tax-payer the right to claim a refund in certain circumstances, then the duty is upon the other party, upon the body which collects the tax. And to give power to make by-laws regarding the collection of taxes, the time and manner in which they are to be paid by those persons from whom they are due, appears to me an entirely different thing from giving power to make by-laws about the conditions on which the Corporation or other body concerned is required to perform its duty of refunding the tax. I cannot find any authority in section 349 (2) empowering the Corporation to make by-laws in regard to the refund of taxes.

Then could the Corporation make this by-law under any other section of the Act? It has been suggested for the plaintiffs that, as the Corporation purported to make these by-laws under sections 129 (3) and 349 (2) of the Act, it is of no interest to us whether they could have made By-law No. 8 under any other section of the Act and that they must be confined to the power to which they themselves have appealed and under which they have purported to make the by-law. On the other

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hand Mr. Mockett for the defendants has contended that, if a by-law-making body quotes, when promulgating a by-law, some provision which is inapplicable, that by-law may yet be quite valid, provided the by-law-making body had authority to make it under some other provision of law: misquoting their authority by oversight or mistake does not take away any authority given by-law. On that question I agree with Mr. Mockett's contention. That is clearly the view which was taken by a Full Bench of this Court in *Rajam Chetti v. Seshayya*(1), and it is the view which was adopted and applied by KRISHNAN, J., in *Secretary of State for India v. Appa Rao*(2). No authority to the contrary has been quoted before us.

Let us see then whether this by-law could have been made by the Corporation under any other provision of the Act. The learned Chief Justice is of opinion that it could have been made by the Corporation under section 129 (1) of the Act. That sub-section provides: "The tax on timber brought into the city shall be levied at such rates and in such manner as may be determined by the Council." There again I must differ from the learned Chief Justice. I do not think that out of a power of fixing the rates at which, and the manner in which, the tax must be paid you can get a power to regulate the refund of that tax. But Mr. Mockett has urged before us, what does not appear from the record or from the learned Chief Justice's judgment to have been urged before him, that this by-law could have been made by the Corporation under section 349 (29) of the Act. That runs:—

"The Council may make by-laws, not inconsistent with this Act or with any other law, to provide in general for secur-

ing cleanliness, safety and order and the good government and well-being of the city and for carrying out all the purposes of this Act."

Mr. Mockett contends that those words "for carrying out all the purposes of this Act" are wide enough to give the Corporation power to make this by-law. On the other hand it is contended for the plaintiffs that we must regard the words "for carrying out all the purposes of this Act" as controlled by the earlier words in that sub-section "securing cleanliness, safety and order and the good government and well-being of the city", and it is contended that making refunds of tax would not come within these expressions. Here again I agree with Mr. Mockett's contention. I do not think this is a case in which we can apply the rule in regard to the interpretation of generic words following specific words. The words here are not "and other" or "the other" purposes of the Act. They are much wider than that. They are "for carrying out all the purposes of this Act". That appears to me to be a general and residual provision to cover all the purposes of the Act which have not been specifically mentioned in the earlier paragraphs of the section. The making of refunds of timber tax may be legitimately said, I think, to be one of the purposes embraced in the Act.

But does it follow that the Corporation can make such a by-law as they have made in this case regarding refunds of timber tax? I agree with Mr. Mockett's contention that, even if there is—and I think there clearly is—a duty imposed by section 129 on the Corporation to make these refunds, we need not read the Act in so unreasonable a way as to suppose that it is the duty of the Corporation officials to run round the town to find exporters of timber and thrust refunds upon them. The reasonable way of interpreting the

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(1) (1895) I.L.R., 18 Mad., 236.

(2) (1923) 45 M.L.J., 160.

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provision regarding refunds is that the Corporation must pay refunds when properly applied for by those who are entitled to them. I think we may go further and agree with Mr. Mockett that the Corporation may reasonably require exporters who claim refunds to show to their satisfaction that refunds are due to them. Indeed I did not understand that this was seriously contested by the other side. It would be perfectly reasonable in my opinion for the Corporation to issue a notification inviting exporters who claim refunds to apply at a certain office or in a certain form or at a certain time, provided the invitation and its details were reasonable. If an exporter claiming refund did not comply with those details, I think the Corporation might well do nothing in the matter and leave it to the exporter to sue them, if he thought fit; and in such a case it is probable that, if the exporter's conduct had been unreasonable in not applying in the way he was invited to do or not giving proper information to the Corporation officials, he would lose his costs and he might perhaps have to pay the Corporation's costs, even if he succeeded in getting his refund decreed. But all that is a very different thing from making a by-law such as has been made in this case. A by-law, as Lord RUSSELL said in *Kruse v. Johnson*(1), is

"An ordinance . . . imposed by some authority clothed with statutory powers ordering something to be done or not to be done and accompanied by some sanction or penalty for its non-observance."

Now here we have a duty imposed by the Act on the Corporation to make refunds of nine-tenths of the tax paid on timber, if it is exported from the city. Can the Corporation make a by-law, enforced by a penalty, compelling the person who has the corresponding right

of demanding the performance of that duty to apply for it in a particular way or at a particular time? If we look at the penalty ostensibly imposed in this group of by-laws, we find that under By-law No. 14 any person offending against any of these by-laws shall be punishable with a fine which may extend to fifty rupees. To apply that to By-law No. 8 appears to me on the face of it absurd, and Mr. Mockett has agreed that that penalty cannot really be applicable to By-law No. 8. Here we have an exporter, who has a right to claim a refund under the Act, and this By-law No. 14 imposes upon him a penalty up to Rs. 50 if he does not apply at a particular time. Supposing he does not think it worth while to apply at all, how can the Corporation have the power to impose a penalty in that way? Realizing that that would be absurd, the Corporation has not attempted to impose that penalty on the breach of this By-law No. 8. What they claim to do is to enforce another penalty, namely, if the application is not made 48 hours before the time of export, to penalize the exporter by not giving him the refund at all. It is worth noticing that the power to impose penalties for infringing by-laws is given under section 351 of the Act, and that only provides for penalties of fine. Then where does the Corporation get this power to impose an entirely different penalty, the loss of the refund? To my mind, if the Corporation could make a by-law ordering the applicant for a refund to make his application in a certain way or at a certain time, they could not impose this particular penalty, that, if he did not comply with that by-law, he should lose his right to the refund altogether. And I may go further and say that in my opinion the Corporation has no power in this matter, in which they have a duty to perform and the exporter has a right to claim, to promulgate any by-law,

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(1) [1898] 2 Q.B.D., 91.

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enforceable by a penalty, compelling an exporter to do some particular thing.

That would I think be enough for the disposal of this appeal. But several other matters have been discussed at length before us, and I shall just say a few words about them. The learned Chief Justice was of opinion that at any rate this By-law No. 8 was a reasonable by-law, that there was nothing unreasonable in requiring an exporter to give 48 hours' notice of his export, if he wanted to get a refund. With that view I am unable to agree. I think it can easily be shown that quite apart from any question of the power of the Corporation to make this by-law, as it stands, without qualification, without provision for exceptional circumstances, it would be an unreasonable by-law. Suppose that a Government engineer or a private person sends an order to Madras to-day from some place a few miles outside the city for the urgent supply of some timber required to prevent the collapse of a bridge or a factory. If this by-law stands good, no one from Madras could send out timber either to-day or to-morrow, however urgently it might be required (other than timber grown in Madras, of which we all know there is comparatively little) except on pain of losing all right to the refund of nine-tenths of the tax, to which he is entitled under the Act. That appears to me to show that we cannot say that this by-law, as it stands, without qualification and without provision for exceptional circumstances, is even a reasonable by-law.

But, reasonable or not in itself, if it is enforced, does it not obviously curtail the right of the exporter to get his refund? In effect the Corporation say by this by-law "Though we are bound to give the refund of this tax by the Act, we will not do so in certain circumstances, that is, unless you give us 48 hours' notice before

export." Mr. Mockett has contended that the by-law, in that sense, can be regarded as carrying out the purposes of the Act. To my mind it could more properly be described as defeating, or at any rate restricting, the purposes of the Act in respect of refunds.

A large number of cases have been quoted before us; but I do not think it necessary now to refer to more than one or two of them. In the *Queen v. Pawlett*(1) there was a right of appeal to the Quarter Sessions, given by the statute. The Court of Quarter Sessions added by a rule of practice an additional condition that such an appeal must be entered so many days before the Sessions began. That additional condition, though regarded by the Divisional Court as very convenient, was held to be invalid. A still more instructive case is that of *Reg v. Bird; Needes, Ex parte*(2). Mr. Mockett suggested that that case was not applicable here. To my mind it is both very instructive and applicable. By the Licensing Act of 1872 a provisional licence granted by the Licensing Justices had to be confirmed by the County Licensing Committee, before whom a person who had opposed the licence before the Licensing Justices might appear and oppose its confirmation; and under the Act the Justices in Quarter Sessions had to make regulations for the meetings of the Committee and the transaction of its business and proceedings. The Justices in Quarter Sessions for the County of London made rules that any one intending to oppose the confirmation of a provisional licence must give notice within seven days after the grant of the provisional licence and must enter into recognizances in the sum of £20. The Divisional Court held that, though the rule about notice was reasonable and proper in itself, the rules were *ultra vires*, because

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(1) (1877) L.R., 8 Q.B., 491.

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

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they imposed fresh conditions on the objector's right to oppose the confirmation, which had been given to him by the Act. WILLS, J. declared it—

“a principle too clear to need the support of authority that, when 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.”

Is not that what the Corporation has attempted to do in this case? The exporter has a right to claim this refund, if he exports timber. The Corporation has in effect attempted to abridge that right by saying that it shall not have effect unless a further condition is fulfilled, unless the application is made 48 hours before the export. The learned Chief Justice at the close of his judgment said that in his opinion the effect of this by-law is only this: “Prove to our satisfaction that it is the same timber and you will get a refund.” With respect in my opinion that is a serious under-statement of the effect of this by-law, as the defendants contend they are entitled to enforce it. Surely it would be more correct to say that what the defendants maintain is the effect of this by-law is: “Prove to us by giving us notice 48 hours before you export the timber that it is the same timber on which you have paid tax: otherwise we will not make the refund.” In my opinion this by-law, in the sense in which the defendants maintain they have a right to enforce it, is entirely beyond the power of the Corporation to make.

There was another aspect of the case which was put before us, namely that the Act gives the exporter a certain right to nine-tenths of the tax which he has paid and that, if the Corporation take away that right to the nine-tenths, as they claim they may do in certain circumstances, they are working a forfeiture of the exporter's

right. On that point *Kirk v. Nowill*(1) was quoted before us, in which Lord MANSFIELD said that a by-law could not impose a penalty of forfeiture unless the power to make it was expressly given, and BULLER, J. said that the invalidity of a by-law to that effect was made more clear by the fact that the power to impose a penalty by fine was expressly given in that case. That case also is interesting in connection with the present case and shows that there is another defect in this by-law. But I do not think in the circumstances it is necessary to discuss that any further.

I may add that the defendants raised a plea of limitation; but, so far as the record goes, nothing appears to have been said about that at the trial, and nothing has been said about it before us.

In my opinion this appeal must be allowed. The result of that is that the plaintiffs' claim to these refunds has still to be disposed of. The learned Chief Justice said that, if he had agreed with the plaintiffs that this by-law was beyond the power of the Corporation to make, he would have referred the case to the Official Referee in order that he might report on which of these lots of timber import tax had been paid, as that was disputed by the defendants and had not yet been made out by the plaintiffs. Mr. Mockett suggested that the proper course would be rather to send the case back to the Corporation in order that they might now satisfy themselves whether the tax had been paid on these lots of timber. Now that the case has come before the Court, I think that cannot be done. The question what is due to the plaintiffs must be decided by the Court. And, if the case is not to go back to the Corporation, the defendants, I understand, do not object to its being

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(1) (1786) 1 T.R., 118; 99 E.R., 1008.

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referred to the Official Referee, to which the plaintiffs also agree. But, before that is done, it has been suggested before us that the parties should be given an opportunity to see whether they cannot agree that import tax was paid on all or any of these lots of timber. It appears to me very reasonable that they should be given an opportunity to do that, and in my opinion the most convenient course will be to make an order that this matter should be referred to the Official Referee, as the learned Chief Justice suggested, for a report by him which of these lots of timber have been actually exported and on which of them import tax was paid, but with the qualification that the matter will be adjourned for a month in order that the parties may have an opportunity of seeing whether they cannot agree in respect to all or some of the items on this part of the case. For the purpose of the proposed settlement documents produced by either party may be delivered to them out of Court on application.

In regard to costs the proper order in my opinion will be that the defendants shall pay the plaintiffs the costs of this appeal. Costs in the suit will remain to be dealt with when the final hearing of the suit is completed. The case should now go back to the Original Side for further proceedings.

CORNISH, J. CORNISH, J.—I agree. In my opinion the Corporation by-laws, even assuming they are *intra vires*, do not justify what the Corporation has done. There is no rule in the by-laws which in terms empowers the Corporation to penalize an applicant by refusing a refund of tax because he has not complied with the by-laws. Rule 8 on which the Corporation relies simply says this :

“Such application (that is, an application for refund) shall be made at least 48 hours before the date of the intended

export beyond the limits of the city, and shall be accompanied by the original receipt granted on import thereof.”

Neither this rule nor any other rule says that, on non-compliance with these requirements, the applicant is liable to forfeit the refund. The only penalty fixed by the by-laws for a breach of them is that contained in rule 14, namely, liability to a fine of Rs. 50 on conviction. If, therefore, it is an offence against the by-laws not to give the Corporation at least 48 hours' notice of an intended export of timber as a condition to an application for refund, the utmost penalty to which the offender is exposed by the by-laws is a fine of Rs. 50. The by-laws do not empower the Corporation to penalize him further by forfeiting his right to get a refund ; and the Act confers no such power.

But apparently rule 8 is intended to mean a good deal more than what it says, and the Corporation claims that it is entitled by this rule to refuse a refund of the tax if the application for refund is not made within the prescribed time. That is the claim asserted in paragraph 5 of the written statement. Whether this is a valid claim depends upon whether the by-law is valid. I do not think that the by-law in question has any relation to section 129 (3) which confers the power to make by-laws for the seizure and sale of timber which has been imported without paying the tax. Nor do I think it necessary to decide whether the power given by section 349 (2) to make by-laws “for regulating the time and mode of collecting the taxes” is wide enough to include a power to make by-laws for regulating the time and mode of refund. In my view, section 349 (29), with its power to make by-laws “in general for carrying out all the purposes of the Act,” is comprehensive enough to include the power to make regulations governing the refund of tax. But all by-laws made

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under section 349 are subject to the restriction imposed by the section itself, that "the council may make by-laws not inconsistent with the Act or with any other law." Now, section 129 (1), second proviso, definitely enacts that when any timber in respect of which tax has been paid is exported beyond the city nine-tenths of the tax shall be refunded. An unqualified right to a refund is given by the Act. But no one could suppose that a refund of the tax is to be had from the Corporation simply for the asking. The Corporation has obviously the right to require that it shall be satisfied by proper evidence that a refund can be claimed. It is only right and reasonable, therefore, that the Corporation should have the power to make by-laws for regulating the procedure to be followed in applications for a refund of tax; and, as I have said, I think section 349 (29) gives the Corporation power to make by-laws for this purpose. But a by-law which professes to take away or abridge the right to a refund given by section 129 would be clearly inconsistent with the Act; and if it is inconsistent, it is *ultra vires*. The authorities which have been referred to by my learned brother leave no doubt on that point. I will only supplement those authorities with a reference to a passage from the judgment of SHEPHARD, J., in *Rajam Chetti v. Seshayya*(1).

"Now it is a recognized principle of law that the rules made in pursuance of a delegated authority to that effect must be consistent with the Statute under which they came to be made. The authority is given to the end that the provisions of the Statute may be the better carried into effect, and not with the view of neutralizing or contradicting those provisions."

Rule 8 of the Corporation by-laws undoubtedly does neutralise and contradict the right to refund given

by section 129 (1), because, as interpreted by the Corporation, it means that the Corporation can refuse to allow an applicant to prove his right to a refund, unless he has given with his application 48 hours' notice of the intended export of timber; and for that reason, in my opinion, this rule is *ultra vires*.

I agree with my learned brother in the proposal to refer the matter to the Official Referee.

S. Rajamanikkam: Attorney for respondent.

B.C.S.

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APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Pakenham Walsh.

PRASANNA VENKATESA RAO AND THREE OTHERS
(PLAINTIFFS), APPELLANTS,

1929,
November 20.

v.

K. SRINIVASA RAO AND NINETEEN OTHERS (DEFENDANTS),
RESPONDENTS.*

Religious and charitable society incorporated under Act XXI of 1860—Resolution of majority opposed to fundamental articles of Association—Ultra vires.

An association of Madhwa Brahmins who were disciples of several Madhwa Mutts, was formed in 1878 on a footing of equality of all the members, for the purpose of promoting the study of Sanskrit literature, especially of the Dwaita system of religious philosophy, by means of meetings, lectures, discourses, etc., and was registered under Act XXI of 1860, the articles of association giving it power to pass resolutions, by-laws and rules consistent with the above object. After working for 30 years on the above lines, some of the

* Appeal No. 219 of 1925.

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members of the association who were disciples of one particular Mutt managed by their numerical strength to get a resolution passed which accorded to their spiritual head the honour of first *thirtham* (holy water) before meals, on occasions of meetings in preference to the spiritual heads of other Mutts, which resolution had a tendency to wound the feelings of other members and to disrupt the association.

In a suit by some of the members of the association to have the resolution cancelled, *held* (1) that the resolution did not relate merely to the internal management of the association and (2) that as it was fundamentally opposed to the basic principle of equality of all the members, it was invalid though passed by a majority and did not bind the minority.

Milligan v. Mitchell (1837) 3 My. and Cr., 72; 40 E.R., 852, 856, and *Free Church of Scotland (General Assembly of) v. Overtoun (Lord)*. *Macalister v. Young* [1904] A.C., 515, followed. APPEAL from the decree of the Subordinate Judge of Chittoor in Original Suit No. 4 of 1921.

This suit was instituted by four members of the "Madhwa Siddhanta Onnahini Sabha" founded in 1878 and registered in 1910 under Act XXI of 1860. The allegations in the plaint, *inter alia*, were that the Sabha was founded by Madhwas who were disciples of various Madhwa Mutts in different parts of India for the promotion of Sanskrit literature, and especially of the Dwaita system of philosophy by means of meetings, lectures, discourses, etc., the cardinal principle of the Sabha being equality of all the members of the Sabha, that in the annual meeting in 1912, the disciples of the Uttarathi Mutt managed by their numerical majority to get a resolution passed to the effect that the Guru or the representative of the Uttarathi Mutt should be given first *thirtham* in preference to the Gurus of other Mutts, in the congregation assembled before meals at the time of each annual and other meetings of the Sabha, that the said resolution wounded the feelings of all other members, and being subversive of the cardinal principle of the Sabha, viz., equality, was

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ultra vires and had a tendency to disrupt the Sabha and that accordingly the framing of a scheme and the directions of the Court for the proper administration of the Sabha were necessary. The plaintiffs also prayed that the defendants should be prevented from changing the character of the institution and diverting the trust funds. The defendants 1 to 15, some of whom were office-bearers and others, important members of the Sabha, and the sixteenth defendant (the Guru of the Uttarathi Mutt) pleaded, *inter alia*, that one of the objects of the Sabha was the feeding of the members assembled at the meetings of the Sabha, that the offering of *thirtham* used in the worship of the Deity before the meals was essential according to religious usage, that the Guru of the Uttarathi Mutt was accorded first *thirtham* in accordance with the practice from the time of the starting of the Sabha in 1878, that the resolution in December 1912 giving him first *thirtham* was an act of internal management of the Sabha, and not a matter for interference by Court, that it was not *ultra vires*, that there was no diversion of the funds of the Sabha, that section 92, Civil Procedure Code, was not applicable to the suit and that the framing of a scheme was unnecessary. The trial Court holding that the suit was properly laid under section 92 of the Civil Procedure Code, and that the allegations in the written statement were proved, dismissed the suit. The plaintiffs preferred this appeal.

Advocate-General (A. Krishnaswami Ayyar) and K. Balasubramania Ayyar for appellants.—After dealing with the origin and practice of the institution, argued that the practice of giving first *thirtham* to the Guru of the Uttarathi Mutt sprung up only in 1910 and continued :—Whatever might have been the practice of the institution before its incorporation, after its incorporation it is only its memorandum and articles that must govern its conduct; if any previous usage is opposed

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to the fundamental provisions of the memorandum and is against them it should be eschewed; any resolution originating or confirming such usage is *ultra vires* and is not binding on the minority even if passed by a majority, as it will tend to disrupt the institution; *Dundee Harbour Trustees v. D. and J. Nicol*(1), *Free Church of Scotland (General Assembly of) v. Overtown (Lord)*, *Macalister v. Young*(2), *Attorney-General v. Anderson*(3), *Milligan v. Mitchell*(4). The Committee of the Sabha are subject to the jurisdiction of the Court; see Halsbury, Vol. 4, section 557, page 283 and Tudor on Charities, 4th edition, page 64.

T. R. Venkatarama Sastri and L. S. Viruraghava Ayyar for respondents 1, 3, 6 and 14 argued that the existence of disputes foreign to the scope of the institution was a good reason for framing a scheme; likewise, misappropriation of funds and absence of proper accounts.

T. Rangachari, P. Panini Rao and S. Panchapagesa Ayyar and T. V. Ramanatha Ayyar for 4th, 9th to 12th, 15th, 17th to 20th respondents.—The practice from 1878 up to date was to give first *thirtham* to the head or the representative of the Uttarathi Mutt and a resolution confirming it is not opposed to the memorandum, especially if it concerns the internal management of the institution, as it is in this case. In such matters the resolution of the majority binds the minority and is not *ultra vires*; *Lalji Shamji v. Walji Wardhman*(5), *Cooper v. Gordon*(6), *Hasan Raza Sahib v. Hasan Ali Sahib*(7), *Yegnarama Dikshitar v. Gopala Pathar*(8), *Venkatasubban Patter v. Ayyathurai*(9). The Committee of the Sabha are not trustees and hence this suit filed under section 92, Civil Procedure Code, does not lie.

L. A. Govindaraghava Ayyar, A. C. Sampath Aiyangar, T. R. Srinivasa Aiyar and C. Hanumantha Rao for twelfth respondent argued that the head of the Uttarathi Mutt was a necessary party and was entitled to first *thirtham* according to the uninterrupted usage of the institution.

(1) [1915] A.C., 550, 556.

(2) [1904] A.C., 515, 518.

(3) (1888) L.J., 57; Ch. D., 543, 550.

(4) (1887) 8 My. and Cr., 72; 40 E.R., 852, 856.

(5) (1896) 1 L.R., 19 Bom., 507, 522. (6) (1869) L.R., 8 Eq., 249, 257.

(7) (1916) 38 I.O., 528.

(8) (1917) 41 I.O., 738.

(9) (1919) 37 M.L.J., 554.

JUDGMENT.

KUMARASWAMI SASTRI, J.—This appeal arises out of a suit filed under section 92 of the Civil Procedure Code, with the previous sanction of the Advocate-General for the settlement of a scheme and for directions for the proper administration of an association called "The Madhwa Siddhanta Onnahini Sabha" (an Association for the uplift of the Madhwa doctrine) which was started in the year 1878 at Chirutanur, also called Tiruchanur, near Tirupati, a sacred place, about 90 miles from Madras, and registered under Act XXI of 1860 in the year 1910. [After holding on the evidence that the origin, objects and the practice of the Sabha were as stated by the plaintiffs in their plaint, his Lordship continued]:—

On the evidence, oral and documentary, I have no hesitation in coming to the conclusion that prior to 1910–11, there was no precedence given to the Uttarathi Mutt.

The next question is whether the resolution of 1912 giving precedence to the Uttarathi Mutt must be held to be binding on the other Mutts because it was passed at a general meeting. It is sought to bring this within rule 14 of the Memorandum of Association and the Rules and Regulations of the Sabha which I have set out giving the Council power to frame such by-laws not inconsistent with the rules and regulations as it may consider necessary for the conduct, maintenance, and upkeep of the Sabha and a like power to alter, modify or rescind any such by-laws, so long as such by-laws are passed at the annual general meeting of the Sabha. If the matter related merely to the internal management without in any way affecting the fundamental basis on which the Sabha was started, the majority decision would bind the minority however galling it may be; but it seems to me that in a case like the present, this

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resolution is fundamentally opposed to the constitution of the Sabha whose very existence depends upon the co-operation of the disciples of the various Mutts on a basis of equality. I have already shown that this was the dominant policy of the Sabha from its foundation. And the events of 1911 and 1912 have shown how vital it is in the interests of the Sabha that no distinction should be made between the various Mutts. I do not think that in a Sabha constituted like the present, it is open to the majority to pass any resolution giving precedence to their own Guru and override the claims of the minority for equal treatment. There can be little doubt that this Sabha which was founded by the disciples of all the Mutts and whose property was acquired by contributions from all the Mutts, possesses substantial property at present, movable and immovable. The Annual Report of the year 1920, the year preceding the date of the present suit shows that Rs. 77,167-14-6 was standing to the credit of the Sabha with its bankers. This would be in addition to the immovable properties which the Sabha possesses. The disciples of one Mutt though they formed the majority have no right virtually to drive the other members out of the Sabha by passing a resolution which would give their Guru priority.

It is argued that if priority is not given to the Uttarathi Mutt Guru, the disciples of that Mutt who are in a majority would not continue to be in the Sabha. But we find from the evidence of Karpur Sreenivasa Rao, D.W. 7, that even among the disciples of the Uttarathi Mutt there are many who are prepared to remain in the Sabha in spite of the interdict of the Uttarathi Mutt Guru, if a proper scheme is framed preventing the abuses he refers to.

A Memorandum of Objections has been filed by defendants 1, 3, 5, 6 and 14 who are disciples of the

Uttarathi Mutt and the third ground of objection runs as follows :—

“The lower Court ought to have held that the Memorandum of Association and the rules and regulations of the Sabha clearly contemplate an equal treatment of all Madhwas irrespective of their being the disciples of any particular Mutt; and any way a preferential treatment of one Mutt is distinctly a violation of the essential object of the Sabha which is to promote the study of Sanskrit and in particular of the Dwaita philosophy of Sri Madhwacharya amongst the Madhwas as a whole.”

At the hearing, the fifth respondent's Advocate wanted to withdraw from this but the other respondents pressed this objection through their Advocate Mr. Venkatarama Sastri and wanted a scheme to be framed. However this may be, it seems to me that justice has to be done to the parties and mere expediency cannot entitle the Court to deny justice to the minority.

It is clear that it is not open to the majority to alter the fundamental principles upon which the Association is founded. I may refer to *Milligan v. Mitchell*(1) and *Free Church of Scotland (General Assembly of) v. Overtoun* (Lord). *Macalister v. Young*(2).

In *Milligan v. Mitchell*(1) it was held that it was not competent to the members of the Association to alter

“the fundamental principles upon which the Association was formed and destroy the trust upon which the property was held but only to altering the laws or making new laws so far as might be consistent with such principles and trust.”

In that case, a chapel was erected and dedicated exclusively as a place of worship for Presbyterians who conformed to the discipline and doctrines of the National Church of Scotland. Then there was a resolution passed subsequently, whereby other preachers were allowed to preach and the question was how far the resolution passed by the general body was valid.

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(1) (1887) 3 My. and Cr., 72; 40 E.R., 852. (2) [1904] A.C., 515.

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In *Free Church of Scotland (General Assembly of) v. Overtoun (Lord)*. *Macalister v. Young*(1), Lord DAVEY, observed at page 645—

"The question in each case is what were the religious tenets and principles which formed the bond of union of the Association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the Association is not vital, essential or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognized body to control, alter or modify the tenets and principles at one time professed by the Association. But the existence of such a power would have to be proved like any other tenet or principle of the Association."

I may also, in this connection, refer to *Attorney-General v. Anderson*(2). It was held in that case that where property was directed to be held in trust to be used as a meeting-house for Protestant Dissenters of the Presbyterian or Independent denomination, a resolution to transfer the chapel and congregation to the Presbyterian Church of England though passed by a majority was invalid.

In the view I take that the giving of precedence in the matter of *thirtham* will be a fundamental alteration of the principles on which the Sabha was (founded?) and is not a matter of mere internal management, it is unnecessary to refer to *Cooper v. Gordon*(3) and the other cases cited by the respondents' Advocate, as to the Court not interfering in affairs of internal management decided upon by the majority of members.

As the decision of the Subordinate Judge on the preliminary issues as to the maintainability of the suit under section 92 of the Civil Procedure Code or the suit being not cognizable by a Civil Court was not seriously

disputed before us, I do not think it necessary to refer to the decisions cited by the Subordinate Judge in his preliminary judgment. I agree with him in deciding the preliminary issue in plaintiffs' favour.

The next question is as to what relief is to be granted. I think the plaintiffs are entitled to a declaration that it is not competent to the majority of the members to make any distinction between the Mutts as regards *thirtham* or any other honours or to give priority to the head of any one Mutt over the rest in the distribution of *thirtham* or any honour.

[After holding that the articles and rules of the Association provided sufficient safeguards for its proper working in the future, his Lordship gave certain directions for the conduct of the meetings of the Sabha in future, held that the framing of a scheme was unnecessary and proceeded as follows:—]

I would reverse the decree of the lower Court and pass a decree in the terms above stated. The Sabha (represented by its committee) and twelfth respondent, the Guru of the Uttarathi Mutt, will pay the appellants' costs both here and in the lower Court.

We fix the Vakils' fee in this Court at Rs. 500.

The decree I pass disposes of the Memorandum of Objections. No costs.

PAKENHAM WALSH, J.—[After dealing with the facts and discussing the evidence, His Lordship continued:]

I hold that the defendants have failed to prove that there was any custom by which the Uttarathi Mutt received first *thirtham* and that the evidence both oral and documentary is distinctly in favour of the contention of the plaintiffs that there was no such custom. Even admitting that in practice any such thing arose, I should be inclined to agree with the learned Advocate-General in holding that legal recognition of such a claim would be

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(1) [1904] A.C., 515.

(2) (1898) L.J. 57 Ch. D., 543.

(3) (1869) L.R., 8 Eq., 249 at 258.

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subversive of the objects of the society and that even a majority resolution in its favour cannot be given effect to. There is a vast difference between mere practice in a matter of this sort and recognition of this practice as a right conferring a superior status in a society whose basic object is equality. The right to first *thirtham* may be, and is no doubt, considered as a mark of superiority in temples and other places; but that will not mean that there is to be superiority in a society of this sort. If I might quote a sort of analogy, I suppose it is likely that when His Majesty the King-Emperor attends a celebration of the Sacrament, he would be communicated before the other members of the congregation; yet, I feel little doubt that to recognize any such priority as of right would be fundamentally opposed to the entire conception of the Sacrament and would be in contravention of its basic idea.

It was suggested that the Sabha are not trustees and can therefore act as they pleased. This does not appear to be correct—vide Halsbury, Vol. IV, section 557, which says:—

“As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property, whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not. Accordingly, like other trustees, charitable or otherwise, they are subject to the jurisdiction of the Court.”

A corporation can no doubt do what is incidental to the purpose of its business, but it cannot travel outside this—vide *Dundee Harbour Trustees v. D. J. Nicol*(1). As to the power of a majority to change the fundamental purposes and principles of the main body, *Free Church of Scotland (General Assembly of) v. Overtoun (Lord)*. *Macalister v. Young*(2) may be referred to where

the majority of the Free Church of Scotland united with a body known as the United Presbyterian Church and it was held that, because the tenets of the latter body on the question of the Establishment principle and the Westminster Confession were not identical with those under which the Free Church held the property in dispute, the minority which adhered to the original view of the Free Church were entitled to the property—vide remarks at pages 613, 645 and 648. In such a case one dissentient is enough, *Attorney-General v. Anderson*(1), and there is no power to alter the central conditions of the society, vide *Milligan v. Mitchell*(2), unless there is such power specially reserved, which must be proved. Of the cases quoted on the other side, there is only one that appears to be relevant and the remark there is *obiter*. This is the remark in *Cooper v. Gordon*(3). In that case, by the trust deeds of a congregation of Independents, a chapel, a house and other property were vested in trustees for the use of the congregation, and to permit the minister for the time being to occupy the house. The deeds contained no express provision for the appointment or removal of a minister. In 1866, the Rev. Samuel Clarke Gordon was invited by a resolution of the church members of the congregation to become co-pastor with the then minister. In 1868, a majority of the church members resolved that Gordon be dismissed, and the majority of the trustees concurred in this resolution. Gordon claimed to hold his office for life, in the absence of immorality, or preaching contrary to the tenets of the denomination, which was not charged. It was held that he was duly dismissed. That case would present no difficulty, but there is a

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(1) (1888) L.J., 57; Ch. D., 543 at 550.

(2) (1837) 3 My. & Cr., 172; 40 E.R., 852, 856.

(3) (1869) L.R., 8 Eq., 249 at 257.

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remark by Sir JOHN STUART, v.o., to the following effect:—

"In his answer, Mr. Gordon says that, in the absence of any special usage or rules, the will of every such congregation is in all cases ascertained and their powers exercised by the votes of the majority of the persons in church fellowship worshipping at the particular chapel; and he adds this qualification that the minority are bound by the majority on all points so long as such majority act consistently with the fundamental doctrines and principles held by the whole body. Such a qualification is futile, because as soon as the fundamental doctrines are contravened by the majority, they cease to be the fundamental doctrines of the whole body, and unless the minority submit there is no longer a united body, held together by fundamental doctrines and principles."

It appears to me that this remark which was apparently unnecessary for the determination of the case cannot be reconciled with the *ratio decidendi* of (1904) A.C., 515, quoted above, where the Lord CHANCELLOR quoted at page 616 with approval the dictum of SMITH, B., in *Dill v. Watson*(1), where he said:

"We do not coerce our neighbour by calling for his signature to our profession or articles of faith. We leave him free to adopt or to repudiate that faith, according as his reason, his conscience, and the grace of God may direct him. We but say to him, if you agree with us, affix your signature to certain articles, or in some way notify your recognition of their truth; or if you disagree, withhold such signature or declaration. And we say of him in the former case, that he *is*, and in the latter case that he *is not* of our religion. We do not compel him to hold our faith; we but ask him to inform us by certain acts, whether he does hold it or does not; and we ask this, only if he claims to be enrolled as one of our body, and to be in religious communion with us. In the absence of such a test our Establishment would not be a rock, cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains

differing from every other, and the whole forming a but nominally united, while really unconnected mass; fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension."

Raghunath Damodhar v. Janardhan Gopal(1) and *Lalji Shamji v. Walji Wardhman*(2) are cases relating to caste decisions where it was held that the decision was in the power of the majority of the caste for their own comfort and convenience and not a matter in which the Court could interfere. *Hasan Raza Sahib v. Hasan Ali Sahib*(3) was merely a matter of election to a committee and *Ramados v. Hanumantha Rao*(4) dealt with the right of the majority of the villagers to manage the temple. There is nothing in these cases to show that the majority of a body can alter the fundamental objects of the body unless such a power is specially reserved.

I therefore hold that the resolution is *ultra vires* and that this would not be altered by any practice having grown up of giving first *thirtham* to the representative of the Uttarathi Mutt. I further hold that by the constitution the majority have no power to declare one Mutt superior in the Sabha to any other Mutt. [His Lordship then held that in the circumstances of the case the framing of a scheme was unnecessary and proceeded:]

I agree with the other directions which my learned brother proposed to give as to the conduct of meetings.

I concur with him that the decree of the lower Court should be reversed and a decree in the terms stated by him passed.

I also agree as regards costs and memorandum of objections.

N.R.

(1) (1891) I.L.R., 15 Bom., 599.

(2) (1895) I.L.R., 19 Bom., 507.

(3) (1916) 33 I.O., 523.

(4) (1911) I.L.R., 36 Mad., 364.

(1) (1896) 2 Jones Rep. (Ir. Ex.), 48, 91.

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APPELLATE CIVIL.

*Before Mr. Justice Reilly and Mr. Justice Cornish.*1929,
December 8.C. MEENAMBAL AMMAL (PLAINTIFF-APPLICANT),
APPELLANT,

ABURUBAMMAL (RESPONDENT), RESPONDENT.*

Executing Court—Duty of, to construe decree—Consent decree against Hindu widow—Charge created on husband's immovable property—Necessity binding on husband's estate not established in suit—Whether charge to subsist till debt satisfied or for life-time of widow—Determination of by executing Court.

An executing Court, though it cannot question the validity of a decree, is bound to construe it, if necessary.

Where by a consent decree against a Hindu widow a charge is created on her husband's immovable property and, though necessity binding the husband's estate was not established in the suit, an application is made for execution after the widow's death, the executing Court must determine whether the charge is to subsist until the debt is satisfied or only for the life-time of the widow.

ON APPEAL from the judgment of BEASLEY, J. (now Chief Justice), dated 28th March 1929 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Execution Application No. 148 of 1928 in Civil Suit No. 758 of 1924.

K. S. Krishnaswami Ayyangar (N. C. Vijiaraghavachari with him) for appellant.

K. Ramanatha Shenai for respondent.

JUDGMENT.

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REILLY, J.—This appeal is against an order made by the learned Chief Justice as Mr. Justice BEASLEY in execution proceedings. In November 1921 one Thayammal, who was the widow of Munuswami Mudali, with her brother Kanniappa Mudali jointly executed two promissory notes in favour of Aburubammal, who is the respondent before us. Kanniappa Mudali became an insolvent, and Aburubammal brought a suit against Thayammal on the notes. That suit was compromised in April 1925; and on the basis of the compromise a consent decree was made, under which Thayammal had to pay Rs. 1,750 in instalments and the whole amount was made a charge upon a house in Madras called Ganesa Vilas. In December 1925 Thayammal surrendered her interest in that property and in her husband's estate to his reversioners; and they a month or so later sold the house to Meenambal, who is the appellant before us. In June 1926 Thayammal died; and the execution petition with which we are concerned was put in on the 30th March 1928. At one stage it was asserted by Aburubammal that this house, Ganesa Vilas, was the absolute property of Thayammal; but it has been admitted before us that Thayammal got it from her husband, whose property it was. How after being her husband's property it became her absolute property there is no evidence, and it has not been explained to us. Before BEASLEY, J. the whole case proceeded on the assumption that Thayammal had only a widow's interest in this house; and in the circumstances we also must proceed on that assumption. BEASLEY, J. eventually made an order that Aburubammal was permitted to execute the decree against the assets of Thayammal in Meenambal's hands and that the house should be sold in execution

* Original Side Appeal No. 57 of 1929.

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of the decree. It is against that order that Meenambal appeals.

It has been admitted before us that Meenambal has had nothing to do with any assets of Thayammal other than this house; and it is clear that Meenambal cannot be the legal representative of Thayammal except as the person owning or possessing the house. A large part of the judgment of BEASLEY, J. is taken up with the consideration of the question whether by surrendering her widow's interest to her husband's reversioners Thayammal could defeat the charge made by the consent decree on this house. I am inclined to agree with BEASLEY, J. that Thayammal's surrender could not have that effect, though I do not think it is necessary for the disposal of this case to express any final opinion on that.

But Mr. Ramanatha Shenai, who appears for Aburubammal, has taken a new point before us. He has drawn our attention to a decision of PHILLIPS and ODGERS, JJ. in *Vijayaraghavachariar v. Ramanujachariar*(1), according to which, having made this alienation by way of a charge on the house, Thayammal had put it out of her power to make any surrender to the reversioners at all. In that decision the learned Judges follow the decision in *Sakharam Bala v. Thama*(2). If that view is correct, then, as Mr. Ramanatha Shenai contends, the surrender made by Thayammal was invalid, and on the strength of that surrender the reversioners could not convey a good title to Meenambal. But that difficulty, I think, could be answered for Meenambal by calling in aid section 43 of the Transfer of Property Act. Mr. Ramanatha Shenai has contended that a transfer or attempted transfer of their expectancy by reversioners

cannot be validated under the provisions of that section and has quoted *Ramasami Naik v. Ramasami Chetti*(1). But that was an entirely different case. In that case certain defendants, who were in the line of succession to a Zamindari, purported to mortgage their expectancy, and the learned Judges held, no doubt rightly, that that was prohibited by section 6 (a) of the Transfer of Property Act. But here the reversioners did not purport to transfer any expectancy to Meenambal. They professed to be the owners of this house on the ground that the reversion had fallen in by the surrender, and they professed to sell their present right in the house to Meenambal. If the true view is that the surrender was invalid, they had not a present right in the house. But, when Thayammal died, the reversion did fall in apart from the surrender, and Meenambal, if the conditions of section 43 of the Act are fulfilled, could call upon them to make good the transfer which they erroneously professed they were able to make at the time of their sale.

But that is really a by-path in this case. Anyhow it is admitted that Meenambal is in possession of the house, and the real question is whether the charge, which was created by the decree, is one which persists after Thayammal's death. If Thayammal had only a widow's estate—and on that assumption we must deal with the case—the charge would not persist beyond her death, unless it was made for legal necessity. BEASLEY, J. in his judgment mentions that Meenambal did raise this objection, that the charge could not extend beyond Thayammal's death; but he says the question was not argued before him. But, if that contention was raised for Meenambal, no argument,

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(1) (1907) I.L.B., 30 Mad., 255.

(1) (1925) 55 M.L.J., 359.

(2) (1927) I.L.B., 51 Bom., 1019.

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so far as I can see, at that stage would be necessary. If Thayammal had nothing more than a widow's estate in this house, all that Meenambal need do was to raise that contention and then wait for the decree-holder to attack the position by showing that the charge was created for necessity legally sufficient to give it effect on the husband's estate after Thayammal's death, or at least to show that she took the charge in good faith that it was of that nature after making reasonable inquiries. The burden was obviously upon Aburubammal. Mr. Ramanatha Shenai admits that that is the well-known rule on the matter and that the burden would be upon his client if this was a suit. But he contends that the whole position is different because these are execution proceedings and that Meenambal cannot question the nature of the charge in execution proceedings. His argument is first that the Court in execution proceedings cannot question the validity of the decree. That is not a proposition which anybody had disputed before us or is likely to dispute. But he goes further and says that this is of the nature of a mortgage-decree for sale, and he contends that no one can be heard to say in execution that this property is not to be sold in satisfaction of the charge. He quotes in support of that position *Kumaretta Servaigaran v. Sabapathy Chettiar*(1), *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc. Devasthanams*(2) and *Sanwal Das v. Bismillah Begam*(3). Now it is quite true that, if there is a mortgage-decree for sale in a suit in which the validity and character of the mortgage have been established or admitted, no one can come in as a claimant under rule 58 of Order XXI of the Code or as an objector under section 47 of the Code and say

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that the property mortgaged and ordered to be sold cannot be sold because someone has a right to it. In such a case the mortgaged property must be sold in accordance with the decree, that is the mortgagor's and mortgagee's interests in the property, whatever they may be. But here to my mind we have something different from a mortgage-decree for sale. This decree is the instrument which created the charge, though no doubt the charge can be enforced in execution. An executing Court, though it cannot question the validity of a decree, is bound to construe the decree, if necessary. Here we have a charge on this house. What does that charge mean? Is it a charge on the house which is to subsist indefinitely until the debt is satisfied, or is it a charge on Thayammal's interest in the house as a widow subsisting only for her life-time? That is a question of the utmost importance and to my mind a question which the executing Court in such a case as this must decide, if required to do so. We must remember that this was a consent decree, made on the basis of a compromise. The charge is a charge created as part of Thayammal's contract, though it is clothed in decretal language and so can be enforced in execution proceedings. But it is obvious that, although the Court was the agency through which this charge was created, Thayammal could give the Court no authority to create a charge of more extended validity than she herself could create. As the nature of the charge actually created is disputed, it must be determined before the decree can be executed.

That appears to me to be one answer to Mr. Ramanatha Shenai's contention that these matters cannot be agitated in execution. A second answer is that Aburubammal has brought Meenambal into this matter as Thayammal's legal representative; Meenambal denies

(1) (1906) I.L.R., 30 Mad., 26.

(2) (1909) I.L.R., 32 Mad., 429.

(3) (1927) I.L.R., 19 All., 480.

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that she is Thayammal's legal representative; then the question whether she is so or not has to be decided in execution proceedings. And how can it be decided without going into the question of the effect of the charge? Meenambal can only be legal representative in this case either if Thayammal had an absolute right to this property, which we must leave out of account, or if Thayammal created a charge on her husband's property validly so that it persisted beyond her death. In the latter case strictly Thayammal would have been acting, when she created the charge, as representing her husband's estate, and Meenambal, being in possession of the property on which the charge has been created, would be the legal representative of Thayammal in that capacity. The dispute whether Meenambal was the proper legal representative first came before the Master, and he refused to go into these questions, whether the property was Thayammal's absolute property, whether Thayammal had only a widow's interest in it, and whether she, having a widow's interest, had created a valid charge. On his refusal, the matter was taken before the Judge and came before KUMARASWAMI SASTRI, J. He found that the Master was wrong and remarked that this was not, as the Master thought, a question of going behind the decree, saying in the course of this judgment "The question for decision is the character of a party, which in turn depends on the title to the property, the possession of which will make the person liable to be proceeded against in execution." With that view I entirely agree.

There is a third difficulty in Mr. Ramanatha Shenai's way. As I have said, KUMARASWAMI SASTRI, J., coming to that conclusion, sent the matter back to the Master for the determination of these questions. The Master found that under the rules of the Court he could not

deal with it and referred it to the Judge. It then came before BEASLEY, J. Now there was no appeal against KUMARASWAMI SASTRI, J.'s order that these questions should be decided in execution. And, though there appears to have been an elaborate hearing before BEASLEY, J., there is nothing to show that any objection was taken for Aburubammal to the determination of these questions in the execution proceedings. In my opinion it is not open to Aburubammal now to say that this is a matter which cannot be dealt with in execution.

The position then appears to me to be this, that the decree-holder as alienee from Thayammal, who had only a widow's interest in the property, has not proved that this alienation, the charge made in the decree, was made for any necessity which could legally extend its validity beyond Thayammal's life or that Aburubammal took this alienation in good faith after making the necessary inquiries. On the facts before us on the contrary it appears probable that the debts for which this charge was created were not debts which could bind the husband's estate as they were contracted by Thayammal and her own brother. However the burden is on the alienee, and the alienee has not discharged it.

There is only one other matter which I need mention. In one part of his judgment BEASLEY, J., has expressed the opinion that at any rate Aburubammal is entitled to recover the rents and profits of this house up to the date of Thayammal's death. In regard to that I must with respect differ from him. The charge, so long as it is valid, gives a right to recover the debt by sale of the house; but it could give no right to participate in the rents or profits.

In my opinion this appeal must be allowed and the execution petition dismissed with costs throughout.

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CORNISH, J.—I entirely agree. I think that much of the argument addressed to us by the learned Counsel for the respondent, the execution petitioner, was not really open to him in this appeal. When this matter came before KUMARASWAMI SASTRI, J., the learned Judge clearly laid down that the objection raised by the appellant (who was the respondent in the execution proceedings) to the notice of execution was not an attempt to go behind the decree against Thayammal, but was intended to show that the decree was not executable against her as Thayammal's legal representative. The appellant's objection was not an objection to the decree, which, so far as she was concerned, was a perfectly valid decree against Thayammal, but her objection was to being treated as Thayammal's legal representative, because she happened to be in possession of the property in which Thayammal, during her life-time, had a Hindu widow's estate. I think the petitioner must have appreciated this position, because in her counter-affidavit she alleged that the property was the absolute property of Thayammal. These were the rival cases put forward by the two parties, and KUMARASWAMI SASTRI, J., in his judgment expressed the opinion that this question must be determined in execution under section 47 of the Civil Procedure Code and that each party was entitled to prove the case which she set up in her affidavit. There was no appeal from this judgment, and when the case was referred by the Master into Court for determination by the Judge, the argument appears to have proceeded on the lines indicated by KUMARASWAMI SASTRI, J., in his judgment. BEASLEY, J., went very closely into the question whether the surrender of her estate, which Thayammal was alleged to have made in favour of the reversioners, from whom the appellant derived title to the property, was a valid surrender, and

the learned Judge came to the conclusion that it was not. He did not, however, find that the property in respect of which the surrender is supposed to have been made was, as alleged by the petitioner, the absolute property of Thayammal. On the contrary, it is clear from the judgment that he was of opinion that it was property in which Thayammal had a Hindu widow's estate, for at the conclusion of his judgment he held that "the defendant, having taken the property with full notice of the charge created upon it and not having proved that the debt was not for necessity, the onus of proving this being upon the defendant, cannot be heard to say that the decree is not to be executed against her". In my view, the question whether Thayammal could or did terminate her widow's estate by a surrender is not very material. Her estate was terminated by her death a few months later, and it appears to me that, if the appellant is a legal representative within the definition of section 2 (11) of the Civil Procedure Code, it does not matter whether the title under which she purported to be in possession was a good title or a bad one. Now, the decree here is not a decree for sale of property under Order XXXIV, Civil Procedure Code, so as to come within the rule referred to in *Zamindar of Karvetnagar v. Trustee of Tirumalai, Tirupati, etc., Devasthanams*(1). It was perfectly open, therefore, to the appellant to object that the decree against Thayammal could not be executed against her unless it was shown that she was Thayammal's legal representative, either by being in possession of property which was Thayammal's property, or, at least, by being in possession of property over which Thayammal had created an encumbrance which continued to be binding on the

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(1) (1909) I.L.R., 32 Mad., 429 at 440.

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property after Thayammal's death. I think that the appellant would have been entitled to succeed on the first point, because the petitioner failed to substantiate her allegation that the property in question was the absolute property of Thayammal. At the hearing, however, this point does not appear to have been argued.

It is necessary, therefore, to consider whether the appellant can be deemed to represent the estate of the deceased Thayammal by reason of being in possession of the property which Thayammal purported to charge, and which property BEASLEY, J., has found was taken by the appellant with full knowledge of the charge. But here the petitioner, being the alienee of Thayammal, that is, the person in whose favour the charge was created by the consent decree, is met with the obligation of discharging the onus of proof which lies on the alienee of property from a Hindu widow. It has been held by a Full Bench in *Tirupatiraju v. Venkayya*(1) that the interposition of a consent decree does not make any difference to the onus of proof. The alienee must still show that the alienation upon which he relies is one that is binding on the estate. The onus, therefore, was clearly upon the petitioner to show that the charge bound the estate after Thayammal's death; but she has not attempted to discharge the onus. On this ground, I am of opinion that the execution petition should have been dismissed.

B.C.S.

(1) (1921) I.L.R., 45 Mad., 504.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Anantakrishna Ayyar.

JAFFAR HUSSAIN KHAN SAHEB AND OTHERS
(PLAINTIFFS), APPELLANTS,

1929,
December 16.

v.

KRISHNAN SERVAI AND OTHERS (DEFENDANTS),
RESPONDENTS.*

Right to worship—Suit by Muhammadans against Hindus of a village for declaration and injunction—Mosque adjoining a Hindu temple—Mosque built subsequent to temple—Right to worship in the mosque undisturbed by playing of music by Hindus in their temple and in their religious processions in public streets.

Where certain representative Muhammadans of a village sued certain representative Hindus of the same village for a declaration that they were entitled to carry on their worship, in a mosque which was closely adjoining a Hindu temple, undisturbed by the playing of music in the temple and in the religious processions of the latter in the public streets, and also prayed for an injunction, and it appeared that the Muhammadans chose to erect their mosque close to the temple which was built and was in existence long before the mosque and that service with music formed part of the usual religious worship in the temple and in the processions in the public streets,

Held, that, where a new sect or body of worshippers invade a locality already occupied by another religious body, it is not a reasonable exercise of their right to undisturbed worship, that the former should claim to curtail the service or worship of the latter which had been customary long before the former had invaded the locality; and that, consequently, the plaintiffs were not entitled to prevent the defendants from playing music in the temple or in the procession in carrying on their customary worship.

Sundram v. The Queen, (1883) I.L.R., 6 Mad., 203, and *Manzur Hasan v. Muhammad Zaman*, (1924) I.L.R., 47 All., 151 (P.C.), referred to.

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SECOND APPEAL against the decree of the Court of the Subordinate Judge of Trichinopoly in A.S. Nos. 252 and 256 of 1923, preferred against the decree of the Court of the District Munsif of Srirangam in O.S. No. 157 of 1920.

B. Pocker for appellants.

M. S. Vythinatha Ayyar for respondents.

JUDGMENT.

WALLACE, J.

WALLACE, J.—The plaintiffs are representative Muhammadans of Lalgudi and neighbouring villages. They sued for a declaration that they are entitled to carry on public worship in the suit mosque, at hours stated by them, undisturbed by Hindu processions of music, or playing of music in the adjoining Pilliar Kovil, and they sued further for an injunction restraining the defendants, who are representative Hindus of these villages, from so disturbing their worship. Both the lower Courts have dismissed the suit and the plaintiffs' appeal.

Although the plaint prayer is indefinite as to the period of time for which the plaint relief is desired, the plaintiffs' learned Advocate stated at the bar that the plaint case relates to the period of the Mari Amman festival. The plaintiffs claim that the relief they seek for was in effect granted in a former suit, filed by the Hindus against the Muhammadans, to set aside a Government Order restraining the Hindus from playing music in front of the suit mosque during stated hours of the day at the time of the Mari Amman festival. The decree in that suit was in favour of the Hindus, but the plaintiffs' argument is that the point on which they now seek relief must be taken to have been decided against the Hindus in the former suit, either because it was there specifically sought for and refused, or because it ought to have been sought for and was not. They thus claim that on this point there is a matter of constructive

res judicata, and that the lower Courts have on this point committed an error of law.

The former suit was O.S. No. 226 of 1911 and ended in the High Court in Second Appeal No. 112 of 1914. The Judgment and Decree in the former suit are Exhibits H and H-1. It was finally decided by the High Court that the scope of that suit was confined to music at a *medai* which was in the public street in close proximity to the mosque, and to the alleged interference with the mosque worship which the playing of music at that *medai* during the Mari Amman festival occasioned. The High Court decided that the Hindus have the right of celebrating the Mari Amman festival at the *medai* "without any restriction as to the time of playing music." That would seem to be a decree entirely in favour of the Hindus, but the plaintiffs here claim that it must be taken that the Hindus have no other right of playing music during the Mari Amman festival than that which has been declared by the High Court, because, if any such further right existed, it was either implicit in the subject-matter of the former suit or ought to have been made the subject-matter of that suit. I am unable to accept that argument. As to the first contention it is not open to the plaintiffs, since they themselves in the former suit contended that that suit was confined to playing at the *medai* and that even the right to take the procession with music *past the mosque* was not included there, and on that very ground they persuaded the High Court to modify the decree of the lower appellate Court. It is not open to them now to turn round and say that any other matter was included in the former suit. As to the contention that it ought to have been made the subject-matter of the suit, I find no substance in this either. The cause of action in the former suit was based on a definite Government order which infringed the present defendants' right of playing music at the

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medai in the public street. On that point they succeeded. The Government Order did not touch the general right of playing music in the public street or inside the Pillayar Kovil which is made the subject-matter of the present case. It was not incumbent on the Hindus in the former suit to seek for a relief which had not been denied to them by the Government Order which formed their cause of action. I, therefore, cannot find that the plaintiffs' present claim can be based on any theory that the rights now claimed by the Hindus were denied to them in the former suit.

Some question was raised as to whether the Hindus have not shifted the position of the *medai*, but the lower Courts have found that there has been no change and that is a pure question of fact binding on us in Second Appeal. The points in the present suit, which were not in the former suit and decided there in favour of the Hindus, are the alleged disturbances caused by the Hindus playing music, not at the *medai* which is in the public street, but in the public street itself and inside the Pillayar Kovil which adjoins the mosque. The plaintiffs allege first that the playing is in itself a nuisance which they have a civil right to stop, and secondly that this playing which is a part of the Mari Amman festival takes place on days outside the proper fifteen days for that festival. As to the first point, the plaintiffs' contention set out in paragraph 32 of the plaint is that any loud playing of music during their religious service is an infringement of their civil rights. No authority is advanced for that proposition. As to the right of procession in public streets with music the law on the subject has been finally laid down by the Privy Council in *Mansur Hasan v. Muhammad Zaman*(1). The Hindus have the

right to conduct such processions so long as they do not interfere with the ordinary use of the street by the public and subject to lawful directions by the Magistrates. So far as the right of the Muhammadans to stop the playing of music inside a Hindu temple is concerned, I find no direct authority in point, but it appears to me that that can only be decided not as a proposition of law but on the stated circumstances in each case. The plaintiffs rely strongly on a sentence from *Muthialu Chetti v. Bapun Saib*(1),

"It is on the one hand a right recognized by law that an assembly lawfully engaged in the performance of religious worship or religious ceremonies shall not be disturbed."

That, no doubt, is a general right, but, obviously, it can be modified by circumstances, so that the exercise by each party of its legal rights shall be reasonable and with due regard to the rights of the others. [See *Sundram v. The Queen*(2)]. If, for example, two places of worship of different sects have been existing side by side from time immemorial, then each, no doubt, must exercise its rights of worship with due regard to the rights of the other and submit to curtail its own rights in consideration of the other party also curtailing its rights. The *modus vivendi* is a compromise of competing rights and the Courts will enforce, as the real civil rights of each party, the mutual compromise, instead of putting both parties in an impossible position by declaring the formal civil rights of both. But where, for example, a new sect or body of worshippers invades a locality already occupied by another religious body, it is not reasonable that it should, in the name of ensuring quietness for its own worship, claim to curtail the service or worship which had been customary long before it invaded the locality. That is the present case. It is found as a fact by the

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(1) (1880) I.L.R., 2 Mad., 140.

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

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lower Courts that the Muhammadans chose to erect their mosque close to an existing Pillayar temple where service with music forms part of the usual public religious worship, and they now claim that such service shall be stopped during their own service hours. The lower Courts have found that the Pillayar Kovil was built long before the mosque and that the mosque, therefore, was built with the full knowledge that it would be close to the Hindu temple. It was urged that, when the mosque was built, the Pillayar Kovil was not actually being used, but I do not see that that makes any practical difference. The Muhammadans deliberately built their mosque cheek by jowl with the Hindu temple, and in such a case the new-comer must respect the religious sentiments and services of the older inhabitant. It would be different if the service in the Pillayar temple amounted to a general public nuisance, but no such case is put forward here. The Muhammadan sect alone cannot and does not represent the general public; it is only one section of the general public.

As to the alleged extension of the Mari Anman festival days, that is a point which seems to me irrelevant. The only ground, on which the extension is attacked and can be attacked in this suit, is that it is an infringement of the former decree. I cannot find that time is of the essence of the former decree nor is the period of fifteen days mentioned. In any case that decree, as I have held, applied only to music at the *medai* and has no concern with music played in the public street or inside the Pillayar Kovil.

The appellants therefore fail on the points raised by them. The lower appellate Court has committed no error of law. I would, therefore, dismiss the appeal with costs.

ANANTAKRISHNA AYYAR, J.—I agree.

K.B.

APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Krishnan Pandalai.

VASTEVA HOLLA AND ANOTHER (DEFENDANTS), APPELLANTS,

1920,
December 18.

v.

MAHABALA RAO (PLAINTIFF), RESPONDENT.*

Usufructuary mortgage of warg lands to which kumki lands are attached—Mortgagee put in possession of warg and kumki lands—Improvements made by mortgagee on both lands—Right to compensation for value of improvements made on kumki lands as well as on warg lands—Suit for redemption.

When a usufructuary mortgagee of certain warg lands in South Kanara, to which the right of holding kumki lands was attached, was put in possession of both warg and kumki lands and he effected improvements on both, he could, on redemption, claim the value of improvements on both the lands.

Although the mortgage deed did not contain a description of the kumki lands, yet as possession of such lands was given to the mortgagee, the kumki lands should be regarded as part of the security under the mortgage for the purposes of redemption and for claiming the value of improvements made on such lands.

APPEAL under clause 15 of the Letters Patent against the judgment of PHILLIPS, J., in Second Appeal No. 711 of 1924.

K. Y. Adiga for appellant.

B. Sitarama Rao for respondent.

The JUDGMENT of the Court was delivered by KRISHNAN PANDALAI, J.—The point for decision in this appeal is whether in the case of a usufructuary mortgage of warg lands in South Kanara to which the right of holding kumki lands is attached, when the warg lands and kumki lands are both put in possession

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* Letters Patent Appeal No. 25 of 1920.

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of the mortgagee and he effects improvements on both, he can on redemption claim the value of improvements on the kumki lands as well as those on the warg lands. The Courts below have held that he is entitled only to the second but not to the first. Hence this appeal.

The facts are as follows:—In 1868 some warg land was usufructually mortgaged by the plaintiff's predecessor-in-title to the defendants' predecessor-in-title. Possession was given to the mortgagee not only of this warg property which belonged to the mortgagor but also of an adjacent area of kumki land (which belonged to the Government) the possession of which is, according to the rules made for that purpose by Government and which are found in Board's Standing Orders, Vol. II, pages 61 and 62, given to the owner or occupant for the time being of the warg land for the more advantageous cultivation and enjoyment of the warg land. The mortgagee has been for more than 50 years in possession and enjoyment under the mortgage of both the warg and the kumki lands. The suit was for redemption and the plaintiff sued for the possession of both the properties on the footing that the mortgagee was put in possession of both under the mortgage and was bound to restore both to the mortgagor. The mortgagee (defendant) did not, as indeed he could not, question the right of the plaintiff to recover, along with the warg property, the kumki property attached to it and a decree has been passed accordingly. But while the Courts have awarded the mortgagee the value of improvements on the warg property, they have held that he is not entitled to the value of improvements, such as trees planted, etc., on the kumki.

The right of mortgagees and other subordinate holders of property to the value of improvements effected by them on their holding in the course of prudent husbandry is a customary right in South Kanara

as indeed it is throughout the West Coast of this Presidency, including the States of Travancore and Cochin, *Daramma v. Mariamma*(1). In the District of Malabar, the matter is now governed by the Malabar Tenants' Improvements Act and forms an important aspect of the Tenancy legislation now pending. Besides, in this particular case, the mortgage deed, Exhibit V, contains a specific clause whereby the mortgagor agrees to pay the mortgagee on redemption the value of the improvements effected by him on the mortgaged property as fixed by grihasthars (panchayatdars). It was argued for the respondent that we should read this specific agreement as confined to the warg property which alone, according to him, is the mortgaged property and as implying a contract that no compensation was payable for the improvements on the kumki. We cannot accede to either of the two propositions, either that the kumki is not to be deemed part of the mortgaged property or that the agreement, even if it were confined to the warg property, implies a contract to the contrary in respect of the kumki. As to the former, it was undoubtedly the case that possession of the kumki was handed over to the mortgagee as part of his security, and the mortgagor has got a decree for re-delivery to him of both on the footing of the mortgage. It has been held that the right of a wargdar over the attached kumki is in the nature of an easement and the two cannot be separated or separately alienated, see *Matilda Fernandez Bai v. Alex Pinto*(2). We need not now decide whether the right of the wargdar which entitles him to be in possession of the kumki, to plant trees, etc., on it and cut and remove them, subject to Government regulations, is not something higher than an easement. But it is clear that, as

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(1) (1898) 24 M.L.J., 397.

(2) (1912) 15 I.C., 278.

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between the mortgagor and mortgagee of the warg, possession and enjoyment of the kumki is a valuable adjunct of the security and therefore a part of it, that the two cannot be separated and that the mortgagor, having given possession of the kumki to the mortgagee, has now got a decree for its recovery. In these circumstances, the argument that the kumki was not part of the mortgaged property (which found favour in the second appellate Court and which is correct only to the extent that the mortgage deed did not contain a description of the kumki for the reason that, being Government land, the mortgagor was not entitled to create a valid charge on it so as to bind the Government), cannot be of any avail to the mortgagor as between him and the mortgagee. The kumki is, for the purposes of redemption and the rights of the parties on redemption, to be regarded as part of the security. If so, the defendants are entitled to compensation for improvements on the kumki as well as on the warg.

Secondly, we are quite unable to imply from an express agreement as to the warg a contract to the contrary in respect of the kumki. There is nothing to show that the defendant, who had been let into possession of the kumki under the mortgage, agreed to give up his right to the value of improvements to which under the customary law he was entitled.

A short consideration will show the unfairness of a contrary opinion. According to Government rules, the pattadar of the warg has a preferential right, which in practice is never denied, of getting the attached kumki registered in his own name, and thereby becoming its owner, and also to be exempted from payment of the value of the trees which would be charged to a stranger. The plaintiff, therefore, on redemption gets the valuable right of having the kumki registered as his property,

and the result of depriving the defendant of compensation for trees or other improvements on the land is simply to compel him to make a present of that amount to the plaintiff. We see no ground for enforcing this unfair arrangement.

In the result, we vary the decree of the lower Court by declaring that the defendant is entitled to the value of improvements made by him or his predecessors-in-title after the mortgage on the kumki property, Survey No. 111-B/1. The case will be remitted to the Court of the Subordinate Judge of South Kanara for fixing the additional amount that may be due to the defendant after obtaining, if necessary, a finding on the point from the District Munsif and for making a decree accordingly. The appellants will have proportionate costs of this appeal and of the second appeal. In other respects this appeal is dismissed.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

AHMED SAIT AND TWO OTHERS (DEFENDANTS), APPELLANTS,

v.

THE BANK OF MYSORE, LIMITED, BY ITS MANAGER,
P. W. O'BRIEN (PLAINTIFF), RESPONDENT.*

*Bank—Precluded by Memorandum from lending on mortgages—
Yet money lent on mortgage—Right of Bank to sue and
realize.*

Though under its Memorandum of Association a Bank is precluded from lending money on mortgages, yet, where money has been lent by the Bank on a mortgage, it is entitled to sue for and realize the money so lent.

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1930,
January 22.

ARMED SAIT
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APPEAL against the judgment and decree of KUMARASWAMI SASTRI, J., dated the 7th day of March 1929, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 212 of 1928.

K. S. Krishnaswami Ayyangar (Ramaswami Ayyangar and Srinivasavarada Ohari with him) for appellants.

Sir C. P. Ramaswami Ayyar (C. Narasimha Ohari with him) for respondent.

JUDGMENT.

This is an appeal from the judgment of our brother KUMARASWAMI SASTRI, J., decreeing a suit by the Bank of Mysore based on a mortgage, dated the 6th of May 1925, for Rs. 1,00,000.

The plaintiff (paragraph 6) alleges that the defendants paid on the whole Rs. 18,672-2-0 up to 6th February 1927 which the plaintiff Bank appropriated in a particular manner. The suit is to recover the balance. The defendants admit the allegations contained in paragraph 6 of the plaintiff but plead that "On account of the relationship existing between them and at their request the said Haji Sir Ismail Sait has paid to the plaintiff the entire amount due on the mortgages referred to in the plaintiff. The actual date of the payments are not known personally to these defendants but they are informed and believe the same to be true that by 3rd March 1926 or thereabouts the payments aforesaid by Haji Sir Ismail Sait were completed." The defendants also pleaded in the course of the trial as probalizing the above plea of discharge that Haji Sir Ismail Sait had a large sum of money amounting nearly to two lakhs belonging to them in his hands and that the payments made by Haji Sir Ismail Sait were made out of those funds. A third plea which was not raised either in the written statement or in the issues or at the trial before the Court below is that the Memorandum of

Association of the plaintiff Bank prohibits the Bank from lending on mortgage and the suit transaction is therefore void as being *ultra vires* and is not enforceable at the instance of the plaintiff.

This last point will be taken up first. The learned Advocate for the appellants relied on the decision in *Ashbury Railway Carriage and Iron Co. v. Riche*(1) and the decision in *Sinclair v. Brougham*(2) which follows it. In the first case it was held that a transaction which was *ultra vires* of the Company could not be enforced against it. In the latter case questions of priority arose between the outside creditors, the unadvanced shareholders and the depositors of a building society formed under the Building Societies Act of 1836, the assets being insufficient to pay off all the claimants and it was held that the depositors were not entitled to priority over other claimants as the contracts of loan were *ultra vires*. The question before us is not similar to the questions raised in those two cases. In *Brice On The Doctrine of Ultra Vires*, it is laid down that "Property legally and by formal transfer or conveyance transferred to a corporation is in law duly vested in such corporation, even though the corporation was not empowered to acquire such property." Under the Indian Law a mortgage is a transfer of interest in immovable property. The case of *Ayers v. The South Australian Banking Co.*(3) is given as an illustration. There the transaction was *ultra vires* as it was prohibited by the charter of the Company. Still it was held that the Company could recover and Mr. Brice observes that the reasoning applies equally to realty. Another case relied on by the learned Advocate for the respondent is *In re Coltman. Coltman v. Coltman*(4), in which the Court of Appeal reversing the

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(1) (1875) L.R., 7 H.L., 653.

(3) (1871) L.R., 3 P.O., 543.

(2) [1914] A.C., 398.

(4) (1881) 19 Ch.D., 64.

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judgment of FRY, J., held that all contracts which were *ultra vires* were not necessarily illegal. This was a case of the trustees of a friendly society. In *Turner v. The Bank of Bombay*(1) it was held by SIR LAWRENCE JENKINS, C.J., and TYABJI, J., confirming the judgment of RUSSELL, J., that notwithstanding section 37 of the Presidency Banks Act, the Bank was entitled to realize money lent on equitable mortgages. The abovementioned decision in L.R., 7 H.L., 653 was referred to by RUSSELL, J., and the decision in L.R., 3 P.C., 548 was applied and followed by the learned judges. For examples of the same principle *The National Bank of Australasia v. Cherry*(2) and *G.E. Railway Co. v. Turner*(3) were also relied on. RUSSELL, J., observes that it is unfortunate that the words '*ultra vires*' should be used to describe two classes of cases, namely, those which are merely *ultra vires* and those which are also illegal. Following the above decisions we think that the Bank of Mysore is entitled to sue. It is unnecessary to describe what exact position the Bank occupies with reference to Haji Sir Ismail Sait on the facts of the case, that is, whether the Bank is a benamidar or a trustee or an agent of an undisclosed principal or does not occupy any of those positions.

[Their Lordships then dealt with the merits and concluded as follows.]

Agreeing with the trial judge we dismiss the appeal with taxed costs. We certify for two Counsel.

Moresby and Thomas : Attorneys for respondent.

B.C.S.

(1) (1900) I.L.R., 25 Bom., 52.

(2) (1870) L.R., 3 P.C., 299.

(3) (1872) 8 Ob., App. 149.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

KRISHNAYYA NAIDU AND ANOTHER (ACCUSED),
PETITIONERS.*

1930,
January 31.

Criminal trials—Case and counter-case—Defence witnesses in a case already examined as prosecution witnesses in counter-case—Depositions—Whether may be filed as part of their evidence as defence witnesses in former case.

Where the defence witnesses in a case have already been examined as prosecution witnesses in a counter-case, their depositions in the latter case may be filed, to save time, as part of their evidence as defence witnesses in the former case, in favour of the prisoner, and with the consent of both sides.

Umar Hajee v. King-Emperor, (1922) I.L.R., 46 Mad., 117, 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 Joint Magistrate of Tiruppattur in Criminal Appeal No. 74 of 1928 (Calendar Case No. 273 of 1928 on the file of the Court of the Second-class Magistrate of Gudiyattam).

This Criminal Revision Case came on for hearing in the first instance before JACKSON, J., who made the following

ORDER :—

This petition raises a point of some importance.

It will be seen on page 23 that the depositions given by D.W. 2 in a previous trial were read out to him and exhibited as evidence in the present case. This is precisely what I myself did in the case which was subject of appeal in *Umar Hajee v. King-Emperor*(1) when it was ruled that my action was fatally irregular.

* Criminal Revision Case No. 672 of 1929.
(1) (1922) I.L.R., 46 Mad., 117.

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Of course there is no objection to a witness being led, if both sides consent, and the alternative and correct procedure according to that ruling would be for the judge to copy out the previous depositions in his own hand.

You were examined at the previous trial?

Yes.

You deposed that, etc., etc.?

Yes.

and then the Judge is set busily to work for a few hours committing to paper what is already on paper. With the greatest respect, I can see no necessity for this deplorable waste of time. The accused is in no way prejudiced. He can ask any supplementary questions he likes. He is present when the depositions are exhibited, so the rule in 2 Hawkins Pleas, Chapter 46, is not violated. As regards the implied consent discussed on page 120, I may say perhaps that the depositions were exhibited at the express request of the defence vakil, as in the present case. I have never been able to understand this ruling and think it should be examined by a Bench.

V. L. Ethiraj and A. S. Sivakaminathan for petitioners.

Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

This case arises out of a judgment in a Criminal Appeal, in which the Appellate Magistrate refused to reverse the conviction of the petitioners, on the ground urged before him that the conviction was illegal, because the trial Court had allowed certified copies of evidence given by the petitioners as defence witnesses in a counter-case to be filed as evidence for the defence in this case. It is contended that the refusal of the Appellate Magistrate is directly opposed to the ruling of a Bench of this Court in *Umar Hujee v. King-Emperor*(1).

On another ground raised, it appears to us that the Appellate Magistrate's judgment cannot be supported.

He considered that section 167 of the Evidence Act did not compel him to order a retrial merely because these copies of depositions had been put in, since, to use his words "without the evidence thus admitted there is sufficient evidence to prove the charges." He seems to have entirely overlooked the fact that the evidence thus admitted was for the defence and not for the prosecution. He has thus decided the case against the accused by the simple process of ruling out and refusing to consider the evidence for the defence. But it would not suffice for us merely to order him to rehear the appeal, if under the law as it stands stated in 46 Madras 117, he would still have to reject these depositions and order retrial. We therefore had the question argued before us, whether the 46 Madras case applies here, and if it does, whether it does not lay down too strict a procedure, and whether we should not have the case posted before a Full Bench to consider whether the 46 Madras case has been rightly decided.

We have perused the printed papers in the two cases which gave rise to the 46 Madras judgment. A criminal trial had proceeded for some time against two persons in part before one Special Sessions Judge. It was then split up into two. That Judge was succeeded by another, who decided on a *de novo* trial. At the *de novo* trial the second Judge permitted the depositions of the prosecution witnesses taken at the original trial to be filed as evidence for the prosecution. Whether this was done at the request or with the consent of the defence is not material. The evidence of the defence witnesses was taken entirely by the second Judge. Now, the judgment in 46 Madras 117 proceeds on the general proposition that "in cases of life, no evidence is to be given against a prisoner, but in his presence", subject to the exceptions permitted by some express provisions

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KRISHNAYYA, In re. of law. It is clear from the facts as set out above that the Bench was dealing only with a case where previous depositions not taken in the presence of the accused were used as evidence against him. We think that the decision does not go further than to decide that such a procedure is contrary to law, and, if we may say so with respect, it embodies a very salutary principle, the principle upon which *Reg v. Bertrand*(1), on which 46 Madras relies, proceeded. In the latter case, there was the additional infirmity that what was read over to the witnesses was not their actual depositions but only notes of those taken by the trying Judge. We do not think that 46 Madras can be taken to have decided that evidence taken in favour of a prisoner in a counter-case, in which he was a witness but was not himself the prisoner, cannot be put in by him on his own behalf.

In the case before us, the depositions given by defence witnesses 2 and 3 when examined as prosecution witnesses in the counter-case were filed with the consent of both sides. We do not think that 46 Madras prohibits such a procedure, which obviously saves a great deal of time which would otherwise be occupied in merely copying down previous depositions. No one is prejudiced. Obviously the prisoner is not, and if the Crown had thought its case would be prejudiced, it would not have consented to the procedure.

Our attention has been drawn to a ruling of a Bench of the Lahore High Court in *Thakar Singh v. Emperor* (2), but so far as we can gather the facts of the case, it appears that the defence witnesses were not summoned and examined in Court, but their previous depositions were put on the record without the witnesses coming to swear to their truth. The same procedure

appears to have been adopted in the case reported in **KRISHNAYYA, In re.** *Allu v. Crown*(1). In the present case, however, the defence witnesses were called and examined in the presence of the accused and they swore to the truth of their previous statements, which were then filed with their consent to save time. In another case, *Emperor v. Harjivan Valji*(2), a High Court Bench held that to file for the Crown depositions taken in one case as substituted evidence in another case against the same prisoner was merely an irregularity. But it may be noted that in that case all the depositions had been taken in the presence of the prisoner.

We do not therefore think it necessary to refer this case to a Full Bench on the question of reconsidering the decision in 46 Madras. We hold on the facts here that there was nothing illegal or irregular in the procedure at the trial Court. However as we have already remarked the Appellate Magistrate has erred in refusing to consider that evidence recorded for the defence. We must therefore set aside his order and direct him to rehear the appeal, and decide it after giving due weight to the evidence recorded in the previous depositions filed as Exhibits VI, VI (a), VII and VII (a). We order accordingly.

B.C.S.

(1) (1923) I.L.R., 4 Lah., 376. (2) (1925) I.L.R., 50 Bom., 174 at 178.

(1) (1867) L.R., 1 P.C., 520.

(2) (1927) 28 Cr. L.J., 771.

APPELLATE CIVIL.

*Before Mr. Horace Owen Compton Beasley,
Chief Justice and Mr. Justice Curgenven.*

1930,
April 9.

RAMI REDDI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

CHENCHU POLAMMA (PLAINTIFF), RESPONDENT.*

*Civil Procedure Code (V of 1908) O. XXXIII, rr. 10 and 11—
Suit in forma pauperis, partly successful—Extent of defend-
ant's liability for court-fee.*

If a plaintiff who is allowed to sue *in forma pauperis* succeeds only in part, the court-fee recoverable under Order XXXIII, rules 10 and 11, Civil Procedure Code, from the unsuccessful defendant is only proportionate to that part and not more, the rest being payable by the plaintiff.

APPEAL against the decree of the Court of the Subordinate Judge of Nellore in Original Suit No. 89 of 1923.

T. V. Ramanatha Ayyar for appellants.

B. Somayya for respondent.

The JUDGMENT of the Court was delivered by

BEASLEY
C.J.

BEASLEY C.J.—This is an appeal from the Court of the Subordinate Judge at Nellore. The defendants in the suit are the appellants and there are also objections by the successful plaintiff in the suit, the respondent here.

The plaintiff whose deceased husband and the first defendant were undivided brothers filed the suit claiming maintenance. The second defendant is the undivided minor son of the first defendant. The plaintiff's husband died on the 12th June 1919 and the suit was filed on 21st December 1923 claiming current maintenance at Rs. 250 a month and arrears from the 12th June 1919 to the date of the plaint. The total valuation of the

claim was Rs. 16,500. The learned District Judge awarded the plaintiff Rs. 50 in cash per mensem and three putties of paddy per annum equivalent to Rs. 240 per annum in respect of current maintenance and arrears at the rate of Rs. 35 per mensem; and with regard to costs, he directed the first defendant to pay the plaintiff's costs of the suit and also the whole of the court-fee payable to Government by the plaintiff who brought her suit *in forma pauperis*.

The members of the first defendant's family consist of himself, his wife, a minor son, two minor daughters, his mother and a widowed sister. The plaintiff's case was that the net income of family amounted to about Rs. 20,000 a year; on the other hand the first defendant's case was that the net income was only Rs. 6,000 a year and he offered to pay only Rs. 25 per mensem as current maintenance. The learned Subordinate Judge took the gross income of the family to be Rs. 24,000 from which he made deductions for kist and estimated the net income at about Rs. 15,000 although there does not seem to be anything on the record which would justify a reduction of the family income below Rs. 19,000 a year. He seems to have been generally satisfied with the evidence as to the family income given on behalf of the plaintiff. Though the first defendant, the managing member of the family, admitted that he had accounts he did not produce them. He must have known that, on the question of maintenance, it was all-important that he should show to the Court not only what the expenditure of the family was but what its profits were and assist the Court in arriving at the proper figure of the income of the family. He chose not to disclose these books and the learned trial Judge has quite properly drawn all inferences adverse to him by reason of the non-production of those books. The inference to be

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drawn is that had he produced them, the figures therein as to the income of the family would have been more approximating to those given on the plaintiff's behalf than those given by the defendants. We see no reason for thinking that the estimate of the income of the family arrived at by the learned Subordinate Judge erred on the side of liberality to the plaintiff, and we are prepared to take it that the net income of the family was about Rs. 15,000 a year. We have got to see whether he has on that net income awarded to the plaintiff the proper amount of maintenance. The net income of Rs. 15,000 means a monthly income to the family of Rs. 1,250. In fixing maintenance at the rate of Rs. 50 per mensem in cash and the equivalent of another Rs. 20 per mensem in paddy making a total of Rs. 70 per mensem, we think he has not been liberal to the plaintiff. We are not fixing maintenance in this case by taking any particular proportion of the net income but we are taking into consideration the fact that Rs. 1,250 per mensem is a very good income for a family of this size which, after all, is quite a small one consisting of some seven members only; and we think that the evidence shows that the plaintiff who is a young woman of about 18 years of age has been educated and is still in need of education and that her requirements certainly are more than those of a woman older than herself. The conclusion we have come to with regard to this is that the current maintenance should be fixed at Rs. 80 per mensem plus the three putties of paddy awarded by the learned Subordinate Judge. This gives the plaintiff a monthly maintenance of approximately Rs. 100.

The first defendant has been directed to pay the court-fee of Rs. 1,004-15-0 to the Government, that being the sum which the plaintiff would have to

pay to Government, she having been allowed to bring the suit as a pauper. The first defendant's contention is that he should be ordered to pay court-fee only on the amount the plaintiff has succeeded in getting under the decree and that that would amount to Rs. 247. In support of this contention, *Srinivasa Ayyar v. Lakshmi Ammal*(1) is relied upon. There it was held that under Order XXXIII, rules 10 and 11 of the Civil Procedure Code, it is not open to the Court to direct the defendants to pay court-fees exceeding the amount which is payable on that portion of the plaintiff's claim which is successful; and another case to the same effect is *Ganga Dahal Rai v. Musammat Gaura*(2). We think that the order of the trial Judge directing the first defendant to pay the court-fee in respect of the amount in excess of that recovered in the suit under the decree by the plaintiff is wrong and we accordingly modify that part of the decree and direct the first defendant to pay court-fee on the amount the plaintiff has succeeded in getting. The plaintiff will pay the balance of court-fee payable to Government.

In the result, the appeal, except as regards the question of the court-fee, is dismissed and the cross-appeal of the respondent allowed in part with costs. The respondent will get costs on the appeal to the extent the appellant is unsuccessful and the appellant will get costs to the extent he is successful in the appeal. In the cross-appeal the appellant will pay the respondent's costs to the extent the respondent is successful.

N.R.

(1) (1927) 54 M.L.J., 530.

(2) (1916) I.L.R., 38 All., 469.

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APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Anantakrishna Ayyar.

1930,
April 4.

AVASARALA VENKATARAMA RAO (SECOND DEFENDANT),
APPELLANT,

v.

MAHARAJA OF PITTAPURAM AND ANOTHER (PLAINTIFF
AND FIRST DEFENDANT), RESPONDENTS.*

Madras Land-revenue Assessment Act (I of 1876)—Land forming portion of an estate—Ownership acquired by adverse possession by another against the holder of the estate—Land-holder, whether entitled to have separate registration of such portion—"Alienation by sale or otherwise", construction of—Alienation, if wider than transfer.

The Madras Land-revenue Assessment Act (I of 1876) applies not only to cases of transfers of portions of a permanently settled estate by acts *inter vivos*, but also to cases where a person has become owner of a portion of such an estate by virtue of adverse possession for the statutory period;

Pusarla Peda Brahmaji v. Krishnamachariar, (1919) 11 L.W., 389; and *Subba Rao v. Rajah of Pithapur*, (1926) 53 M.L.J., 400, followed; *Krishna Pramada Dasi v. Dhirendra Nath Ghosh*, (1928) I.L.R., 56 Cal., 813 (P.C.), referred to.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Cocanada in Appeal Suit No. 109 of 1924 preferred against the decree of the Court of the Additional District Munsif of Cocanada in Original Suit No. 31 of 1925.

C. Rama Rao for appellant.—The Madras Land-revenue Assessment Act (I of 1876) requires that a portion of an estate must be "alienated by sale or otherwise," before an application for separate assessment of revenue and registry can be made.

The application may be made by alienor or alienee. "Alienation by sale or otherwise" means a transfer by act of parties. It does not apply to acquisition by adverse possession. In *Pusarla Peda Brahmaji v. Krishnamachariar*(1), OLDFIELD and KRISHNAN JJ. held that adverse possession came within the purview of the Act. But there is no reasoning given in the judgment. The whole wording of the Act is opposed to a person acquiring title by adverse possession being included under the Act.

Advocate-General (A. Krishnaswami Ayyar) for respondent.—The decision in 11 L.W., 389 is followed in *Subba Rao v. Rajah of Pithapur*(2). The word "alienation" is wider than "transfer". Section 9 of Regulation XXV of 1802 speaks of "separation" and "separate". See *Maharaja of Vizianagaram v. The Collector of Vizagapatam*(3). Even a person, who has become owner by adverse possession of a portion of an estate, is a person in possession of land by alienation of a portion of the estate within the preamble of the Act. Both the holder of the estate and the owner by adverse possession can apply for the benefit of the Act. Section 2 of the Act shows that the nature of the enquiry to be made is as to who is the present owner of the portion in respect of which the application is made. See *Krishna Pramada Dasi v. Dhirendra Nath Ghosh*(4).

JUDGMENT.

This Second Appeal arises out of a suit filed by the Maharaja of Pittapuram against the Secretary of State for India in Council as the first defendant, and Avasara-
lara Venkatarama Rao of Panduru as the second defendant, for separate registration of the lands situated in the village of Panduru alleged to be within the zamindari of Pittapuram. Prior to the suit, the plaintiff applied to the Deputy Collector under the provisions of Madras Act I of 1876 for such separate registration. The second defendant having raised an objection, the Deputy Collector declined to order separate registration, with the

(1) (1919) 11 L.W., 389.

(2) (1926) 53 M.L.J., 400.

(3) (1914) I.L.R., 38 Mad., 1128 at 1130.

(4) (1928) I.L.R., 56 Cal., 813 (P.C.).

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result that the Maharaja of Pittapuram filed the suit from which this Second Appeal has arisen.

The main pleas raised by the second defendant were (1) that there was no "alienation" in the present case, within the meaning of Act I of 1876, and (2) that, on the merits, the plaintiff was not entitled to separate registration since these lands were not included within the assets of the zamindari at the time of the permanent settlement. Both the lower Courts over-ruled the first contention raised by the second defendant and held that, if, on the merits, the plaintiff proved that the suit lands were included within the assets of the zamindari, the plaintiff would be entitled to have separate registration as prayed for. On the merits, the trial Court found against the plaintiff and accordingly dismissed the suit. On the plaintiff's appeal, the learned Subordinate Judge held, for reasons given in paragraph 10 of his judgment, that the suit lands must be taken to have been included in the assets of the zamindari, and he passed a decree for separate registration as prayed for by the plaintiff. This Second Appeal has, accordingly, been preferred by the second defendant in the case.

On his behalf, his learned Advocate argued two points, one relating to the preliminary question whether Act I of 1876 applies to this case, and the other to the merits. Taking the first question about the applicability of the provisions of Act I of 1876, it was argued for the appellant that the Act deals only with cases of lands "alienated by sale or otherwise." It being common ground that the Maharaja was not able to point out to any particular act of "alienation *inter vivos*," the finding of the lower Appellate Court was that the second defendant had acquired ownership of this property by virtue of adverse possession for over the statutory period. The learned Advocate argued that such a case

could not be said to come within Act I of 1876. He argued that the words "alienation by sale or otherwise" imply cases of transfer *inter vivos*. On behalf of the respondent it was argued that the word "alienation" is wider than the word "transfer" and that all that the Act contemplates is that there should be separation from the main estate of the land in question in such a way that the ownership of the land in question has become vested in the other person as owner. We think that the contention raised by the respondent should be upheld. It must be noticed that the wording in question occurs in an Act passed as early as 1876, and that the exact question that we are now called upon to decide has come before this Court, at least twice, as reported cases show. In *Pusarla Peda Brahmaji v. Krishnamachariar*(1), OLDFIELD and KRISHNAN JJ. decided this very point against the contention raised by the appellant before us. Later on, in the case reported in *Subba Rao v. Rajah of Pithapur*(2), the same question arose before WALLER and MADHAVAN NAIR JJ. and the learned Judges, as we understand their judgment, followed the decision in *Pusarla Peda Brahmaji v. Krishnamachariar*(1) and were not prepared to have the question reopened. If the learned Judges in *Subba Rao v. Rajah of Pithapur*(2) doubted the correctness of the decision in *Pusarla Peda Brahmaji v. Krishnamachariar*(1), they would not have sent the case back for enquiry on the merits (which would have been unnecessary if the appellant's contention was right). In addition to the two direct decisions on the point in question, there is also an observation in *Proprietor of Siripuram Estates v. Venkatasurya Rao*(3), where it is stated that all that was necessary to bring a case under Madras Act I of 1876 is

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(3) (1922) 17 L.W., 6.

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that the land in question should be fully owned by a person other than the zamindar proprietor. Though the preamble to the Act speaks of "alienation of portions of permanently settled estates by sale or otherwise", when we go to section 2 which speaks of the exact nature of the enquiry to be conducted by the Collector, we find the following words:—

"The Collector shall thereupon hold an enquiry as to who is the present owner of the property in respect of which the application is made."

A person could become "owner" of property as much by transfer *inter vivos* as by the effect of adverse possession for the statutory period. As mentioned by this Court in *Sambasiva v. Ragava*(1)

"It is hardly necessary to observe that it has been repeatedly held that the title acquired by adverse possession for twelve years is only equivalent to that given by a parliamentary grant of the interest vesting in the party affected by the adverse possession."

We may also refer to a recent decision of the Privy Council in *Krishna Pramada Dasi v. Dharendra Nath Ghosh*(2). No doubt the Privy Council had there to consider a case that arose in Bengal. This is what their Lordships say:—

"The owner of a part of a revenue-paying estate obtaining his title by adverse possession, remains liable for land-revenue fixed on the estate under section 37 of the Land-revenue Sales Act. *He may, if he so desires, have the portion of the estate which passed to him by adverse possession, separately assessed to land-revenue; but, if he omits to do so, it continues to form part of the security for the whole land-revenue of the estate and to be liable to be sold under the said section.*" (*The italics are ours.*)

From this it is clear that it is ordinarily open to any person who has become owner of land by virtue of adverse possession to apply to have separate registration

of the same in his name, to avoid the risk of the land being sold to recover arrears due, not properly upon it but upon the whole estate of which it was a part. It, therefore, seems to us that Act I of 1876 applies not only to cases of transfer *inter vivos* but also to cases where a person has become owner of property by virtue of adverse possession for the statutory period. We, therefore, follow the two rulings of this Court mentioned above, and over-rule the contention raised by the appellant.

On the merits, we find that both the lower Courts refer to D.C.B. accounts and Amarakam accounts as having been filed as evidence in the case. By reference, however, to the list of witnesses examined and documents filed, we are not able to find any such documents having been exhibited. It is possible, since it is clear that these suits were tried along with other suits, that there was some sort of agreement between the parties that these documents should be taken as exhibited, and treated as evidence in these cases also; but as the record now stands, we are not able to state definitely what exactly happened. As we should like to know more about these documents before we dispose of these appeals, we call upon the lower Appellate Court to produce and forward to this Court copies of Amarakam and D.C.B. accounts referred to in the lower Court's judgment. It will also submit a copy of the judgment in O.S. No. 29 of 1923 with all the records (including the B. Diary) filed in that suit. It will be open to either party to apply for the printing of any portion of the record so received, leaving it to the Court to decide upon any matters regarding the admissibility of the same in evidence in these second appeals at the time of the final hearing of these cases.

K.R.

(1) (1890) I.L.R., 18 Mad., 512 at 515. (2) (1928) I.L.R., 56 Cal., 813 (P.C.).

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APPELLATE CIVIL.

*Before Mr. Justice Waller and Mr. Justice Krishnan
Pandalai.*

1980,
March 6.

VELLAPALLI SEKHARA MENON (SIXTH RESPONDENT),
PETITIONER,

v.

NARAYANAN *alias* PARAMESWARAN NAMBUDERI AND
OTHERS (APPELLANTS AND RESPONDENTS), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), O. XXII, rr. 8 and 10—
Appeal in a suit for redemption by one of several trustees
of a devaswom impleading other trustees and mortgagees as
respondents—Death of a trustee, who was respondent, before
judgment—Judgment passed without bringing legal re-
presentative of deceased trustee—Abatement of appeal—
Judgment, if valid.*

Where, during the pendency of an appeal in a suit for redemption, by a trustee of a devaswom impleading the other trustees as well as the mortgagees as respondents, one of the trustees, who was a respondent, died and his legal representative, the succeeding trustee in his place, was not brought on the record, and judgment was passed in the appeal in favour of the devaswom, and a member of the mortgagee's family, who was a respondent, applied to set aside the judgment as invalid, on the ground that the appeal had abated as the legal representative of one of the trustees of the devaswom was not on the record of the appeal;

Held, that the appeal had not abated; that the devaswom was sufficiently represented in the appeal even after the death of the trustee; and that the judgment was binding on both the parties.

PETITION filed in the High Court to set aside the judgment and decree in Letters Patent Appeal No. 71 of 1924 and to dismiss the said appeal as having abated.

• *P. Govinda Menon* for petitioner.
T. R. Ramachandra Ayyar for respondents.

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JUDGMENT.

This is a petition for review of judgment in a Letters Patent Appeal based on an alleged defect of procedure which occurred during the pendency of the appeal, which, it is said, invalidates the judgment.

The suit was brought in 1919 to redeem a kanom on behalf of a Malabar devaswom by one out of the four Uralans, the other three being joined as twenty-fourth to twenty-sixth defendants. The other defendants were members of the tenant's tarwad of which the first defendant was the karnavan. The District Munsif gave a decree as prayed. The District Judge on appeal and PHILLIPS J. on second appeal, held that the suit was barred by Order IX, rule 9, by reason of the dismissal of a former suit brought for the same relief and dismissed the suit. The plaintiff preferred a Letters Patent Appeal under clause (15) of the Letters Patent and on 7th December 1928 a Bench of this Court consisting of DEVADOSS and WALLER JJ. set aside the judgments of the first and second Appellate Courts and remanded the appeal to the District Judge to hear and determine it on the merits. We were informed at the hearing of this application that the District Judge has since heard the appeal and confirmed the decree awarded to the plaintiff by the District Munsif.

The petitioner is the sixth respondent in the Letters Patent Appeal, a junior member of the tenant's tarwad. He now objects that, on 21st May 1928, i.e. more than six months before the judgment, the third respondent (twenty-fourth defendant) had died, that the petitioner knew this only on January 28 (1929), that as the appellant took no steps to bring on record the legal

* Civil Miscellaneous Petition No. 1622 of 1929.

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representative of the deceased third respondent, one of the four Uralans, without whom the appeal could not proceed, the appeal abated or became incompetent before the judgment, and that, therefore, the judgment in the appeal reversing the decisions of the lower Appellate Courts was wrong.

The petitioner's Advocate argues that, as it is necessary in every suit brought on behalf of a devaswom to have all the Uralans as parties either as plaintiffs or as defendants, it follows that, on the death of one of them in a pending suit to which they have all been made parties, a necessary party is eliminated, and that, unless the legal representative of the deceased who was the next Uralan is added within the time allowed, the suit or appeal abates and its continuance becomes incompetent for want of necessary parties, that, thereafter, subject to the abatement being set aside, the only legal order possible is one of dismissal, and that, if a judgment on the merits is passed in ignorance of the death, such judgment is one of no effect or validity. When the judgment was pronounced, no one was aware that the respondent had died. The question, in such circumstances, is not whether in the first instance all the Uralans or trustees should have been impleaded which had been done—but whether the death or removal of one of several trustees or Uralans who had been impleaded, *ipso facto*, makes the further progress and decision on the merits of the suit or appeal illegal till his successor has been impleaded. It is material that the objection is raised not by the devaswom or on its behalf by the Uralans but by its opponent who has been defeated on the merits.

No decision exactly applicable was cited. But reliance was placed on an unreported decision of

DEVADOSS J. in *Manikkal Sankaran v. Rama Variar*(1). In that case, the death of one of the Uralans being known before judgment, an application to set aside the abatement and bring in the new Uralan had been made but, however, was refused. Thereupon, the learned Judge, while also basing his judgment on the merits, held that the appeal could not proceed in the absence of all the Uralans. Whether that opinion was right or not, that is not the case here.

Similarly the case in *Arayil Kali Amma v. Sankaran Nambudripad*(2), was one in which the death of the co-Uralan was known before the judgment and apparently there was no petition to set aside the abatement or bring in his successor. The decisions in *Shanmuga Mooppanar v. Subbayya Mooppanar*(3) and *Kanman Kutty v. Velu*(4) are of no assistance to the petitioner.

There is authority for the proposition that, in order that a decree may bind a devaswom, it is not necessary to have all the trustees or Uralans as parties, provided that the litigation was conducted *bona fide* in the interests of the devasthanam by those Uralans who were parties; *Madhavan v. Keshavan*(5). The ground of this was explained and approved in *Rangamma v. Narasimha-charyulu*(6). The principle governing the representation in suits of mutts, temples, etc., by Dharmakartas, Uralans or Matathipathis is illustrated by other decisions of this Court. In *Ratnam Pillai v. Annamalai Desikar*(7), Nataraja Desikar, who had no rights to a mutt, brought a suit on its behalf purporting to do so as head of the mutt. Pending the suit he was declared by the Privy Council not entitled to the headship. On the death of Nataraja Desikar, the person declared to be

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(1) S.A. No. 292 of 1921.

(2) (1910) I.L.R., 34 Mad., 292.

(3) (1921) 42 M.L.J., 133.

(4) (1923) 46 M.L.J., 122.

(5) (1867) I.L.R., 11 Mad., 191.

(6) (1916) 31 M.L.J., 26, 30.

(7) (1923) 46 M.L.J., 1341.

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the rightful head applied to be impleaded and it was held that the case really fell under Order XXII, rule 10, though the rule quoted was Order XXII, rule 3, and that the applicant should be allowed to continue the suit. The principle is that on the death or removal of an Uralan impleaded as such in a suit, what takes place is devolution of the office and the person entitled to be impleaded in the suit is the successor to the office. This is not affected by the fact that the office is hereditary or belongs to a tarwad, which merely means that the office-holder must be sought among the heirs or in the tarwad of the deceased. That this is the correct view was indicated in *Sirakasi Viswanathaswami Devasthanam v. Koodalinga Nadan*(1). There one of two trustees who were parties to an appeal on behalf of a devasthanam had died and the other had resigned and his resignation had been accepted and two other persons had been appointed trustees by the Temple Committee but had not taken charge of their office. In this state of affairs, the appeal was heard and decided without bringing on record the new trustees. The contention raised in the High Court by the new trustees, that the decision in the lower Appellate Court was incompetent, was negatived on the ground that the new trustees had not taken charge of their office on the date of the judgment in the Court below. But SRINIVASA AYYANGAR J. also said that the case fell really under Order XXII, rule 10 and that the policy of the Code is that, if the proceeding originally instituted is right and proper, any decision obtained therein is binding on all persons on whom the interest or right may devolve under that rule pending the disposal of the proceeding. Similarly in *Ittunan Panikkar v. Narayana Bharatikal*(2), which

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was a case of a mutt, it was held that a trustee, who files an action which is properly framed and constituted at the time of its institution, does not cease to be entitled to maintain and continue the suit merely because of his removal from office during the pendency of the suit. It was pointed out that the expression "by leave of the Court," in Order XXII, rule 10, indicates that it was optional on the part of the assignee to apply and it is also in the discretion of the Court to allow him to do so or not. If this is so in the case of a plaintiff Uralan, it is *a fortiori* so in the case of a *pro forma* defendant like the deceased third respondent, who by his written statement merely supported the plaintiff's claim and whose death at the time of the judgment was not known to any one.

In this view, the petition so far as it is based on the idea that there was any abatement in the proper sense of the term is misconceived.

In addition, we are satisfied that the devaswom was substantially and sufficiently represented in this Letters Patent Appeal even after the death of the third respondent, and that the decision given after contest between the devaswom and the petitioner's tarwad is binding upon both and is not liable to be questioned for failure to implead the successor of the third respondent.

The petition is dismissed with costs.

K.R.

(1) (1927) M.W.N., 743.

(2) (1926) M.W.N., 746.

APPELLATE CIVIL.

*Before Mr. Justice Anantakrishna Ayyar and
Mr. Justice Cornish.*

1930,
March 11.

ANGANNA REDDI AND OTHERS (RESPONDENTS 2,
4 AND 5), APPELLANTS,

v.

SUBBARAYA CHETTIYAR AND ANOTHER (PETITIONER AND
FIRST RESPONDENT), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), ss. 144 and 146, O.
XXI, r. 53 (3) and O. XXII, r. 10—Restitution—Decree-
holder of a money-decree—Attachment of a money-decree of
judgment-debtor—Money realised—Attached decree reversed
on appeal—Right of judgment-debtor of attached decree to
restitution from attaching decree-holder, under sec. 144.*

Where the holder of a decree for money attaches a decree of his judgment-debtor and realizes a sum of money in execution of the latter decree, but on appeal the latter decree is reversed, the attaching decree-holder is liable to make restitution of the amount realized by him to the judgment-debtor in the latter decree, under section 144 read with Order XXI, rule 53 (3), Order XXII, rule 10 and section 146 of the Civil Procedure Code.

APPEAL against the order of the District Court of South Arcot made in Execution Petition No. 5 of 1928, in Original Suit No. 1 of 1924.

C. S. Venkatochari for appellants.

K. P. Padmanabha Pillai for respondents.

JUDGMENT.

This appeal raises a question relating to the construction of section 144 of the Civil Procedure Code. In O.S. No. 1 of 1924 on the file of the District Court of South Arcot, Periyathambi Dorai obtained a decree

against Subbaraya Chetti for money. Subbaraya Chetti had preferred an appeal to the High Court against that decree. Pending appeal, the appellant before us, Anganna Reddi, who had obtained a decree in O.S. No. 11 of 1923 on the file of the Salem Court against Periyathambi Dorai, had his decree transferred to the South Arcot Court and he attached the decree which Periyathambi Dorai had obtained against Subbaraya Chetti in O.S. No. 1 of 1924. In execution of the attached decree, the appellant, namely, the decree-holder in O.S. No. 11 of 1923, was able to realize a sum of Rs. 3,000. The result of Subbaraya Chetti's appeal to the High Court against the decree in O.S. No. 1 of 1924 was that the High Court reversed the judgment of the trial Court and remanded the suit for fresh disposal. The result of the fresh disposal by the trial Court was that Periyathambi Dorai's suit was dismissed. It is said that an appeal is pending in this Court against that decree dismissing the suit. In the meanwhile Subbaraya Chetti, the judgment-debtor in O.S. No. 1 of 1924, applied to the South Arcot Court for restitution against Anganna Reddi, the decree-holder in O.S. No. 11 of 1923, who, as attaching decree-holder of the decree in O.S. No. 1 of 1924, had realized Rs. 3,000 from the defendant, Subbaraya Chetti. He alleged that, the decree in O.S. No. 1 of 1924 having been ultimately reversed and as things stand at present, he is entitled to have restitution under section 144 of the Code. The plea of Anganna Reddi was that the rights, if any, which Subbaraya Chetti had, were only against Periyathambi Dorai and not against Anganna Reddi. That contention of Anganna Reddi having been overruled by the lower Court, the lower Court allowed execution by way of restitution to proceed against Anganna Reddi in respect of Rs. 3,000 drawn by him, with

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interest. It is against that decision that Anganna has preferred the miscellaneous appeal.

It was argued, on behalf of the appellant by his learned Advocate, that the judgment-debtor Subbaraya Chetti was not entitled to any relief as against him, and that Subbaraya Chetti's relief should be sought by proceedings against Periaithambi Dorai. He argued that Anganna was not the decree-holder in O.S. No. 1 of 1924 nor an assignee of the decree-holder and, consequently, no restitution proceedings should be started as against him. In answer to that contention, it was urged, on behalf of the respondent, that section 144 read with Order XXI, rule 53 (3), and Order XXII, rule 10 and also section 146 of the Code entitled Subbaraya Chetti to relief against the appellant. Now Order XXI, rule 53 (3) indicates that

"The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof."

So that, this section specifically says that such attaching decree-holder shall be deemed to be the representative of the holder of the attached decree and as such entitled to execute such attached decree. Turning now to Order XXII, rule 10, which is the section prescribing the procedure to be followed in cases of assignment before final order in suits, clause (2) of Order XXII, rule 10, provides as follows :

"The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub rule (1)."

Reading these two provisions of law together, it is, we think, reasonably clear that the attaching decree-holder, in these circumstances, is the representative of the original decree-holder for purposes of execution.

Restitution proceedings are essentially proceedings in execution. If, as representative of the original decree-holder, an attaching decree-holder is entitled to the benefit of execution provided for by the Code, he must also be liable similarly, as the original decree-holder, to the burdens imposed upon such decree-holder by the Code when the decree in execution of which the proceedings were taken is subsequently reversed on appeal. Section 146 is also relevant in this connection. That section indicates that

"Save as otherwise provided by this Code or by a law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Subbaraya Chetti would undoubtedly be entitled to take out proceedings under section 144 against Periaithambi Dorai, the original decree-holder. Under section 146, as Anganna Reddi is the representative of Periaithambi Dorai for purposes of execution, Subbaraya Chetti is entitled to take similar proceedings against Anganna Reddi. It was argued that there is a difference between the attachment of a decree and an assignment of a decree. No doubt it is so. An assignment of a decree will vest in the assignee all the rights of the original decree-holder, whereas in the case of an attaching decree-holder the section only makes him the representative of the original decree-holder to the extent necessary for the purpose of satisfying his decree. It is possible that the original decree which was attached was for an amount much larger than the amount of the decree for which that decree was attached. In the case of an assignment of a decree, this Court has laid down in *Govindappa v. Hanumanthappa*(1), that an assignee-decree-holder would be liable to be proceeded against

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(1) (1912) I.L.R., 38 Mad., 36.

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under section 144, in case the original decree was reversed in appeal, even though the assignee-decree-holder was not a party to the final decree which reversed the lower Court's decree. The learned Judges observed that it was open to the assignee-decree-holder to make himself a party to the appeal, and if he trusted the original decree-holder to do the needful, he could not subsequently be heard to say that he was prejudiced by not himself being a party on record in the appeal. Similarly, reading Order XXI, rule 53, with Order XXII, rule 10, it is reasonably clear that it was open to the attaching decree-holder to make himself a party to the appeal and, not having made himself a party, he cannot be heard to complain that the original decree-holder on record did not sufficiently represent him. The cases quoted by the appellant, namely, *Kedar Nath v. Jai Berhma*(1) and *Jai Berhma v. Kedar Nath Marwari*(2), as also *Jatindra v. Sarat*(3), are not cases where a person standing in the position of a decree-holder took coercive steps to have the properties of the judgment-debtor brought to sale by processes in execution. These were cases where money decree-holders finding moneys belonging to their judgment-debtor in Courts proceeded to get at the same under section 73 of the Code. The Courts held that, in the circumstances, they could not be said to be decree-holders or representatives of decree-holders in the sense that the judgment-debtors would be entitled to proceed against them in case the orders were subsequently reversed. On the other hand in *Raju Rao v. Ananthamurayana Chetty*(4), AYLING Offg. C.J. remarks as follows:—

"The decree-holder in that case was the person responsible for wrongfully bringing the properties to sale. In the

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present case, refund is asked for from persons who had nothing to do with causing the auction sale, but merely profited by it, in the way of rateable distribution under the orders of the Court. This distinction seems to me to be of considerable importance in connection with the exercise of extraordinary powers which are of a purely equitable and discretionary nature."

Courts, in exercising jurisdiction under section 144, do so by virtue of the equitable jurisdiction to set right the injustice caused by the lower Courts passing erroneous decrees and by allowing proceedings to be taken thereunder. In such cases, it has been pointed out that it is the duty of the Court, as far as possible, to restore parties to the position in which they would have been, had not the erroneous orders been passed. No doubt in its anxiety to work out justice, a Court should not, in the exercise of powers under section 144, work out injustice in particular cases. Having regard to the facts in the present case, we are not in a position to say that the lower Court was not entitled to pass orders directing the appellant to restore the benefit that he received by executing the decree in O.S. No. 1 of 1924.

The order passed by the lower Court is accordingly right and we dismiss the appeal with costs. The respondent will, however, be directed not to draw the money from the lower Court for a period of one month from this date. The stay petition is dismissed.

K.R

(1) (1916) 37 I.C., 462.

(3) (1918) 29 Cal. L.J., 361.

(2) (1922) I.L.R., 3 Pat., 10.

(4) (1921) 42 M.L.J., 309 at 311.

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice
Anantakrishna Ayyar.*

1929,
December 3. MEENAKSHI AMMAL AND OTHERS (LRS. OF FIRST PLAINTIFF
AND PARTY APPELLANT IN THE HIGH COURT), APPELLANTS,

v.

A. RANGASWAMI AYYAR AND ANOTHER (DEPENDANT AND
SECOND PLAINTIFF), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), sec. 112—Agreement to
sell by landholder—Proceedings under sec. 112 started by
landholder after the agreement but before execution of sale
deed by him—Notices issued to Collector but not served on
ryots prior to sale—Competency of landholder to sustain
proceedings under the section.*

Where a landholder, after he had agreed to sell his interest in the property to another but before a sale deed therefor was executed, started proceedings, under section 112 of the Madras Estates Land Act, for the recovery of arrears of rent and sent notices to the Collector as contemplated by the section, *Held* that the proceedings were properly initiated under the section, even though the ryots were not actually served with notices prior to the execution of the sale deed, and that the landholder was entitled to attach and sell the holding for arrears of rent.

Forbes v. Maharaj Bahadur Singh, (1914) I.L.R., 41 Calo., 926 (P.C.), explained and applied.

SECOND APPEALS against the decrees of the District Court of Rāmnād in Appeal Suits Nos. 8 and 9 of 1924 preferred against the decrees of the Court of the Special Deputy Collector of Manamadura in Summary Suits Nos. 242 and 250 of 1922, respectively.

T. R. Ramachandra Ayyar (with him *P. R. Ganapathi Ayyar* and *K. P. Panchapagesa Ayyar*) for appellants.

* *C. S. Venkatachari* (with him *M. S. Venkatarama Ayyar*) for respondents.

The JUDGMENT of the Court was delivered by

ANANTAKRISHNA AYYAR J.—The landholder proceeded to take steps under section 112 of the Estates Land Act to attach and sell the holding of the ryots for non-payment of arrears alleged to be due to him by the ryots. The ryots instituted the two suits, Summary Suit Nos. 242 and 250 of 1922, to set aside the attachment under section 112. Second Appeal No. 2242 relates to the suit filed to set aside the attachment in respect of the arrears for fasli 1329 and Second Appeal No. 2243 relates to the suit similarly instituted to set aside the attachment made by the landholder in respect of the arrears for fasli 1328. The main pleas raised by the ryots, the plaintiffs in these suits, were that the landholder had agreed on the 31st March 1920 to transfer his rights as landholder in favour of a stranger. He took proceedings in respect of rent due for fasli 1329 on the 15th August 1920, and in respect of rent due for fasli 1328 in June 1920. The sale deed, however, was executed only on the 16th August 1920. On these facts, the plea raised by the ryots that the landholder had no *locus standi* to take proceedings under section 112 of the Estates Land Act was overruled by both the lower Courts. There was also a question raised on behalf of the ryots as to whether they had encroached on some portion of the Mulaimal land, and, if so, what rent was due by them in respect of the same for the faslis in question. The first Court held that the encroachment was proved, whereas the lower Appellate Court held that Exhibit VI was not reliable, and that the alleged encroachment was not proved and consequently that the ryots were not bound to pay anything in respect of the alleged encroached lands. The ryots have preferred these second appeals.

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The first point raised by the learned Advocate for the appellants in these cases is that the landholder is not entitled to take, or to continue, proceedings under section 112 of the Estates Land Act. The learned Advocate argued that the decision of the Privy Council in *Forbes v. Maharaj Bahadur Singh*(1) is an authority for the position that after a landholder transferred his interest as landholder in the lands to a stranger, he is not entitled to take any steps in respect of any past arrears under the Madras Estates Land Act. For the purpose of disposing of the present appeals, we think it is enough to confine our decision to the actual facts of these two cases. As already remarked, the landholder had initiated proceedings under section 112 of the Estates Land Act before he transferred his interest in the land to a third person. The case is not, therefore, one where a landholder, after a transfer of his rights in the lands, began proceedings under the Estates Land Act. The learned Advocate, however, argued that proceedings under section 112 could be taken to be initiated only when the ryots were actually served with notices. We are unable to agree with that contention. The landholder legally initiates proceedings under section 112 if he sends the notices contemplated by section 112 to the Collector in proper time. It is not disputed that the landholder's acts in sending the notices were in fact before he sold the properties to a stranger by a document dated the 16th August 1920. In the Privy Council case their Lordships took care to remark at page 939

"The right to proceed to sale in one case, in the other to eject, is dependent on the existence of the relationship of landlord and tenant at the time when the remedy provided by law is sought to be enforced."

Having regard to the facts of the present case, the landholder had the right to initiate proceedings

at the time that he did, and therefore the learned Advocate's argument on the first point is not, in our view, sustainable.

[His Lordship then dealt with the questions relating to deduction of interest, road-cess and village-cess, and concluded as follows:—]

For these reasons we think that, except in respect of the modification made above, the decrees of the lower Courts should be confirmed. As the appellants have substantially failed, the second appeals will be dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri
and Mr. Justice Pakenham Walsh.

AMBU NAIR (FIRST DEFENDANT), APPELLANT,

v.

KELU NAIR AND ANOTHER (PLAINTIFF AND THIRD
DEFENDANT), RESPONDENTS.*

*Mortgage—Transfer of Property Act (IV of 1882), sec. 60—
Usufructuary mortgagee suing for possession or for mortgage
money—Compromise decree perpetuating mortgage relation-
ship and also giving right to redeem in execution—Dismissal
of execution application as barred by time—Right of
redemption by suit—Civil Procedure Code (V of 1908),
sec. 47—Res judicata—Clog on equity of redemption.*

In a suit by a usufructuary mortgagee for possession and in the alternative for the mortgage money, a compromise decree was passed to the following effect:—(a) that the mortgagor was to pay the mortgage amount in three years and redeem, (b) that, on default, the mortgagee was to take possession in execution, (c) that the mortgagor could, thereafter, pay on the first day in any

* Appeal No. 406 of 1924.

(1) (1914) I.L.R. 41 Cal. 926.

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KELU NAIR. year the mortgage amount and get possession, if necessary, by taking out execution, (d) that till payment within the three years the mortgagor was to be in possession on payment of an annual rent to the mortgagee, (e) that, on default of payment of rent, the mortgagee was to take possession in execution, and (f) that the mortgagor was to be entitled to redeem on payment of the mortgage amount thereafter, on the first day in any year and get possession, if necessary, by taking out execution.

Default in payment of rent having occurred, the mortgagee took possession; and thereafter, viz., more than three years after the decree, the mortgagor filed an application in execution for redemption on payment.

On the mortgagee's objection, the execution application was dismissed as barred by limitation. Then the mortgagor brought this suit for redemption.

Held, upholding the right to redeem, that the compromise decree did not put an end to the relationship of mortgagor and mortgagee, but on the contrary, perpetuated it, which carried with it the right of redemption,

that though it was a decree, it was no better than a contract and did not operate as *res judicata*; and, on the footing that it was a contract, clause (a) above cannot be construed to restrict the mortgagor's right to one of redemption in execution only; for if so construed, it would be void and unenforceable, as a clog on the equity of redemption in that it reduced the time for redemption from 60 years to 3 years,

that the right to redeem in execution being only a privilege in addition to the right of suit, the dismissal of the execution application was no bar to the suit, and

that section 47, Civil Procedure Code, was therefore no bar to the suit; *Sri Raja Papa-ma Rao v. Sri Viri Pratapa H. V. Ramachandra Razu*, (1896) I.L.R., 19 Mad., 249 (P.C.), followed; *Hari Ravi Chiplunkar v. Shapurji Hormasji Shet*, (1886) I.L.R., 10 Bom., 461 (P.C.), explained.

APPEAL from the decree of the Court of the Subordinate Judge of South Kanara in Original Suit No. 56 of 1921.

On 8th December 1892, the second defendant in this suit who was the original owner of the suit properties usufructually mortgaged them to the first defendant for Rs. 27,000. Not having obtained possession, the

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KELU NAIR. mortgagee filed O.S. No. 22 of 1898 for possession in the first instance and in the alternative for realization of the mortgage amount by the sale of the mortgage properties. A consent decree was passed on 2nd January 1899 to the following effect:— (a) that the mortgagor was to pay the mortgage amount, etc., viz., Rs. 31,000, in three years and redeem, (b) that, on default, the mortgagee was to take possession in execution, (c) that the mortgagor could, thereafter, pay on the first day in any year the mortgage amount and get possession, if necessary, by taking out execution, (d) that till payment within the three years the mortgagor was to be in possession on payment of an annual rent to the mortgagee, (e) that in default of payment of rent the mortgagee was to take possession in execution, and (f) that the mortgagor was to be entitled to redeem on payment of the mortgage amount thereafter, on the first day in any year and get possession, if necessary, by taking out execution. The annual rent not having been paid, the mortgagee took possession in 1900. Thereafter, the mortgagor filed an application for execution to obtain possession of the mortgage properties by payment of the Rs. 31,000. On the opposition of the mortgagee this application was dismissed under article 181, Limitation Act, as having been brought more than three years after the consent decree. This was in 1920. In 1921, the High Court confirmed the said order. Thereafter, the plaintiff who succeeded to the mortgagor's rights brought this suit for redemption (O.S. No. 56 of 1921). The first defendant pleaded, *inter alia*, that the mortgagor's right was only to obtain possession in execution, that having failed therein, he had no further remedy, that the previous suit and the decree therein operated as *res judicata*, that section 47, Civil Procedure Code, was a bar to the present suit, and that there was no relationship of mortgagor and

AMBU NAIR v. KELU NAIR. mortgagee. The Subordinate Judge allowed the suit, and the first defendant preferred this appeal.

There were certain intervening proceedings which were as follows:—The original mortgagor created a second mortgage in 1901 in favour of the same mortgagee for Rs. 1,675 on which the mortgagee obtained a decree for sale for about Rs. 6,000 in O.S. No. 44 of 1912 subject to his above usufructuary mortgage and the consent-decree. One Subbaraya Kamathi, obtained a money decree against the mortgagor and purchased the equity of redemption and afterwards sold his rights in the properties to the plaintiff in April 1913. The plaintiff thereupon deposited Rs. 6,115 and redeemed the second mortgage which was a simple mortgage. In 1913 the plaintiff gave notice to the first defendant announcing his intention to redeem the mortgage embodied in the consent decree to which the first defendant replied that he was not aware that the plaintiff had succeeded to the mortgagor's rights but there was no repudiation therein by the mortgagee of the relationship of the mortgagor and mortgagee.

T. Rangachari, B. Sitarama Rao and K. B. Venkatachala Ayyar for appellant.—As the compromise decree is executable, a suit for redemption is barred by section 47, Civil Procedure Code. *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*(1). This suit to redeem is barred by *res judicata* on account of the previous suit though it ended in a compromise decree. No second suit for redemption lies; *Vedapuratti v. Vallabha Valiya Raja*(2), *Ranga Ayyangar v. Narayana Chariar*(3), *Mayankutti v. Kunhammad*(4), *Ellarayyan v. Nagaswami Ayyar*(5). Only if the previous decree is not executable a second suit on the judgment will lie, otherwise not; *Ramasami v. Muthayya Chetty*(6). A compromise decree is not on the same footing as a contract; even illegal terms in a compromise decree are enforceable; *Raja Kumara Venkata Perumal Raja Bahadur v.*

(1) (1886) I.L.R., 10 Bom., 461 (P.O.). (2) (1902) I.L.R., 25 Mad., 800 (F.B.).
(3) (1915) I.L.R., 39 Mad., 896. (4) (1917) I.L.R., 41 Mad., 641.
(5) (1926) I.L.R., 49 Mad., 691. (6) (1924) I.L.R., 48 Mad., 482.

Thatha Ramasamy Chetty(1). Though parties to a mortgage contract cannot as part of that contract stipulate to put an end to the right of redemption, they can do so afterwards; see section 60, proviso of the Transfer of Property Act. *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(2), is distinguishable as there was no executable mortgage decree therein. The only right of this plaintiff under the compromise decree was to execute, which was held barred.

Advocate-General (A. Krishnaswami Ayyar) with *P. Govinda Menon* for respondent.—The compromise decree instead of terminating the relationship of mortgagor and mortgagee has revived it; hence the present suit for redemption of this new mortgage is maintainable. A compromise decree is no better than a contract and illegal terms therein should be ignored; *Nagappa v. Venkat Rao*(3), *Lakshmanaswami Naidu v. Rangamma*(4), *Krishnabai v. Hari Govind*(5), *Great North-West Central Railway v. Charlebois*(6). Hence even if the clause relating to execution in the compromise decree is to operate, it is legally invalid as it would curtail the time for redemption from 60 years to 3 years. Section 60 of the Transfer of Property Act contains no words, such as, "in the absence of a contract to the contrary." Hence a party cannot contract himself out of the right to redeem; *Muhammad Sher Khan v. Raja Seth Swami Dayal*(7), *Sayad Abdul Hak v. Gulam Jilani*(8). The clause is only a clog on the equity of redemption and not any collateral advantage; *Fairclough v. Swan Brewery Company, Ltd.*(9), *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Coy., Ltd.*(10), *Samuel v. Jarrah Timber and Wood Paving Corporation*(11). This case exactly resembles *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(2) and must be governed by it. *Hari Ravji Chiplunkar v. Shapurji Hormasji Shet*(12), is distinguishable in several respects and has been distinguished in a case exactly like this, viz., *Abdul Rajack v. Vaman Ganesh*(13), as a case where the right to redeem was not reserved by the previous decree. Similarly if there had been a decree for sale there will be no further right to redeem. See also *Maina Bibi v. Chaudhri*

(1) (1911) I.L.R., 35 Mad., 75, 82, 91. (2) (1896) I.L.R., 19 Mad., 249 (P.C.).
(3) (1900) I.L.R., 24 Mad., 265. (4) (1902) I.L.R., 26 Mad., 31.
(5) (1906) I.L.R., 31 Bom., 15. (6) [1899] A.C., 114, 124.
(7) (1921) I.L.R., 44 All., 185 (P.C.). (8) (1895) I.L.R., 20 Bom., 677.
(9) [1912] A.C., 565. (10) [1914] A.C., 25.
(11) [1904] A.C., 823. (12) (1886) I.L.R., 10 Bom., 461 (P.C.).
(13) (1921) I.L.R., 45 Bom., 1335.

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Vakil Ahmad(1). The former decision holding that execution was barred by time reserves the right of suit and cannot operate as *res judicata* in respect of this suit for redemption. A decree should be so construed if possible as not to affect the right of redemption. The plaintiff's rights under the compromise were, first, to execute and, secondly, to redeem by suit which was not negatived by it. Only if the consent decree is legal, section 47 will be a bar; otherwise not. The defendant is estopped by his previous conduct in executing the decree on second mortgage of this property when he admitted the existence of this mortgage, which admission continued for over 12 years; *Secretary of State for India v. Krishnamoni Gupta*(2), *Williams v. Pott*(3).

T. Rangachari in reply.—Section 60 of the Transfer of Property Act does not apply to mortgages created by operation of law, such as this; *Vishnu Chintaman v. Balaji Bin Raghuj*(4) holds such mortgages valid. Moreover, the equity of redemption can be extinguished by subsequent agreement; *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Coy., Ltd.*(5).

JUDGMENT.

[After stating the facts their Lordships proceeded as follows:—] There is no repudiation here (in the reply by the mortgagee in 1913) of the allegation that the relationship of mortgagor and mortgagee subsists. It is not alleged that the mortgagor has lost his rights to redeem. These notices were in 1913. It is therefore clear that from 1892 till 1917 there was no question raised that the possession of the mortgagee under the mortgage, dated the 8th of December 1892 and the compromise, dated the 2nd of January 1899, was possession under a subsisting mortgage for Rs. 31,000 which was liable to be redeemed.

The plaintiff in this suit acting under the power conferred by clause (2) of the razinama decree, Exhibit C, deposited Rs. 31,000 in Court and filed an application

for execution praying for re-delivery of possession of the properties. This application was opposed by the mortgagee on the ground that the execution of the decree was barred by limitation. There were other grounds of objections which it is not necessary to consider now. It was contended for the plaintiff who was the first petitioner in the execution application that time began to run only in default of the respondents to deliver possession on the petitioner's depositing the mortgage amount on the Vishu day of any one year they chose within the period of sixty years fixed for redemption under the Limitation Act and that his cause of action only arose when the mortgagee refused to deliver possession on the money being paid. The Subordinate Judge, however, upheld the contention that the application was barred by limitation. As regards the maintainability of a fresh suit to redeem, he did not decide the question. All that he said in paragraph 8 of the judgment was :

“Whether a fresh suit for redemption by the petitioners will be barred by the aforesaid decree is a question which we need not go into at present.”

It appears also from the order, dated the 10th of November 1920, that both the parties wanted the question of limitation to be taken up as a preliminary question. The order is filed as Exhibit I. Against this order an appeal was filed in the High Court and on the 20th of December 1921 the appeal was dismissed and the order of the Subordinate Judge was confirmed. The judgment of the High Court is filed as Exhibit II in the case. The learned Judges held that article 181 was the article applicable to a case like the present, that the starting point of limitation was the date when the right to apply for execution accrued and that the right to apply for execution accrued from the date of the

(1) (1924) I.L.R., 47 All., 250 (P.C.). (2) (1902) I.L.R., 29 Cal., 518 (P.C.).
(3) (1871) L.R., 12 Eq., 149. (4) (1887) I.L.R., 12 Bom., 352.

(5) [1914] A.C., 25.

AMBU NAIR
KRLU NAIR. decree and they preferred to follow the decision of the Bombay High Court in *Maruti v. Krishna*(1) to the decision of the Allahabad High Court in *Ohhedi v. Lulu* (2). The learned Judges observed :

"On our construction of this decree it is not a case of option given to the mortgagors to make payment on successively recurring dates and a number of other cases which have been quoted by the learned vakil for the appellants need not be dealt with by us for that reason."

The learned Judges did not express any opinion as to whether a suit for redemption would be maintainable. This judgment has become final and therefore it has to be taken that the remedy to redeem by way of executing the decree has become barred. The effect of this judgment is that the compromise which is embodied in the razinama decree, Exhibit C, virtually out down the period of redemption from sixty years to three years, if it should be held that executing the decree is the only method by which the mortgagor or his representatives could redeem.

We do not think the razinama decree in O.S. No. 22 of 1898 renders the present suit *res judicata*. There was no adjudication in that suit of any of the questions raised here. We need only refer to the decision of their Lordships of the Privy Council in *Maina Bibi v. Chaudhri Vakil Ahmad*(3). In that case, the heirs of a deceased Mohammadan filed a suit and obtained a decree that, on payment of a certain sum of money they should get possession from the widow who claimed to be in possession in lieu of her decree-debt, and that, if the money was not paid in six months, the suit should be dismissed. They did not pay as directed and several years afterwards filed a suit for possession conditionally and alternatively on payment of the sum.

(1) (1899) I.L.R., 23 Bom., 592. (2) (1902) I.L.R., 24 All., 800.
(3) (1924) I.L.R., 47 All., 250.

The main contention of the appellant before us is AMBU NAIR
KRLU NAIR. that section 47 of the Civil Procedure Code 1908, which corresponds to section 244 of the Act of 1882 and to section 11 of the Act of 1861, bars a separate suit in all cases where the party can execute the decree. Section 47 runs as follows:—

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit."

The contention is that the clause in paragraph 2 of the razinama decree which states that, if the mortgagors pay the kanom amount of Rs. 31,000 mentioned in paragraph 1 of the decree on the Vishu Shankaramana Vaide of any one year in a lump sum, he, the mortgagee, should relinquish his *arwar* right and deliver the said property back to the mortgagors, and that, if he fails to deliver the same in that manner the mortgagor should take possession of it by taking out execution, limits the right to execution, and that, if that right is extinguished, the right of redemption also is extinguished, as a separate suit would not lie. As we pointed out before, so far as the parties to the razinama decree were concerned, they neither at the time of the razinama decree nor for several years thereafter thought that the right of redemption would be barred in three years. Till the execution application was put in in 1920, in the various proceedings, the parties acted on the footing that the mortgage was still subsisting and could be redeemed. It cannot be said that the parties, when they entered into the razinama, agreed that there should be this clog on the equity of redemption, that the right to redeem should be barred in three years, when the law allowed

AMBU NAIR sixty years. Even assuming that they did, it is clear that
KELU NAIR. if such a clause was put in in a mortgage document, it
would be void as a clog on the equity of redemption.

Section 60 of the Transfer of Property Act enacts :

"At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court."

It should be observed here that unlike other sections dealing with mortgages, section 60 does not permit parties to contract themselves out of its provisions. In *Muhammad Sher Khan v. Raja Seth Swami Dayal*(1), the question was whether a clause which suspended the right to redeem was valid. Their Lordships of the Privy Council after referring to section 60 observed :

"The section is unqualified in its terms and contains no saving provision, as other sections do, in favour of contracts to the contrary. Their Lordships, therefore, see no sufficient reason for withholding from the words of the section their full force and effect."

The proviso as regards the right being extinguished by act of the parties has been in several cases held to mean an act done after the mortgage has been entered into, such as, release of the right to redeem or sale. In *Fairclough v. Swan Brewery Company, Limited*(2), Lord MACNAGHTEN observed :

"It is now firmly established by the House of Lords that the old rule still prevails and that equity will not permit any device or contrivance being part of the mortgage transaction or contemporaneous with it to prevent or impede redemption." AMBU NAIR
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It has been argued that the strict rule of the Courts of Equity has been relaxed and reference has been made to *G. & C. Kreglinger v. New Patagonia Meat and Cold Storage Coy., Ltd.*(1). We do not think the rule that you cannot clog the equity of redemption at the time of the mortgage has been affected by this decision. Lord PARKER at page 60 observes :

"If once you come to the conclusion that the parties intended that the property should be reconveyed on payment off of the moneys secured, any provision which would prevent this must be rejected as inconsistent with and repugnant to the true intention. But, on the other hand, if you once come to the conclusion that this was not the real intention of the parties, then the transaction is not one of mortgage at all."

The conclusion which the learned Lord came to has been thus summarised by him :

"My Lords, after the most careful consideration of the authorities, I think it is open to this House to hold, and I invite your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem."

There can be little doubt that the intention of the parties in the present suit, when they entered into the compromise embodied in Exhibit C, was clearly to keep the mortgage alive, that possession was taken under the mortgage and there is nothing to suggest that the parties ever intended that the equity of redemption should be lost if the mortgagor did not repay the mortgage money in three years, for, this is the effect of the clause put in as

(1) (1921) I.L.R., 44 All., 185 (P.C.). (2) [1912] A.C., 565.

(1) [1914] A.C., 25.

AMBU NAIR v. KELU NAIR. to recovery in execution of possession. There can be little doubt that this clause, if interpreted as extinguishing the right to redeem if execution is not taken out within the time limited by law, that is three years, works a great hardship on the mortgagor. It is stated by the Counsel for the respondent that the property is now worth more than a lakh of rupees. Counsel for the appellant says that he is not in a position to give the value of the property. But, having regard to the extent and nature of the property as disclosed in the schedules to the plaint, the income of the property which, even according to the deed of compromise, was considerable and the fact that the mortgagees were willing to lend money on a second mortgage, there can be little doubt that the value of the property at the date of the compromise and at the date when the mortgagor applied for execution by depositing Rs. 31,000 into Court was considerably in excess of the mortgage money.

Even if the decision in *G. & O. Kreglinger v. New Patagonia Meat and Cold Storage Coy., Ltd.*(1) establishes a new principle, we think the proviso to section 60 which refers to the extinguishment of the right by act of the parties must, having regard to the authorities above cited, be an act subsequent to the transaction and it is difficult to see how, when the law has been codified by section 60, which as interpreted by their Lordships of the Privy Council, prevents any party from contracting himself out of it, it is possible to relax the rule on any of the considerations which influenced the Court in the above case. Altered conditions may be a good ground for relaxing a rule of equity but can hardly be a ground for not applying the provisions of a statutory enactment.

(1) [1914] A.C., 25.

It has been argued that, even if the clause in the razinama as to execution was invalid and unenforceable, the fact that that compromise has been made a decree of Court validates the transaction. It should be noted in the present case that all that the Court did was to embody in the decree the terms of the compromise. It is not suggested that there was any adjudication or any enquiry by the Court before the razinama decree was passed. All that the parties consented to is the agreement as embodied in the razinama decree. We do not think in these circumstances the fact that an illegal term in an agreement is by consent of parties embodied in a consent decree could make that term enforceable or could be a defence in a subsequent suit to redeem. We may in this connexion refer to the decision of their Lordships of the Privy Council in *Great North-West Central Railway v. Charlebois*(1). In that case, a term which was *ultra vires* of a company was embodied in a contract and also in a consent decree of Court. It was contended that the fact that the term is embodied in the decree prevented the parties from disputing it. Lord HOBHOUSE in delivering the judgment of their Lordships of the Privy Council observed at page 123 (end):

"But the difficulty is to reconcile an opinion that the contract is *ultra vires* with an opinion that a judgment obtained, as this was, is a binding judgment. The authorities referred to by the Supreme Court do not relate to contracts *ultra vires*. It is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done."

After pointing out that the legality of the act was not one of the points substantially in dispute and that, if that was the subject of a fair compromise in Court, it may make a difference, his Lordship said that a judgment obtained upon such a contract which is *ultra vires*

(1) [1899] A.C., 114.

AMBU NAIR v. K. L. NAIR. cannot be of more validity than the invalid contract on which it was founded.

So far as decrees founded on contracts are concerned, it has always been held that the Court can give relief in a separate suit or in execution proceedings where the terms of the consent decree are against the provisions of any statute. In *Nagappa v. Venkat Rao*(1), a suit was filed by the landlord for arrears of rent and possession. The parties arrived at a compromise and the decree contained a stipulation that if default should be made in payment of rent within the time fixed for payment each year, the lease should be forfeited. Default was made and the plaintiff applied in execution for possession and arrears of rent. It was held that, inasmuch as the decree passed by the Court was a mere adoption of the contract which existed between the parties to it, it was competent to the Court to relieve against the forfeiture under the general provisions of the law.

In *Lakshmanaswami Naidu v. Rangamma*(2), it was held that any terms of a contract which are opposed to public policy are invalid and would not be enforced by the Courts, and that if such terms are embodied in a compromise decree those terms would not be enforced. In this case the compromise decree provided for the sale of an office attached to a temple involving service of a personal nature and entitling the holder to receive emoluments.

In *Krishnabai v. Hari Govind*(3), there was a consent decree passed which created the relationship of landlord and tenant and which contained a clause for forfeiture if the rent was not paid. There was nothing in the decree which provided any relief against the terms

embodied in the decree. The plaintiff filed a suit for possession on the ground that the right to possession which was conferred by the consent decree accrued owing to forfeiture. It was held that, as the consent decree created the relationship of landlord and tenant, the Court could relieve against forfeiture. Sir LAWRENCE JENKINS C. J. after stating that as it was an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when those relations are established by a decree passed in accordance with the agreement, observed :

"It was laid down in *Wentworth v. Bullen*(1), and has since been repeatedly affirmed that 'the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded a command of a Judge' and this in my opinion lends a sanction to the conclusion I have expressed."

BEAMAN J. observed :

"By private agreement, converted into a decree, parties cannot empower themselves to do that which they could not have done by private agreement alone" and referred to *Great North-West Central Railway v. Charlebois*(2).

Applying these principles to the facts of the present case, the position is this. The compromise of the suit on the mortgage, Exhibit A, which is now the foundation of liability did not put an end to the relationship of mortgagor and mortgagee but, on the contrary, affirmed it. The decree perpetuated the relationship of mortgagor and mortgagee and did not dissolve that relationship. It enforced the right of the mortgagor under the mortgage to obtain possession, and provided for the right of the mortgagor getting back possession on payment of Rs. 31,000. The ordinary incidents of that relationship are that, even though a term is fixed for

(1) (1900) I.L.R., 24 Mad., 285.

(2) (1902) I.L.R., 26 Mad., 31.

(3) (1906) I.L.R., 31 Bom., 15.

(1) (1829) 9 B. & C. 840, 850; 109 E.R., 313, 316.

(2) [1899] A.C., 114.

AMBU NAIR redemption by the parties, the party is allowed to redeem
KELU NAIR within the period of 60 years provided by the Limitation Act, and that any provision in the agreement which in effect limits the right to redeem by a clause that the right is to be exercised by execution (which necessarily reduces the period to three years) is as invalid as if there was a clause saying that if the property is not redeemed in three years the property should be lost. This clause was embodied in the decree by consent of all parties. It is, therefore, a case where the parties have done what section 60 of the Transfer of Property Act prohibits. In a suit to redeem, it seems to us to be no defence to state that the sole remedy is the remedy by execution, which remedy the parties had no right to insert as being a clog on the equity of redemption. In this view, section 47 of the Code would not debar the plaintiff from filing a suit to redeem.

We think that, on a proper construction of the compromise decree, the clause that the mortgagor should take possession of the property by executing the decree is not the sole right which the mortgagor has. Unlike a decree for redemption under the Transfer of Property Act, the decree does not say that if money is not paid as stipulated, the right to redeem is lost. What the parties contemplated was that they should be entitled to the benefit of the summary way of getting possession. The fact that the plaintiff does not choose to exercise that right would not deprive him of the larger remedy he has of getting possession by suit. If he had applied within three years by execution to redeem the property, he would have had to pay only a few rupees as stamp duty under the Court Fees Act and he would have got possession on payment into Court of Rs. 31,000. If he wants to have it done by a suit, a very heavy stamp duty of about Rs. 1,492 would have to be paid and, as a

matter of fact, such a stamp duty was paid in the present **AMBU NAIR** suit to redeem. It also appears to us that the existence **KELU NAIR** of that clause would not prevent redemption as the case falls within the decision of their Lordships of the Privy Council in *Sri Raja Papamma Rao v. Sri Vira Pratapa H. V. Ramachandra Razu*(1), where the facts were shortly these:—The plaintiffs sued to redeem a mortgage on the ground that it was discharged by the rents and profits appropriated by the mortgagee. The mortgagors undertook in the mortgage deed to repay a sum of Rs. 2,011 with interest by four annual instalments, mortgaging as security a village belonging to them. The mortgagee sued the mortgagors upon this bond and prayed for a decree directing the defendants to pay the amount then due with interest by means of the mortgaged property. The decree of the District Judge was:

“In accordance with the custom prevailing in the Courts in this Presidency three months’ time will be allowed to the defendants within which to pay up the whole sum now decreed, principal and interest and costs, failing which the plaintiff shall be put in possession of the immovable and movable property specified in the bond sued upon, and in the plaint and schedule, as provided in the terms of the bond.”

We may state in passing that in this case the decree was a consent decree which directed that if the mortgage was not redeemed in three years, the mortgagee should take possession of the properties. Under this decree, the mortgagee took out execution and got possession as the mortgagee in the present case acting under clause 2 of the razinama decree got possession in execution. Then the plaintiffs, mortgagors, filed the suit to redeem alleging that if an account was taken it would be found that the whole mortgage had been discharged by the usufruct. The defence was that, by virtue of the terms of the decree, the property had become the absolute property

of the mortgagee and that it was not competent to the parties to go behind the decree. The Subordinate Judge dismissed the suit on the ground that the mortgage was foreclosed if the money was not paid in three years. On appeal this judgment was reversed by the High Court. Their Lordships of the Privy Council affirmed the decision of the High Court. Lord HOBHOUSE in delivering the judgment of their Lordships of the Privy Council, after referring to the decree of the District Judge and the fact that the decree stands because no appeal was filed against that decree, observed :

"The decree therefore stands and is binding on the parties; and the mortgagee took possession under it. He has since sold the property, but that does not affect the rights of the mortgagor. The question is in what character was the possession taken. If in the character of a mortgagee, the mortgagor had a right to redeem, which was not barred by the time the suit began."

His Lordship, after dealing with the contentions of Mr. Mayne, further observed :

"It is sufficient that the mortgagee, not being entitled to foreclosure, and not asking for it, got a decree which did not purport to work foreclosure. It purported to give possession 'as provided in the terms of the bond'. That was impossible, for there were no such terms; but it purported to do that, and did not purport to put an end to the bond and to the relations of mortgagor and mortgagee altogether. It could, though subject to correction on appeal, give possession, and did so. The mortgagee thereupon became mortgagee in possession; and as such he must submit to be redeemed."

It seems to us difficult to distinguish the facts of the present case from the facts of the case in 19 Mad. referred to above. The decree with which their Lordships were dealing was an executable decree and, for the purpose of section 47, the addition of a clause allowing parties to execute makes no difference, if the decree is *in fact* executable. The test applied by their Lordships is 'what was the character of the possession taken under the decree', and if the character was as mortgagor

and mortgagee, their Lordships hold that the right to redeem followed.

Reference has been made by the appellant's Advocate to *Hari Ravi Chiplunkar v. Shapurji Hormasji Shet*(1), and it was contended that the decision in that case lays down a contrary rule. We do not think the facts of that case are similar to the facts of the case with which we are dealing now. In that case, a suit was filed by the mortgagees to recover their mortgage money by sale and a decree was passed in accordance with the award of arbitrators to the effect that the defendants were to pay in all Rs. 2,396 to the plaintiffs on a date which would be fixed and should redeem the land which till payment was to remain in the possession of the plaintiffs. This state of things continued from September 1825, and in 1877 a suit was filed to redeem. The Subordinate Judge held that the mortgage had entirely merged in the decree and that execution was barred. This judgment was confirmed by the High Court. Their Lordships of the Privy Council held that, as the execution of the decree was barred, no fresh suit for redemption would lie on the rights created by the decree. Their Lordships held that, on the frame of the plaint, the plaintiff could not fall back on a right to redeem the original mortgage, as he, in the plaint, did not seek to redeem the mortgage of 1806, which, on the face of it, would be barred but for some acknowledgment and no such acknowledgment was alleged. Their Lordships left open the question whether, if a proper suit was filed on the original mortgage and an acknowledgment was proved so as to get over the bar of limitation, that suit would be maintainable. In the case before us, the suit to redeem is not barred as it is within 60 years of the date of the mortgage. It is clear from the facts of the

(1) (1886) I.L.R., 10 Bom., 461 (P.C.).

AMBU NAIR case in 10 Bombay 461 that the suit was not a suit to
KELU NAIR. enforce the term of the mortgage as to possession and to
keep the rights of the parties subsisting, but was, on the
contrary, a suit by the mortgagee to get back his money.
In cases where the mortgagee sues to get back his
money, of course the decree fixes the period for payment
and provides either for sale or foreclosure. And the
effect of the decree is to put an end to the relationship
of mortgagor and mortgagee after the period mentioned
in the decree and to substitute new rights created by
the decree. This is clearly brought out by the pro-
visions of the Transfer of Property Act and Order 34,
Civil Procedure Code, which relate to mortgage decrees.

This case has been considered by the Bombay High
Court in *Abdul Rajack v. Vaman Ganesh*(1). That was
a suit to redeem a mortgage of 1874. There was a
previous redemption decree of 1881, the terms of which
were that the plaintiff should pay the defendant Rs. 400
with interest by annual instalments and that, if the
plaintiff failed to pay any instalment, the defendant
should take possession of the land mortgaged and
receive the produce thereof in lieu of interest, and, on
the plaintiff paying the principal amount at the end of
any fasli year, the land belonging to the plaintiff should
be returned to him. It was contended that the suit to
redeem was barred by reason of the previous decree
and reliance was placed on 10 Bombay 461. Sir
NORMAN MACLEOD C.J. observed :

"This case belongs to that numerous class of cases in which
the question arises whether the mortgagor is in effect bringing
a suit to execute a previous redemption decree, or whether he
is seeking to exercise the right to redeem, as a right which was
reserved to him by the previous decree. On the authority of
Hari Raji Chiplunkar v. Shapurji Hormanji Shet(2) if the suit
must be treated as a suit claiming a right to execute the

previous decree, then undoubtedly it must be dismissed. But AMBU NAIR
if it comes within the Full Bench decision of the Court in *Tani* KELU NAIR.
Bagavan v. Haribin Bahavani Dubal(1), then the plaintiff is
entitled to succeed. The decision must depend entirely on the
nature of the decree in the previous suit; and the difficulty in
reconciling the various decisions lies in the fact that the terms
of the previous decree will generally vary, and further the
decision of the question may depend upon whether the previous
suit had been brought by the mortgagor or the mortgagee."

After referring to *Tani Bagavan v. Haribin Bhavani
Dubal*(1), the learned Chief Justice observes :

"It seems to me that in the decree in Suit No. 480 of 1881
the right to redeem was reserved and that the plaintiff is now
entitled to sue for redemption."

Applying this test to the present case, it seems to us
that the compromise decree, far from putting an end to
the right to redeem, was passed on the basis that the
mortgage right should subsist. We are of opinion that,
in any view of the case, the present suit is not barred
by section 47 as contended for by the appellant.

In the view we take, it is unnecessary to consider
the contention raised by the learned Advocate-General
for the respondents as to the defendant being estopped
from contending that the mortgage is not redeemable
by reason of the various proceedings we have already
referred to, or the contention that the decree in the suit
on the second mortgage obtained by the mortgagees on
the basis that the first mortgage was subsisting operates
as *res judicata* or as an estoppel, or the contention that
the mortgagees having admitted for over the statutory
period of twelve years their possession as being posses-
sion under the mortgage a fresh title to redeem arises
irrespective of the compromise decree.

The appeal fails and is dismissed with costs.

N.R.

(1) (1887) I.L.R., 16 Bom., 659.

(1) (1921) I.L.R., 45 Bom., 1335.

(2) (1886) I.L.R., 10 Bom., 461.

APPELLATE CIVIL.

Before Mr. Justice Kumaraswami Sastri and Mr. Justice Pakenham Walsh.

1929,
October 29.

THE IMPERIAL BANK OF INDIA (PLAINTIFF), APPELLANT,

v.

AVANASI CHETTIAR (DEFENDANT), RESPONDENT.*

Surety in respect of a banking account—Information as to extent of customer's past indebtedness to bank—Duty of bank to disclose, if any.

If *A* agrees with a bank to stand surety for *B* for advances to *B*, the bank is under no legal obligation to volunteer to *A* any information as to the extent of *B*'s past indebtedness, which is a matter on which the surety has to inform himself. But if in reponse to *A*'s request, the bank gives false or wrong information, it might vitiate the contract of suretyship.

The general presumption is that a promissory note or bill given for reducing a liability only operates as a conditional discharge until it is honoured. If no intimation was given by the creditor to the debtor that he had appropriated any particular amount sent towards a particular debt, then the creditor is entitled to change and reappropriate it to another debt.

APPEAL against the decree of the Court of Subordinate Judge of South Malabar at Calicut in Original Suit No. 31 of 1924.

The plaintiff (the Imperial Bank of India) filed this suit (originally for Rs. 10,053 which was afterwards reduced to Rs. 8,470) alleging (a) that a firm of Nanchappa Chetti & Co., hereinafter called Nanchappa Chetti, had a current account with the Bank on which he was allowed to overdraw, (b) that the defendant, by a letter, dated 15th March 1923, undertook to be surety to

the Bank for the discharge of all the advances (past and future) that might be due from the said Nanchappa Chetti, to the extent of Rs. 10,000, (c) that in order to cover the said Rs. 10,000 the defendant executed a promissory note in favour of the said Nanchappa Chetti who endorsed it over to the Bank, (d) that the said Nanchappa Chetti thereafter opened a loan account with the Bank, (e) that the sum of Rs. 10,053 remained due to the Bank in the beginning of 1924 both on the current and loan accounts which, in spite of repeated demands on Nanchappa Chetti and the defendant, remained unpaid, and (f) that as the Bank had petitioned to have the said Nanchappa Chetti declared an insolvent, he was not added as a defendant in the suit.

The defendant pleaded *inter alia* (1) that he did not execute the letter of guarantee, (2) that he was not informed of its contents at the time of its alleged execution, (3) that he did not execute the promissory note to cover any such suretyship, (4) that even if he had executed any such letter, it was not for any account then due to the Bank by the said Nanchappa Chetti under his current account, (5) that the Bank did not then inform him of the extent of the amount due under the current account, (6) that his contract of suretyship was therefore vitiated by such fraudulent concealment, and (7) that the Bank having once credited the loan account with Rs. 3,000, the amount of three promissory notes endorsed in favour of the Bank by the said Nanchappa Chetti to whom they were executed by one Govindan Nayar, the Bank was not thereafter entitled to debit Nanchappa Chetti with that amount on account of later dishonour of the notes by Govindan Nayar by non-payment.

The Subordinate Judge found that the defendant executed the letter of guarantee, that by that letter he

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stood surety not for any amount due under the current account, but only for future advances under the loan account, that the Bank after having credited Nanchappa Chetti with Rs. 3,000 was not thereafter entitled to debit him with the said amount, that as the defendant did not stand surety for the amounts due under the current account, the question of fraudulent concealment did not arise, and that after excluding Rs. 3,000 and the liability of Nanchappa Chetti under the current account, the amount due to the Bank was only Rs. 2,334. A decree was accordingly given for Rs. 2,334.

The plaintiff filed this appeal for the balance.

S. Duraiswami Ayyar for appellant.—The defendant executed the letter of guarantee and thereby stood surety not only for future advances but also for past advances. Section 148 of the Contract Act only reproduces the English Law and lays down no further liability on the Bank. Under the English Law there is a difference between fidelity guarantees and those given to secure a banking account. Under the latter a banker is not bound to give to the surety any information as to customer's past indebtedness unless asked for, though if he gives false or wrong information, the contract of suretyship will be vitiated; see *Hamilton v. Watson*(1), *The North British Insurance Coy. v. Lloyd*(2), *London General Omnibus Coy., Ltd. v. Holloway*(3), *National Provincial Bank of England, Ltd. v. Glanusk*(4), *Wythes v. Labouchere*(5), *Balkrishna V. N. Kirtikar v. The Bank of Bengal*(6), *Rowlatt on Principal and Surety*, 2nd edn., page 158. A promissory note given in discharge of a debt is only a conditional payment. If it is dishonoured, the creditor can sue on the original debt; *Jambu Chetty v. Palaniappa Chettiar*(7), *Palaniappa Chetty v. Arunachellam Chetty*(8). If the creditor has not communicated to the debtor that he had appropriated a sum sent by the debtor towards any particular

debt, he can change and appropriate it towards another debt; *Cory Brothers & Co. v. Owners of Turkish Steamship "Mecca"*—The "Mecca"(1), *Chegganmull Sowcar v. Manicku Mudaliar*(2).

K. P. M. Menon for respondent.—The guarantee was only for future advances. There is no difference between fidelity contracts and contracts of guarantee in respect of banking accounts. The question in each case is whether there is evidence to go to the jury that non-disclosure of past liability amounts to concealment of a material fact or not; *Lee v. Jones*(3), and *Railton v. Mathews*(4).

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JUDGMENT.

[After stating the facts and holding that the letter of guarantee was given to cover not only future advances but also past advances, and that the defendant signed it knowing its contents, their Lordships proceeded as follow:—] The first question is whether in respect of these three promissory notes the Bank was entitled to make an entry in the current account debiting the amount when the bills were dishonoured. There can be little doubt that these notes were endorsed over to the Bank in order that credit may be given in the account for the amount of the bills and the Bank took them upon the expectation that the moneys would be paid by Govindan Nayar. When they were not paid, the Bank had a right to make the entries. It is not suggested that the Bank treated them as complete discharge. The general presumption is that a promissory note given for reducing a liability only operates as a conditional discharge of the liability. We need only refer to *Palaniappa Chetty v. Arunachellam Chetty*(5) and the judgment of BHASHYAM AYYANGAR J. in *Jambu Chetty v. Palaniappa Chettiar*(6). As regards the right to

(1) (1846) 12 Cl. & F. 109; 8 E.R., 1339.

(2) (1854) 10 Ex., 523; 156 E.R., 545. (3) [1912] 2 K.B., 72.

(4) [1913] 3 K.B., 385.

(5) (1859) 3 De. G. & J., 593; 44 E.R., 1397, 1403.

(6) (1891) 1 L.R. 15 Bom., 585, 593. (7) (1902) 1 L.R., 20 Mad., 526.

(8) (1911) 21 M.L.J., 432.

(1) [1897] A.C., 286.

(2) (1925) 50 M.L.J., 212.

(3) (1864) 17 O.R. (N.S.), 482; 144 E.R., 194.

(4) (1844) 10 Cl. & F., 934; 8 E.R., 993.

(5) (1911) 21 M.L.J., 432.

(6) (1902) 1 L.R., 26 Mad., 526.

reappropriate, it is clear in this case that no intimation was given to the surety of the first appropriation and therefore the Bank, when they sent a letter through their vakil, had a right to reappropriate the amount. This is clear from the decision in *Cory Brothers & Co. v. Owners of Turkish Steamship "Mecca"*—*The "Mecca"* (1) and *Ohegganmull Sowcar v. Manicka Mudaliar* (2), where it was observed that so long as notice had not been given as to the appropriation of any amount to any particular account, it is open to the creditor to alter it and make reappropriation. If the defendant is liable, he is liable also for the amount of the promissory notes accepted as conditional payment by the Bank, which were dishonoured and on being dishonoured corresponding debits were made by the Bank in the account.

Then the last question is as regards the guarantee not being enforceable owing to concealment of facts. In this connection, reference is made to section 143 of the Contract Act which runs as follows:—

"Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid."

It is argued that the material circumstance in this case is that the fact that at the date of the guarantee letter, Exhibit A, about Rs. 5,000 was due by the firm already to the Bank was not disclosed, and that on account of this non-disclosure the contract of indemnity is not enforceable. It is not disputed that on the date of Exhibit A the amount which was due by Nanchappa Chetti under the current account was not mentioned; and the question is whether such non-mention vitiates the contract of indemnity. We have already given our reasons for holding that Exhibit A, the letter of guarantee, covers past indebtedness also and that this

fact was within the knowledge of the defendant when he signed it. The evidence of the defendant, who is the only witness examined on his behalf, does not touch any of the questions which were argued before us. In his evidence he says that he executed Exhibit B and that he also signed another and then he signed in Exhibit C and that P.W. 2 did not explain to him any document. This has been disbelieved. He refers to copies of letters Exhibits IV to VI, VIII and XI and the originals Exhibits XV series. He then says that N. Nanchappa Chetti & Co. became insolvents and he and some others filed a petition for declaring them insolvents, that he has mentioned in paragraph 3 of that petition the amount he was liable to pay to the Bank for the firm, which figure he got from a letter of the Bank, that the other figure Rs. 2,823-9-0 mentioned in the petition was also taken from a letter of the Bank and that, if the Bank had given the amount of both the accounts, he would have mentioned the whole amount. This really does not touch any question of estoppel. There is, therefore, no statement of the defendant that if he had been informed of this already existing debt of Rs. 5,000 he would not have signed the letter of guarantee. We must, therefore, treat the argument as being that there is a duty cast on the Bank to disclose the past indebtedness under the current account of N. Nanchappa Chetti irrespective of the defendant's knowledge, and we are asked to presume that that duty not having been performed the guarantee is invalid. We do not think that the authorities cited by Mr. Menon lead to this conclusion. The balance of authority is that there is a difference between fiduciary guarantees and guarantees by persons in favour of banks and that though, in the former case, there may be a duty to disclose all material facts, there is no such duty in the case of a Bank which takes a guarantee

(1) [1897] A.C., 288.

(2) (1925) 50 M.L.J., 242.

from a person to disclose the indebtedness of the person guaranteed at the date of the guarantee. In *Hamilton v. Watson*(1), it was held by the House of Lords that a surety is not of necessity entitled to receive, without enquiry, from the party to whom he is about to bind himself, a full disclosure of all the circumstances of the dealings between the principal and the party and that, if he wants to know any particular matter, he must make it the subject of a distinct enquiry. The learned Judges who took part in this decision were Lord LYNDHURST L.C., Lord BROUGHAM and Lord CAMPBELL. In *The North British Insurance Company v. Lloyd*(2), it was held that the rule which prevails in assurance upon ships and lives that all material circumstances known to the assured must be disclosed, though there be no fraud in the concealment, does not extend to the case of guarantees and that in the latter case, the concealment, to vitiate the guarantee, must be fraudulent. In *Wythes v. Labouchere*(3), a similar view was taken. In that case, Lord CHELMSFORD observes as follows:—

“I will consider the question of concealment solely upon the footing of the duty of the defendants towards the plaintiff as surety. It must of course be conceded that if the plaintiff had applied to the bankers, and they had given him a false account of the transactions between them and M'Gregor, the plaintiff would be entitled to be relieved from his suretyship. But not only was there no application to the defendants by the plaintiff, but they never came into communication with each other directly or indirectly in the transaction. Was there under these circumstances any legal, or I would add, any moral obligation upon the bankers, when they learnt that the plaintiff was willing to become security to them for a large advance to M'Gregor, to search for him and warn him against the danger of such a step, by communicating the condition of his old

account, the security which they had taken, and the circumstances connected with the Parliamentary qualification? No case which has been cited goes this length or near it. Indeed the case of *The North British Insurance Company v. Lloyd*(1), expressly decides that the obligation of the creditor to communicate even material circumstances that are known to him is not co-extensive with the rule which prevails in insurance upon ships and lives; and that unless the non-disclosure amounts to a fraud upon the surety, he is not entitled to relief.”

These cases have been considered in *London General Omnibus Company, Limited v. Holloway*(2), where it was held that suretyship for the fidelity of a servant is distinct from a guarantee in respect of a banking account. In that case FARWELL L.J. observes:—

“There is a wide distinction between a case like the present and the cases which have been cited of guarantees for overdrafts given to bankers, such as *Hamilton v. Watson*(3) and *Wythes v. Labouchere*(4)”

and he points out the difference. He further observes:—

“No surety asked to guarantee a banking account is entitled to assume that the customer of the Bank has not been in the habit of overdrawn; the proper presumption in most instances is that he has been doing so, and wishes to do so again. That is a legitimate carrying on of business, and that is what the surety is asked to guarantee.”

KENNEDY L.J. observes:

“On the other hand in the case of the suretyship or guarantee of a financial account, the previous pecuniary dealings between the creditor and the person whose future liability the surety is invited to secure, constitute only extrinsic circumstances. They may be material circumstances such as might affect the judgment of the person who is asked to be surety. But in the language of Sir Frederick Pollock (*Principles of Contract*, 8th Edn., page 568) ‘the creditor is not bound to volunteer information as to the general credit of the debtor or anything else which is not part of the transaction itself to which the

(1) (1854) 10 Exch., 523; 156 E.R., 545. (2) [1912] 2 K.B., 72.

(3) (1845) 12 Cl. & F., 109; 8 E.R., 1389.

(4) (1859) 8 De. G. & J., 593; 44 E.R., 1397.

(1) (1845) 12 Cl. & F., 109; 8 E.R., 1389.

(2) (1854) 10 Ex., 523; 156 E.R., 545.

(3) (1859) 8 De. G. & J., 593; 44 E.R., 1397.

suretyship relates, and on this point there is no difference between law and equity. The bank or other creditor cannot reasonably be taken as affirming by mere silence respecting earlier dealings, the financial ability of the person whom the proposed surety is asked to guarantee'".

Then the learned Judge quotes with approval a passage from Mr. Justice ROWLATT's work on Principal and Surety, 1st Edn., page 155. At page 154, 1st Edn. (page 158 in Second Edition), the following passage occurs:—

"A guarantee will fail if the creditor misrepresents to the surety the state of accounts between the principal and himself. But a surety proposing to guarantee a banking account should inquire whether there is any adverse balance already existing; he is not entitled to assume there is not."

So far as the Indian cases are concerned, in *Balkrishna V. N. Kirtikar v. The Bank of Bengal*(1), Sir CHARLES SARGENT C.J. and BAYLEY J. took a similar view and held that the expression "keeping silence" in section 143 of the Contract Act "clearly implies intentional concealment as distinguished from mere non-disclosure" and "the withholding must be fraudulent," as necessarily is "the case when a material circumstance is intentionally concealed". This case, so far as we are aware, has not been dissented from and is on a line with the English cases we have referred to. It is contended by Mr. Menon that there is no difference between fidelity contracts and contracts of guarantee in respect of banking accounts, that some eminent English Judges have dissented from the view that there should be any such difference and that in each case the question is whether there is evidence to go to the Jury to say that the non-disclosure of the past liability which was existing at the date of the

(1) (1891) I.L.R., 15 Bom., 595.

guarantee amounts to concealment of a material fact or not; and *Lee v. Jones* (1) is referred to. In that case there was a difference of opinion; CROMPTON J., CHANNELL B., BLACKBURN J. and SHEE J., taking one view and POLLOCK C.B. and BRAMWELL B. taking another view. We may state that BLACKBURN J. refers to the decision in *Hamilton v. Watson*(2), and notes the distinction between the contracts referred to. He says:

"Now whether the handing the agreement by the plaintiffs to the defendant amounted to an inaccurate representation or not, depends, as I think on the question whether in such a transaction as that described in the agreement, it might or might not naturally be expected that the masters might have allowed a balance of this extent to accumulate, and might have allowed the account to stand over unsettled for so long a time. In *Hamilton v. Watson*(2), the transaction was a security for a banker's cash account, and the decision of the House of Lords was that, in such a case, it might be so naturally expected that the proposed principal had already overdrawn his account, that there was no evidence of a representation that he had not."

Although SHEE J. took the view that there was no difference in principle between the contracts and that the question in the case was whether there was evidence for the jury to say that the suppression was material POLLOCK C.B. and BRAMWELL B. took the opposite view. Reference was also made by Mr. Menon to *Railton v. Mathews*(3), where the judges were of opinion that undue concealment need not be wilful or intentional with a view to the advantages the employers were thereby to gain, but it was sufficient if it was material. This case related to a fidelity contract. A party became surety in a bond for the fidelity of a commission agent to his employers. The commission agent was entrusted with the property of his employers.

(1) (1864) 17 O.B. (N.S.), 482; 144 E.R., 194.

(2) (1845) 12 Cl. & F., 109 at 118; 8 E.R., 1389.

(3) (1844) 10 Cl. & F., 984; 8 E.R., 993.

The employers discovered irregularities in the agent's accounts and put the bond in suit. The surety then instituted a suit on the ground of concealment by the employers of material circumstances. It was held by the House of Lords that mere non-communication of circumstances affecting the situation of the parties, material for the surety to be acquainted with and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional or with a view to any advantage to himself. We think that the balance of authority is clearly in favour of the view that where a person stands surety for another as regards an advance to be made by a bank, the bank is under no obligation to disclose any past indebtedness existing at the date of the contract or suretyship and that it is a matter on which the person standing as surety has to inform himself. If, of course, he wanted information and the bank gave wrong information, it might vitiate the contract of suretyship. In the present case the defendant did not require any information as to the state of the account between the firm and the Bank on the date of the suretyship. There can, therefore, be no question of the guarantee being invalid because of the non-disclosure by the Bank that about Rs. 5,000 was due. Further, the defendant does not plead this in his written statement as a ground; he does not state that if he had been aware of this fact he would not have become surety. Even assuming that in every case it is for the jury, there is nothing in the evidence which would enable the jury to hold that if the defendant had been told that Rs. 5,000 was due by the firm he would not have stood surety. We find that Rs. 7,000 went in discharge of the indebtedness under the current account under which money was already due by the firm.

[Their Lordships then dealt with the question whether the plaintiff was estopped from holding the defendant liable for past transactions and for the Rs. 3,000, and, deciding it in the negative on the evidence in the case, concluded as follows:—]

We do not think that the decision of the Subordinate Judge can be supported on any of the grounds stated by him. The decree of the Subordinate Judge is set aside and, in lieu thereof, there will be a decree in favour of the plaintiff for Rs. 8,470-10-7 with interest at 6 per cent from the date of the plaint to the date of payment with costs in this and the lower Court on the entire amount decreed.

The Subordinate Judge's decree allowing any costs to the defendant will be set aside.

[The case having been set down for being spoken to on a later date, the Court made the following ORDER:—]

Credit will be given for the amounts already collected and no interest will run on the amounts collected.

Moresby and Thomas: Attorneys for appellant.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice
Madhavan Nair.

1929,
August 21.

KEMGAM SWAMY AND OTHERS (COUNTER-PETITIONERS),
APPELLANTS,

VADDADI SUBBAMMA AND OTHERS (PETITIONERS AND
COUNTER-PETITIONERS), RESPONDENTS.*

Suit for land and past mesne profits—Suit after Civil Procedure Code of 1908—Decree for possession stating “mesne profits to be determined by inquiry in execution proceedings”—Application for execution of decree for past and future mesne profits—Mesne profits, whether directed by decree—Contravention of O. XX, r. 12, effect of—Decree as to mesne profits, whether void for want of jurisdiction—Irregular exercise of jurisdiction—Future mesne profits, whether granted by decree—Construction of decree.

In a suit for the recovery of possession of immovable property and for past mesne profits, instituted after the Civil Procedure Code of 1908, the Court passed a decree, as regards mesne profits, in the following terms: “The mesne profits will be determined by a separate inquiry in execution proceedings.” On the decree-holder filing a petition for execution for the ascertainment of past and future mesne profits, the judgment-debtor objected, *inter alia*, that the decree did not award mesne profits, that, even if it did, the direction for ascertainment in execution proceedings was passed without jurisdiction and void as being in contravention of Order XX, rule 12 of the Code of 1908, and that, in any event, the decree did not award future mesne profits;

Held, (1) that the decree awarded mesne profits by necessary implication;

* Appeal against Order No. 432 of 1927.

(2) that, though the decree of the Court, directing the ascertainment of mesne profits in execution proceedings and not in the course of the suit, was in contravention of the provisions of Order XX, rule 12 of the Code of 1908, it was not passed without jurisdiction and was, therefore, not void, but was passed in an irregular exercise of jurisdiction and could be given effect to; *Lakshmibai v. Ravji*, (1928) 31 Bom. L.R., 400, followed;

(3) that the decree must be deemed to have awarded future as well as past mesne profits, even though there was no prayer in the plaint for future mesne profits; the alteration in the language of Order XX, rule 12 of the Code of 1908, from the corresponding provision of the Code of 1882, did not affect the power of the Court in awarding future mesne profits; *Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal*, (1881) I.L.R., 8 Cal., 178 (P.C.), referred to; and

(4) that the petition for execution must be treated as an application in the suit under Order XX, rule 12 of the Code; *Ramachandra Raju v. Sri Raja Bhujanga Rao*, (1923) 46 M.L.J., 46, followed.

APPEAL preferred against the order of the District Court of the Subordinate Judge of Vizagapatam in Execution Petition No. 36 of 1927 in Original Suit No. 28 of 1928.

The material facts appear from the judgment of VENKATASUBBA RAO J.

T. Rangachari (with him *V. Govindarajachari*) for appellant.—The decree contains no direction to pay any mesne profits. Even if the decree be deemed to contain such a direction, it directs the inquiry to be made in execution; the direction is in contravention of Order XX, rule 12, Civil Procedure Code, 1908, and the decree, as regards mesne profits, is one passed without jurisdiction and is void. The inquiry as to mesne profits should be directed to be made by proceedings in the suit and not in execution proceedings, under the Code of 1908.

Where there is no direction to pay mesne profits in the decree, the Court cannot order payment in execution proceedings, *Kalka Singh v. Paras Ram*(1), *Sadasiva Pillai v. Ramalinga Pillai*(2).

(1) (1894) I.L.R., 22 Cal., 434 (P.C.)

(2) (1875) 2 I.A., 219.

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Pramada Nath Roy v. Secretary of State for India(1) is distinguishable, as there was a direction in the decree itself for payment of mesne profits. In any event, future mesne profits are not awarded by the decree. The plaint did not ask for it, but only for past profits. The present application for execution is not maintainable; the application must be in the suit as required by Order XX, rule 12, even though the decree directs it to be ascertained in execution. The present application is barred by the rule of *res judicata*.

G. Lakshman (with him *Y. Suryanarayana* and *B. V. Ramanarayan*) for respondents.—As regards future mesne profits, under both the old Codes of 1859 and 1882, as well as the Code of 1908, the Court can grant future mesne profits, whether plaintiff asked for future profits or not. Unless the plaint or decree cuts them down, future mesne profits are awardable. See *Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal*(2). Future mesne profits are included in the expression "mesne profits", if it is not expressly limited in the decree to past mesne profits.

If a Court passes a decree directing inquiry into mesne profits in execution and not in proceedings in the suit, in contravention of Order XX, rule 12, the order is not void for want of jurisdiction, but it is only an irregular exercise of jurisdiction. See *Lakshmibai v. Ravji*(3). The application in execution should be treated as an application in the suit. See *Ramachandra Raju v. Sri Raja Bhujanga Rao*(4).

T. Rangachari in reply.—If there is a direction in the decree for payment of mesne profits, then alone mesne profits may be ascertained and awarded, not when there is no such direction as here.

As for awarding future mesne profits, the plaint does not ask for them but only for past mesne profits. There is a difference in the language of Order XX, rule 12 the Code of 1908 and that of sections 211 and 212 of the Code of 1882. Under the old Code if the suit was for land (without more) only future and not past mesne profits, could be given; if the suit was for land and past profits, future profits also could be given. Under the Code of 1908, only in suits for land and mesne profits, can past and future profits be given; in suits for land only, no

(1) (1926) I.L.R., 53 Cal., 992.

(3) (1928) 31 Bom. L.R., 490.

(2) (1891) I.L.R. 8 Cal., 178 (P.C.).

(4) (1923) 46 M.L.J., 41.

past or future profits can be given; in suits for land and past profits, no future profits can be given. See 8 Cal., 178 at 189.

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JUDGMENT.

VENKATASUBBA RAO J.—The point arises in execution: Is the plaintiff entitled to mesne profits under the decree? The learned Subordinate Judge has upheld the plaintiff's claim and the correctness of his order is called in question in this appeal.

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A few facts may be stated. The plaintiff, who was a minor at the date of the suit, claimed her deceased husband's properties from the defendants, who were alleged to have been in unlawful possession. Her husband died in 1913 and the suit was filed in 1919. Judgment was delivered for the plaintiff on the 10th February 1922, directing delivery of possession of certain immovable properties. The judgment contains a further direction which is now material. It runs thus:

"The mesne profits will be determined by a separate enquiry in execution proceedings."

An appeal—A.S. No. 220 of 1922—was taken to the High Court and in 1925 the judgment of the trial Court was confirmed subject to a slight modification, which I need not notice.

The plaintiff applied to the lower Court (on 6th April 1927) by way of execution of the decree, for mesne profits *past and future*; in other words, she filed an execution petition claiming those profits. The learned Subordinate Judge, as I have said, has made an order, dated 13th October 1927, in her favour. The appellants attack that order on five distinct grounds, and I shall proceed to deal with each of them.

It is first contended that there is no effective decree in respect of mesne profits capable of execution but the direction to which I have referred awards profits by necessary implication. The order directing enquiry

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into mesne profits necessarily involves an award of those profits; for, why should there be an enquiry unless the profits were assumed to have been awarded? The decree must be construed in a reasonable sense and, as Mr. Lakshmananna for the first respondent points out, should a different view be taken, the direction in the decree would be entirely futile. This is a result that every Court must avoid if possible.

It is next contended that, under the Code of Civil Procedure, it was in excess of the Court's powers to direct an enquiry into profits in execution proceedings. On this point, the present Code, departing from the previous one, clearly lays down that mesne profits should be awarded by the decree itself, implying that the enquiry should not be postponed to the stage of execution. But, unfortunately, Courts in the mufassal frequently frame their decrees, as if the old Procedure Code is still in force in this respect and this repeatedly leads to trouble. While deploring this practice, we must still ask ourselves, is it a question of complete want of competency, or, of erroneous exercise of jurisdiction? The distinction between absence of jurisdiction and irregular exercise of jurisdiction has been frequently pointed out. If the Court fails to conform to the provisions of Order XX, rule 12, it is impossible to hold that the defect is one of inherent incompetency. I agree with *Lakshmibai v. Ravji*(1), and hold that, if a Court passes an order in contravention of that provision, it is not a nullity owing to total want of jurisdiction. That the Court is competent to award mesne profits cannot be doubted, but, in exercising that undoubted jurisdiction, it adopts a wrong procedure. Thus, it is a case of mere irregular exercise of jurisdiction.

(1) (1928) 31 Bom. L.R., 400.

and from this it follows that the executing Court cannot go behind the decree to which it is bound to give effect, in execution. If *Ganga Prasad Dutt v. Hemangini Debi*(1) takes a different view (which I doubt), I respectfully dissent from it.

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The third objection of the appellants relates to the form of the proceeding. They contend that, notwithstanding the error in the decree, the application for an enquiry into mesne profits should have been made in the suit itself. As the plaintiff filed instead an execution petition, it is urged that it is incompetent. This contention receives support from *Ramachandra Raju v. Sri Raja Bhujanga Rao*(2). But, as on the facts of this case no further point is involved such as limitation, it is clearly open to the Court to allow a mistake of this kind to be repaired and treat the petition as an application in the suit. This is the view of the learned Subordinate Judge and I unhesitatingly accept it. Moreover, as he points out, when the parties came to Court on a previous occasion, the defendants objected that the plaintiff should seek relief by filing an execution petition. Apart from the inconsistency involved in their position, I am satisfied that the present contention must be rejected.

The fourth objection, namely, that the application is barred by *res judicata*, is equally untenable. The facts that bear on this point may be briefly stated. There was a previous petition filed by the plaintiff for an enquiry into mesne profits and for the passing of a final decree (E.A. No. 1120 of 1926). This is precisely what is contemplated by Order XX, rule 12 of the present Code. Such a petition pre-supposes that the request is made in the suit itself and not in execution.

(1) (1917) 37 I.C., 997.

(2) (1923) 46 M.L.J., 46.

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But the decree having followed the old Code, the plaintiff's application, though, as I have said, it must be deemed to have been made in the suit, was wrongly described as one in execution; that is, it was called an "E.A." (Execution Application). To this, objection was taken by the judgment-debtors, namely, that the heading should have been not "E.A." but "E.P." Rule 3 of the Civil Rules of Practice says thus:—

"(4) Execution petition means a petition to the Court for the execution of any decree or order.

(5) Execution application means an application to the Court made in a pending execution petition."

The form adopted by the plaintiff is that prescribed by rule 149 which deals with Execution Applications. The chief feature, on the other hand, of an Execution Petition, as is well known, is the tabular form referred to in Order XXI, rule 11, Civil Procedure Code. The objection that was urged, as I have pointed out, was that the heading should have been "E.P." and not "E.A." An objection more plausible might have been taken, namely, that the plaintiff's request conformed to the present Code, whereas the decree was framed under the repealed provision. But it must be noted that this seemingly valid objection was not the one taken. But the objection raised was upheld by the Court and the following order, dated 22nd March 1927 was made:—

"As admitted by the decree-holder's vakil an E.P. is necessary and this petition is not maintainable. The petition is rejected."

The above order becomes intelligible when it is remembered that "E.P." is used in it, as distinguished from "E.A." Every one concerned missed the substance of the thing and it is now said that this order operates as *res judicata*. The previous order decided nothing beyond stating what the form of the petition was to be. As I have pointed out in dealing

with objection No. 3, the order itself was misconceived, for what the plaintiff was competent to file, was not an E.P. but a petition in the suit itself. Be that as it may, I fail to see how the previous order can possibly bar the present application. There was no decision in any sense on the merits and in such circumstances, as held in the case already referred to, *Ramachandra Raju v. Sri Raja Bhujanga Rao*(1), the rule of *res judicata* cannot apply.

The fifth objection of the appellants now remains to be dealt with. Mr. Rangachari, on their behalf, contends that in any event the plaintiff cannot, under the decree as it stands, obtain mesne profits subsequent to the suit. There is some force in what Mr. Lakshmanan suggests that this objection is a clear afterthought; for, certain previous proceedings show that the defendants, equally with the plaintiff, understood the decree as granting both past and future profits. But still the question is, what is the true construction of that decree? In the plaint, the claim was confined to past mesne profits and the relief was valued with reference to such profits only. The lower Court refers, *inter alia*, to the fact that the plaint contains a prayer in general terms, "that the Court may grant such other relief as it deems fit and reasonable." On this circumstance, I do not propose to rely. The decree, however, relates to mesne profits generally. The question is, what is the rule applicable to the construction of such a decree?

The leading case on the point is the decision of the Privy Council in *Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal*(2). In clear and unequivocal terms, their Lordships declared:—

"that possession with wasilat (mesne profits) means wasilat up to the time of possession being delivered."

(1) (1923) 46 M.L.J., 46.

(2) (1881) I.L.R., 8 Calc., 178.

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The reasoning adopted is this. Whether the plaint contains or not a claim to future profits, the power to grant them vests in the Court. Subsequent profits, as the very term implies, are profits accruing subsequent to the institution of the suit. There is no cause of action as regards such profits at the time of the filing of the plaint. It is by virtue of a special provision that such profits can be claimed or awarded. (See *Bhupendra Kumar Chakravarty v. Purna Chandra Bose*(1). This is an exception to the general rule that the relief granted is confined to rights accruing before the date of the suit. The Legislature has expressly enabled the Courts to grant such relief with the beneficent object of preventing unnecessary litigation. Therefore, the Court must, while passing the decree (unless a contrary intention is manifest) be deemed to have exercised its powers to the full, for, otherwise, its decree fails to give effect to what is plainly the intention of the Legislature. Their Lordships observe:—

“Wasilat by law is demandable up to the time of possession; and the question is whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is that the Court, with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession.”

(1) (1910) I.L.R., 43 Calc., 650, 655.

“Their Lordships next cite two cases and to one of them I shall refer. In *Dhurm Narain v. Bandhoo Ram* (1), in the plaint, mesne profits were claimed only up to the date of the institution of the suit. The decree passed was “one for possession of land with wasilat.” The question arose in execution, just as in the present case, is the plaintiff entitled to subsequent mesne profits? JACKSON J., with whom MARKBY J. concurred, stated the law thus:—

“When the Court in its decree ordered that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive such mesne profits down to the date of the delivery of possession.”

In short, the decree, when it awards mesne profits without qualifying words, must be construed to have granted past as well as subsequent profits. The case relied on by Mr. Rangachari, *Sadasiva Pillai v. Ramalinga Pillai*(2), does not militate against this view, for, what it lays down is that, if future profits are not awarded by the decree, the Court cannot grant them in execution. This is not a case bearing on the construction of decrees relating to mesne profits. As a matter of fact, this was one of the cases relied on for the appellant in the course of the argument in the case already cited *Fakharuddin Mahomed Ahsan v. Official Trustee of Bengal*(3). Their Lordships explain that case by observing that there the decree was silent on the subject of wasilat and it could not therefore be added in the course of the execution. (See page 190.) That ruling throws no light on the construction of the decree which says “possession with wasilat,” which, upon a reasonable construction, means “wasilat up to the time of possession being delivered.” Mr. Rangachari has

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(1) (1869) 12 W.R., 75.

(2) (1875) 2 I.A., 219.

(3) (1881) I.L.R., 8 Calc., 178.

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been at pains to distinguish this case (8 Calc. 178) on the ground that the decree was construed with reference to the particular plaint before the Court. In that case, as in this, mesne profits were claimed only up to the date of the suit. Similarly, there, as here, in valuing the relief, only past profits were taken into consideration. But the suit was described as brought to obtain possession of the zamindari "and the mesne profits thereof," that is, mesne profits generally. Their Lordships in the earlier part of their judgment observe that the plaint is capable of being construed as containing a comprehensive claim for mesne profits. Their Lordships recognize that this is too slender a ground for resting their judgment on and they therefore begin their discussion on the subject, with the significant words "but be that as it may" (see page 189). The view I am taking receives support from *Pramada Nath Roy v. Secretary of State for India*(1), especially the judgment of CUMING J. in that case. (For the learned Judge's observations on this point, see (1927) A.I.R., Calc., 182 at 183 and 184. The report in 53 Calc., 992, does not contain the relevant passages).

Mr. Rangachari next contends that, unless there is an express prayer for subsequent profits, they cannot be awarded under Order XX, rule 12 by the decree. He argues that this result follows from the wording of the present section, which, it is said, is different from that of the repealed provisions. I cannot accede to this contention. Such difference as exists in the language is due solely to the fact that the subject-matter of two sections in the previous Code (sections 211 and 212 of the Code of 1882 and sections 196 and 197 of the Code of 1859) was condensed into the limits of one section in the

(1) (1926) I.L.R., 53 Calc., 992.

present Code. Moreover, even as a matter of strict construction, a suit for past mesne profits is surely a suit for mesne profits (under Order XX, rule 12); for the words "mesne profits" include past profits. I am, therefore, clearly of the opinion that the lower Court's conclusion is right.

The result is that the appeal is dismissed with costs and the Memorandum of Objections is also dismissed, but I make no order as to costs.

MADHAVAN NAIR J.—This appeal arises out of execution proceedings. The decree-holder-respondent instituted O.S. No. 28 of 1919 in the Sub-Court, Vizagapatam, for possession of properties with mesne profits. In the plaint—see paragraph 3 (h)—she claimed specifically past profits from 1914 to 1919. The plaint was silent regarding future mesne profits. In the schedule relating to the valuation of the suit for purposes of Court-fee and jurisdiction, the amount of past profits for the years 1914 to 1918 was included as one of the items. The Subordinate Judge passed a decree in the plaintiff's favour. The relevant portion of the decree is as follows:—

"This Court doth order and decree that the plaintiff do recover possession of the suit properties described in Schedules A and B except items 9, 14, 16 and 19 of the Plaint A Schedule hereto attached. It is further ordered that the mesne profits be determined by a separate enquiry in execution proceedings."

On appeal (A.S. No. 220 of 1922), this decree was affirmed with a slight modification by the High Court on 31st July 1925. It was found that the plaintiff was entitled to recover a portion of item 16 also. The judgment of the High Court referring to this modification is as follows:—

"The decree of the lower Court will, therefore, be amended by reading for "Item 16," "the portion of item 16 covered

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by Exhibit XIX." The lower Court directed that mesne profits should be determined separately in execution. As regards this No. 16 it will be for consideration when mesne profits are determined whether the plaintiff should be given mesne profits from this date or from the date of the decree or from any other date, seeing that he neglected to make this application earlier."

The application, out of which this appeal arises, was made by the decree-holder for the ascertainment of past and future mesne profits. The lower Court passed an order in her favour. On appeal, Mr. Rangachariar contends that the respondent is not entitled to claim any amount by way of mesne profits as *no decree* for profits, either past or future, has been passed in her favour and that, if there is such a decree, it gives her only past and not future mesne profits. He also contends that the entire claim is barred by *res judicata* and that this petition is not maintainable.

Before I deal with these contentions and the respondent's reply to them, I shall dispose of one of the subsidiary contentions of the respondent which is a very simple one and which is based upon the construction of the High Court's decree. This contention is that the High Court's decree, which is the one sought to be executed, makes special provision with regard to future mesne profits. This contention is based on the observations made by the learned Judges regarding mesne profits so far as it relates to item 16 with reference to which the decree was slightly modified. These observations, even if they are made applicable to all the decreed items of property, as has been wrongly done by the amended decree, while as a matter of fact they refer only to item 16, do not in my opinion award any mesne profits to the decree-holder which have not been awarded by the original decree. The learned Judges do not decide the question whether the decree-

holder is entitled to get future mesne profits, but they simply state—

"When mesne profits are determined it will be a question for consideration whether the plaintiff would be entitled to future mesne profits."

That leaves the matter exactly where it was according to the terms of the decree passed by the Subordinate Judge, and which they confirm by their judgment so far as it relates to the present question. In discussing the point whether the decree-holder is entitled to the past and future mesne profits claimed by her, I shall, therefore, confine my attention to the terms of the original decree as it has, with regard to mesne profits, not been amended by the decree passed by the High Court.

Now coming to the main arguments, the appellant's first contention, as I have already observed, is that no decree has been passed by the lower Court for profits, either past or future. His argument is twofold; firstly that there are no words containing any *direction or order* in the decree awarding mesne profits, and secondly that even if there be any such direction it is contained in a portion of the decree which the Court had no jurisdiction to pass and which must therefore be treated as of no effect whatever. The decree says:—

"It is further ordered that mesne profits be determined by a separate enquiry in execution proceedings."

If it was not the intention of the Court to award mesne profits by this direction, I cannot see the necessity for directing any enquiry as regards mesne profits at all. In my opinion, it must be presumed from this provision that the Court intended to award mesne profits to the decree-holder. Though there are no express words awarding mesne profits to the decree-holder, to make the decree consistent with itself we must hold that the Court intended to award mesne profits and that the decree-holder is entitled to claim

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them if there are no other objections in her way for doing so.

The next argument is that, even if we read an implied direction awarding mesne profits in this portion of the decree, it cannot be given any effect as the Subordinate Judge has no jurisdiction to make a decree directing the determination of mesne profits in execution proceedings. This argument has been occasioned by the fact that the Subordinate Judge has, in making the provision for mesne profits, followed the procedure laid down in the old Code of Civil Procedure. Under the old Code, sections 211 and 212, mesne profits were assessed in the execution department; while, under the terms of Order XX, rule 12 of the present Code, mesne profits are assessed by an enquiry in the suit itself, and, when they are determined, a final decree will be passed in respect of them. Though the Subordinate Judge's Order is not in conformity with the provisions of Order XX, rule 12 of the present Code, it cannot be said that for that reason that portion of the decree directing an enquiry into the mesne profits is absolutely null and void. In support of this part of his argument, Mr. Rangachariar relies upon the following observation of FLETCHER J. in *Ganga Prasad Dutt v. Hemangini Debi*(1):—

"It was in excess of the powers of the Court to suggest that mesne profits would be ascertained in any manner other than that prescribed by the law. The method in which mesne profits are ascertained under the present Code of the Civil Procedure is not by an enquiry in execution but by an application in the suit itself."

If, by this observation, it is meant that decretal orders passed by judges, no doubt erroneously under the present Code, directing an enquiry into mesne

profits in the execution department, are to be treated as absolutely null and void, I respectfully differ from the opinion of the learned Judge. The present Code, no doubt, does not justify the order passed by the lower Court, but it does not follow that the order is, therefore, necessarily void. In my opinion, the order of the Subordinate Judge in this respect, though irregular, is not without jurisdiction and therefore can be given effect to. This view is supported by the recent decision in *Lakshmi Bai v. Rajji*(1). In that case also, the Subordinate Judge, instead of passing an order under Order XX, rule 12, ordered the mesne profits to be determined in execution. The learned Judges held that the decree, though irregular, was binding between the parties. They observe:

"In the present case, we do not think that there was any want of jurisdiction in the Court passing an order in contravention of Order XX, rule 12, but that it was merely an erroneous or irregular exercise of jurisdiction."

In this view, which I am prepared to accept, I must hold that, in the present case, the Subordinate Judge has passed an executable decree as regards mesne profits in favour of the respondent.

The next question is whether this decree awards to the decree-holder only past mesne profits, as contended for by Mr. Rangachariar, or future mesne profits as well, as contended for by Mr. Lakshmanan. The question is not quite free from difficulty, but, after giving my best consideration to it, I have come to the conclusion that the respondent's plea should be upheld. It is true that the plaintiff in her plaint did not ask for future mesne profits. In paragraph 3, as already pointed out, she asked for mesne profits for the years 1914 to 1919 and the valuation in the schedule specified

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(1) (1928) 31 Bom. L.R., 400.

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this amount alone as one of the items for computing the Court-fee. Our attention has been specially drawn to these aspects of the claim to show that the order of the learned Judge should not be construed as giving a relief to the plaintiff which she did not ask for in her plaint. We are asked to say, in view of the pleadings, that the mesne profits with respect to which an enquiry has been ordered should be confined to the past mesne profits alone, for which the demand was made in the plaint. This contention, however plausible, cannot be accepted in view of the decision of the Privy Council in *Pakhar-uddin Mahomed Ahsan v. Official Trustee of Bengal*(1), which is the main case relied on by the respondent. In that case

“The plaintiff is declared entitled to possession of the land mentioned in the kabinnama with wasilat from the commencement of Srabun 1267; the wasilat to be ascertained by local enquiry.”

Though no doubt the plaint was open to the construction that the plaintiff intended to claim future mesne profits as well, their Lordships of the Privy Council make it clear by their observations that they were prepared to uphold the order awarding future mesne profits exclusively on considerations of law which may be applied generally to all cases. Their Lordships, after expressing the opinion that the plaint is, at all events, open to the construction that the plaintiff intended to claim wasilat up to the time of delivery of possession, although, for the purpose of valuation only, so much was valued as was then due, proceeded to state as follows:

“but be that as it may, they are of opinion that, under section 196 of Act VIII of 1859, it was in the power of the Court, if it thought fit, to make a decree which should give the

(1) (1851) 1 J., 8 Calo., 178 at 189.

plaintiff wasilat up to the date of obtaining possession.” (The italics are mine.)

Then after quoting section 196 of the Code of 1859 their Lordships state:

“Wasilat, by law, is demandable up to the time of possession; and the question is, whether the Court intended to give to the plaintiff that amount of wasilat to which he was undoubtedly entitled by law in this action, or whether they intended to cut his claim for wasilat into two, and to give him in this suit so much only as accrued up to the time of the commencement of the suit, and to leave him to bring a separate suit for the rest. According to that interpretation, they could not have intended to give him wasilat up to the time of the decision, which was three or four years after the commencement of the suit. It appears to their Lordships that the more reasonable construction of this document—which undoubtedly might have been clearer—is, that the Court, with a view to carrying out the object of the Legislature, namely, the prevention of unnecessary litigation and multiplication of suits, intended in this suit to give, with possession, that wasilat which was by law claimable up to the time of possession.”

Their Lordships close the discussion by saying that this view was supported by two cases *Dhurm Narain v. Bandhoo Ram*(1) and *Bunsee Singh v. Mirza Nazuf Ali Beg*(2). If we apply the test laid down in this judgment to the present case, I think it must be held that, as the plaintiff is entitled under the present law also to claim mesne profits up to the time of possession, the more reasonable construction of the decree should be that the Court, in awarding her mesne profits, intended to award her such profits as are claimable up to the time of possession. It is contended that their Lordships of the Privy Council awarded future mesne profits because the plaint was open to that construction. But the expression “be that as it may” occurring in their Lordship’s judgment extracted above, having regard to the context, clearly shows that the judgment is based

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(1) (1869) 12 W.R., 75.

(2) (1874) 22 W.R., 323.

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upon the law that, as mesne profits are claimable up to the time of delivery of possession, the decree should be construed as giving the plaintiff future mesne profits, though he has not asked for it. In this connection it may be noted that in one of the two cases referred to by their Lordships (namely, 12 W.R., 75) the plaintiff, as will appear from the judgment, was not open to the construction that future mesne profits were claimed in it. In that case the decree was one for possession of land with wasilat (mesne profits). The decree-holder applied for possession and for wasilat from the period of dispossession down to the time of delivery of possession. The judgment-debtor complained that "the plaintiff was not entitled under the decree to anything more than wasilat down to the date of the institution of the suit *as stated in the plaint*" (the italics are mine), see the judgment of JACKSON J. This complaint was overruled and wasilat, having regard to section 196 of the Civil Procedure Code of 1859, was awarded up to the delivery of possession. JACKSON J. stated thus:

"When the Court in its decree orders that the plaintiff should receive mesne profits, I think it must be held to have meant that he should receive such mesne profits down to the date of delivery of possession."

In passing, I may note that having regard to the point under discussion the case before us is almost identical with the case in 12 W.R., 75. The decision of the Privy Council, as explained above, was followed in *Pramada Nath Roy v. Secretary of State for India*(1). In that case the terms of the decree were:

"The plaintiffs will be declared entitled to a five-anna share of the disputed property and they do get possession of the same, the amount of mesne profits to be ascertained in execution"

(1) (1926) I.L.R., 53 Cal., 992.

and, though it was urged that the plaintiffs did not claim to recover future mesne profits in their plaint, the learned Judges held that they were entitled to future mesne profits also. It will appear from the judgment of GUMING J. (more fully reported in 99 Indian Cases, 429), with which, PAGE J. concurred, that "future mesne profits" were awarded on a construction of the decree on the principles indicated in I.L.R., 8 Cal., 178 (P.C.), though in the course of the judgment reference is made to the fact that, at the commencement of the plaint in the suit, it was stated to be a suit for declaration of title and for recovery of possession of immovable property and mesne profits. The contention that the decree-holder should not be given future mesne profits because in the plaint he has asked only for past mesne profits, and has not included any claim for future mesne profits, should not be allowed to prevail because mesne profits antecedent to the suit and mesne profits *pendente lite* stand on very different grounds. As observed by MOORE J. in *Bhupendra Kumar Chakravarty v. Purna Chandra Bose*(1),

"As regards the latter, there is no cause of action at the time of the commencement of the suit, and it is only by means of statutory provisions framed with the obvious purpose of shortening litigation, that they can be awarded in the suit even though they accrued subsequent to the institution of the suit. The mesne profits antecedent to the suit have, on the other hand, accrued before the commencement of the suit and although, therefore, the amount may not be stated with absolute certainty, the amount can be mentioned with some approach to approximation."

From this it will follow that the plaintiff should not be punished for not including in this plaint a cause of action which had not arisen at the time of the suit and so it is wisely provided by statutory provision, "with

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(1) (1910) I.L.R., 43 Cal., 650 at 655.

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the obvious purpose of shortening litigation", that the future mesne profits may be awarded in the suit though they were not asked for in the plaint. A decree, though framed generally for mesne profits, should, therefore, be reasonably construed as awarding future mesne profits as well, if there is nothing in the decree standing in the way of such a construction. The decree-holder should, therefore, be given future mesne profits, as mesne profits are demandable up to the time of execution unless, as I have already pointed out, the decree clearly indicates that future mesne profits have not been awarded to the decree-holder. Mr. Rangachariar contends that the use of the definite article "the" before "mesne profits" appearing in that part of the decree directing enquiry into mesne profits shows clearly that the enquiry is to be as regards the mesne profits that were asked for, that is, "the past mesne profits," and nothing more. This argument is objectionable as it lays an unnecessary emphasis on the word "the" and runs counter to the principle of construction that, I have said, should be adopted. It is further contended that the Privy Council decision should not be applied to this case because, under Order XX, rule 12 of the present Civil Procedure Code, future mesne profits are not claimable in law in a suit for "past mesne profits." It is conceded that in a suit for "past mesne profits," under sections 211 and 212 of the old Code, future mesne profits may be awarded. The provisions in the old Code relating to mesne profits have been recast and they are now contained in Order XX, rule 12 and section 2, clause 12. The words "mesne profits" in Order XX, rule 12, will include past profits. The language used in the rule does not endorse the view suggested by the appellant and no authority has been cited by the learned advocate in support of his

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proposition. I must, therefore, hold, on the authority of the Privy Council decision in *Fakharuddin Mahomed Ahsan v. Official Trustees of Bengal*(1) that the lower Court was right in allowing execution of the decree for future mesne profits as well. This conclusion is not opposed to the decision in *Sadasiva Pillai v. Ramalinga Pillai*(2), for the decree in that case (see page 226, paragraph 1) was "silent as to the mesne profits which has accrued since the institution of the suit", whereas in the present case the decree refers to mesne profits generally.

The next argument advanced for the appellant is that the present application is barred by *res judicata* on account of the order passed in E.A. No. 1120 of 1926. That was an application filed by the decree-holder for the determination of past and subsequent mesne profits in respect of the suit properties from the defendants and to pass a decree accordingly. The application was dismissed by the following order :

"As admitted by the decree-holder's vakil, an E.P. (Execution Petition) is necessary and the petition is not maintainable. The petition is rejected with costs."

It is argued that the present application asking for the same relief is, therefore, barred by this order. There was a good deal of discussion at the bar as regards the distinction between an E.P. (Execution Petition) and an E.A. (Execution Application)—see rules 3 and 149 of the Civil Rules of Practice for the distinction—and what was really meant by the admission of the decree-holder's vakil in the prior petition that "an E.P." is necessary and the petition is not maintainable. In the view that I take of the appellant's argument, it is not necessary to discuss this question as I think the plea of *res judicata* should not be allowed to prevail

(1) (1881) I.L.R., 8 Cal., 178.

(2) (1875) 2 I.A., 219.

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inasmuch as the prior application was not disposed of by the Court on the merits [see *Ramachandra Raju v. Sri Raja Bhujanga Rao*(1)], as is obvious from the order itself.

One more argument advanced on behalf of the appellants remains to be noticed and that is, that the present application headed "Execution Petition," that is, an E.P. should not have been accepted by the Court, as Courts have no jurisdiction to entertain what are termed "Execution Applications" for ascertainment of mesne profits under Order XX, rule 12; see *Ramachandra Raju v. Sri Raja Bhujanga Rao*(1). I must say that the argument comes with very bad grace from the appellant, for it was on the objection raised by him that the decree-holder consented to file the "Execution Petition" (see the order in H.A. No. 1120 of 1926 quoted above). However that may be, the present petition, though headed "Execution Petition," is obviously, having regard to its contents, an application in the suit itself for the determination of past and future profits as required under Order XX, rule 12 of the Code of Civil Procedure. As regards the form of the application, therefore, there can be no objection. No other bar to the entertainment of the application has been pleaded in connexion with this argument. I think the lower Court was right in treating the application as an application in the suit for the ascertainment of mesne profits.

Mr. Lakshmanan on behalf of the decree-holder relied on the conduct of the parties as shown by certain proceedings in Court and also on the order passed by the High Court for stay of the execution of the lower Court's decree pending the appeal and the papers connected therewith, to show in what manner the decree,

so far as the question of mesne profits was concerned, was interpreted by the parties. I do not think that these considerations are really relevant for the disposal of this appeal.

In the result, I agree that the appeal should be dismissed with costs.

The Memorandum of Objections is also dismissed but without costs.

K.B.

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APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice
Anantakrishna Ayyar.

1930,
April 8.

IN RE KOLANDA NAYAKKAN (PRISONER), APPELLANT.*

Murder—Deliberately planned, and cold-blooded—Appropriate sentence irrespective of age—Exception under sec. 22, Madras Children Act (IV of 1920)—Circumstances in which capital sentence inappropriate.

In cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature, whatever the age of the accused might be, provided his case does not come under section 22 of the Madras Children Act (IV of 1920), the Capital sentence would usually be the appropriate one.

But where the murder cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, the Capital sentence might not be the appropriate one.

TRIAL referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the appellant in Case No. 4 of the Calendar for 1930.

* Referred Trial No. 83 of 1930.

KOLANDA
NAYAKKAN,
In re.V. L. Ethiraj and N. Somasundaram for appellant.
Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

The accused has been convicted by the learned Sessions Judge of Coimbatore of the offence of murder and sentenced to death.

The charge against him was that at about 11 o'clock on the 20th of October last he stabbed one Abdul Muthu in the streets of Tiruppur and inflicted upon him seven incised wounds three of which were fatal. The man after running for some distance collapsed and died practically on the spot. The eye-witnesses to the attack are P.Ws. 2, 3, 4, 5 and 12. That it was the accused who so attacked the deceased has not been seriously disputed by the learned Counsel for the accused, although he would suggest that the series of blows occurred in quicker succession than the eye-witnesses would say, and perhaps it may be allowed that on the medical evidence it is a little difficult to imagine how the deceased was able to run about 180 yards after receiving the blows which the medical certificate describes, and it may be that the attack was something more rapid and not quite so deliberate as the eye-witnesses would make out. The offence *prima facie* is clearly murder. There can be no doubt that the person who inflicted with a knife such fatal wounds on the deceased certainly intended nothing short of inflicting death. We cannot find any extenuating circumstance which would bring the offence to anything less than murder. There is no question of self-defence raised, nor is there any such case appearing in the prosecution evidence. It has been suggested that the accused had a certain amount of provocation, but the only provocation that has been spoken to by prosecution witnesses occurred a

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couple of hours earlier than the offence and cannot therefore easily be described as grave and sudden. The only defence put forward by the accused is that the case is a false one and has been got up by his enemies. But there is really no motive elicited why the eye-witnesses should lend themselves to a false case against the accused. There can be no doubt that the learned Sessions Judge is correct in convicting the accused of the offence of murder, and the only question which remains is whether the capital sentence, in the circumstances, was an appropriate one.

The accused is stated to be aged about 15. Both the committing Court and the Sessions Judge say that he looks more, that he looks about 18; so far as the records show, it may be taken that he is about 15 years of age, but his age has not been definitely determined. A plea has been put forward that in the case of a youth the capital sentence is inappropriate. To the proposition put thus broadly we cannot assent. Beyond the provisions of sections 82 and 83, the Penal Code does not say anything about there being any age limit for the capital sentence; and, in cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature, we think that usually, whatever the age of the accused might be, provided his case does not come under section 22, Madras Children Act (IV of 1920), the death sentence would be the appropriate one. This Court has, for example, in cases where the accused had been convicted of decoying away children and cutting their throats, or drowning them, or putting them away, in order to possess themselves of a few rupees worth of jewels, held that, in spite of the murderers being youths (about 18 years old), the capital sentence would be the only appropriate sentence. But where the murder cannot be said to be wholly deliberate

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and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, we think that the capital sentence might in certain cases not be the appropriate one. In the present case, apart from the question whether the accused is entitled to the benefit of the provisions of section 22 of the Madras Children Act, we have evidence that within about a couple of hours before the occurrence the accused and the deceased had been quarrelling, and that the deceased, who is described by the prosecution witnesses themselves as a bully and the terror of the village, had assaulted this boy and had given him several blows; about two hours later the accused retaliated by stabbing the deceased in the manner described. There is, therefore, in the present case this amount of recent provocation which justifies us in describing the murder as not deliberately cold-blooded and inherently vicious. In these circumstances we think that the adequate sentence will be the lesser sentence of transportation for life.

We, therefore, reduce the capital sentence to one of transportation for life.

B.O.S.

• APPELLATE CRIMINAL.

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*Before Mr. Justice Krishnan Pandalai.*IN RE KOLAPALLI NARASEMHAMURTI AND FOUR OTHERS
(APPELLANTS—ACCUSED), PETITIONERS.*1930,
March 14.

Code of Criminal Procedure, 1898, sec. 421—Whether prohibits hearing and dismissal of criminal appeal at time of presentation of papers—Need for special posting of appeal for hearing after reasonable time—Disposal of appeal raising questions of fact without original records being sent for—Desirability of giving sufficient time when appellant or his pleader unable to argue appeal when it is presented.

Section 421 of the Code of Criminal Procedure does not prohibit a criminal appeal being heard and dismissed at the time of presenting the papers and there need not be a special posting of the appeal for hearing after a reasonable time.

It is however desirable, when the appellant or his pleader is unable to argue in support of the appeal when it is presented, that a Court proceeding under section 421 should give sufficient time to the appellant or his pleader and inform him that he will be heard on a particular day in support of the appeal.

An appeal though raising questions of fact may be disposed of under section 421 without the original records being sent for.

Hussain Sahib, In re, (1924) I.L.R., 48 Mad., 385, 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 Joint Magistrate of Rajahmundry in Criminal Appeal No. 73 of 1929 preferred against the judgment of the Court of the Second-class Magistrate of Amalapuram in C.C. No. 270 of 1929.

M. Appa Rao for petitioners.

A. Narasimha Ayyar for Public Prosecutor (*I. H. Bewes*) for the Crown.

JUDGMENT.

NARASIMHA-
MURTI,
In re.

The petitioners, five in number, were convicted by the Second-class Magistrate of Amalaputram, under section 323, Indian Penal Code, and sentenced to a fine of Rs. 20 each or one month's rigorous imprisonment in default. Out of the fine, P.W. 1 was awarded Rs. 30 as compensation. They appealed to the Joint Magistrate of Rajahmundry. The petition of appeal and a copy of the judgment of the Sub-Magistrate were presented to the Joint Magistrate on the 5th August 1929, when he was on tour, by a pleader on behalf of the petitioners. The Magistrate having heard, as he reports, the pleader in support of the appeal, dismissed it under section 421, Criminal Procedure Code. His judgment is brief. After stating that the judgment of the Sub-Magistrate sets out the evidence fully, it goes on to say that the attack on the complainant took place in daylight in the open and that the defence of *alibi* was a tissue of falsehood, and winds up with the remark that the appellant's pleader has shown no grounds for interference. For the petitioners, it was represented at the time this petition came on for admission that according to the petitioner's pleader who presented the appeal, the Joint Magistrate personally perused the judgment and the grounds of appeal, and asked him whether he conducted the case in the lower Court, to which he said that he did not conduct it throughout, that then the Magistrate asked him if he had anything to say in support of the appeal, that the pleader then asked for time to argue the case as he had not fully gone through the record, that no time was granted and the appeal was summarily dismissed under section 421. This representation for the petitioners was communicated to the Joint Magistrate, who has sent a report, dated 6th December 1929, that the appeal was presented to him at

the Amalapur travellers' bungalow in the morning, that on perusing the judgment of the lower Court he informed the pleader who presented it that it appeared to fall into the class of appeals which he usually dealt with under section 421, Criminal Procedure Code, that the pleader voluntarily launched into the merits of the appeal rather fully, and was heard for at least half an hour, that no application for further opportunity to argue the case was made to him, that if such application had been made it would have been given, and that finally the Magistrate intimated his intention of dismissing the appeal summarily.

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In re.

The question before me is whether the procedure adopted by the Joint Magistrate was, in the circumstances, substantially in accordance with the provisions of section 421, in other words, whether the petitioners or their pleader had a reasonable opportunity of being heard in support of the appeal.

On this point a decision of RAMESAM J. has been brought to my notice, namely, *Hussain Sahab, In re*(1). That decision seems to lay down as a rule of law that a criminal appeal should not be heard at the time of presenting the papers even for the purpose of dismissal under section 421 of the Code of Criminal Procedure and that there must be a special posting of the appeal after a reasonable time for the purpose of hearing under section 421. It also appears to lay down as a rule that an appeal raising questions of fact ought not to be disposed of under section 421 without the original records being called for from the lower Court. If either of these two requirements was a necessary condition before action under section 421 could be lawfully taken, there would be no further

(1) (1934) I.L.R., 48 Mad., 385.

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MURTI,
In re.

question in this petition, because neither of these was done. The appeal was dismissed on the very day it was presented and it was not posted a week later for the purpose of the hearing. Also the records were not sent for. Without entering into the matter more fully, because in the nature of the conclusion at which I have arrived in this petition it is not necessary to do so, I do not think that the learned Judge intended to do more than indicate that as a rule of caution and sound procedure it is better to post an appeal for being heard even under section 421 and to send for the original papers. So far as the section itself is concerned, neither of those requisites would seem to be laid down by the words. The section says explicitly that "on receiving the petition and copy under section 419 or 420 the appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering may dismiss the appeal summarily" and then the proviso says that "an appeal presented under section 419 should not be dismissed unless the appellant or his pleader had a reasonable opportunity of being heard in support of the appeal." In sub-clause 2 it is distinctly said that "before dismissing an appeal under the section the Court may call for the record in the case but shall not be bound to do so." In the face of this express declaration that the Court shall not be bound to send for the papers, I do not think it was intended to be laid down in the decision cited by the petitioners that the Court was bound to send for the papers before taking action under section 421. No distinction is made in the section between appeals relating to facts and appeals raising questions of law. The provision is perfectly general. Similarly as to posting the case to a subsequent date after the presentation for the purpose of being heard under section 421, the words of sub-section 1 seem to me to be plain that, so long as a

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reasonable opportunity is given to the appellant or his pleader to be heard in support of the appeal, there is no legal requirement as to any postponement of the hearing after the presentation of the appeal. I quite appreciate that in the great majority of cases, when an appeal is presented, neither the appellant nor his pleader may be in a position to straightway argue in support of the appeal, and therefore it may be a wise rule in proceeding under section 421 to give sufficient time to the appellant or his pleader and to inform him that he will be heard on a particular day in support of the appeal with a view to action being taken under section 421. More than that I do not think that the section really requires, nor do I think that RAMESAM J. intended to lay down.

In this case, the question really is whether the petitioners' pleader had a reasonable opportunity of being heard in support of the appeal, although undoubtedly he was allowed to address some argument to the Joint Magistrate. On the whole, I have come to the conclusion that the pleader had not the required opportunity for the simple reason that he had not got all the records with him and had not fully conducted the case himself. It is not necessary to go into the slight discrepancies as to what happened between the accounts respectively given by the pleader and the Joint Magistrate. One thing, however, is clear, that whatever the pleader said may be, the Joint Magistrate conceived the idea that the occurrence took place in open daylight, whereas in fact it took place after 8 p.m. Such a hearing could not have been well informed on the part of the pleader or anything but casual on the part of the Joint Magistrate. Holding that the petitioner's pleader had not the opportunity given to him to which he was entitled under the section, the dismissal of the appeal will be set

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MURTI,
In re.

aside, and the appeal will be sent back to the District Magistrate of East Gōdāvari to be heard by him or by some other competent Magistrate other than the one who disposed of it.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

1930,
March 27.

IN RE EKAMBARA MUDALI (ACCUSED IN BOTH),
PETITIONER.*

Revision—Subordinate Criminal Courts—Whether competent to revise their own orders—Procedure where mistake has been committed.

In this Presidency it is a clear rule of processual law that no Subordinate Criminal Court can sit in revision upon its own record, and decide whether upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed, the matter must be referred to the High Court.

(1875) High Court Proceedings, 17th Aug. 1875, No. 1793, II Weir, 307, and *Achambit Mandal v. Mahatab Singh*, (1914) I.L.R., 42 Calc., 365, referred to.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the orders of the Court of the First-class Bench of Magistrates of Vellore, dated 22nd April 1929, and passed in Summary Trials Nos. 233 and 234 of 1929.

A. Ramaswami Ayyar for petitioner in both.

P. Govinda Menon for respondents in both.

Public Prosecutor (L. H. Bewes) for the Crown in both.

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In re.

JUDGMENT.

The petitioner has been sentenced to a fine of Rs. 15, in default two weeks' rigorous imprisonment, under section 352, I.P.C., in the following circumstances :—

The case was filed before the First-class Bench, Vellore, on 19th February 1929 and posted to 26th February. On 26th February, according to the diary extract, it was adjourned to 1st March. On 1st March the complainant was absent, and the accused, the present petitioner, was acquitted under section 247, Criminal Procedure Code. On the 5th March the complainant's vakil represented that the posting to the 1st was a mistake for the 5th. Thereupon an entry was made in the diary for the 5th March : "Alamelu Ammal prefers a complaint against Ekambara Mudali. Her sworn statement is recorded. The case is taken on file under section 352, I.P.C., and posted to 19th March 1929."

This was merely a revival of the old complaint dismissed on 1st March 1929. There was, as a matter of fact, no fresh stamped complaint and no sworn statement on 5th March. There was a complaint on plain paper, dated 5th March, and a sworn statement, dated 26th March.

The petitioner complains that having once been acquitted he cannot be retried for the same offence. The President thinks that his Court can act as a Court of Revision and decide which of its decisions may or may not be quashed. In any circumstances there is no legal authority for making false records in the Court's diary. If the President thought he could treat the order of acquittal as a nullity, he should have done so, proceeding with the case of 19th February on 5th March as though

* Criminal Revision Cases Nos. 571 and 572 of 1929.

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nothing had happened on 1st March. But such procedure is quite contrary to the Code, which has never contemplated a Court sitting in revision upon its own completed and pronounced judgments. The President, if he thought there had been a miscarriage of justice, should have referred the matter to the District Magistrate, who, if so advised, could have acted under section 438.

A case very similar to the present case is considered in *Achambit Mandal v. Mahatab Singh*(1) and there it is held that the acquittal following upon a mistake about the posting date is a nullity, and the trial may proceed as if it had never been pronounced. This ruling is in terms based upon II Weir, 307, but the Madras decision is no authority for the Court acting in revision of its own proceedings. A Third-class Magistrate posted a case to a certain date without informing the parties, and on their non-appearance, acquitted the accused. The District Magistrate ordered him to restore the case to file. The Sessions Judge questioned the legality of this order, and this Court, holding that the Third-class Magistrate's procedure was substantially irregular, set aside the order of acquittal. It did not confine itself to returning the record with the observation that there was no cause for interference, which it would have done if it had held, as the Calcutta case assumes, that the Third-class Magistrate could himself restore the case. That the District Magistrate has no jurisdiction to order a retrial was ruled in the next case but one in Weir's Criminal Rulings, see *Narayanasami Aiyar v. Janaki Ammal* (Criminal Petition No. 342 of 1881)(2). It must be taken as the processual law in this province that no Subordinate Court can sit in revision upon its own record,

(1) (1914) I.L.R., 42 Cal., 365.

(2) (1881) II Weir, 308.

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and decide whether upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed, the matter must be referred to the High Court.

The petition is allowed; the sentence is cancelled; the fine is ordered to be refunded; and the President is enjoined that his diary must be a plain record of fact and not a pious adaptation to circumstance.

B.O.S.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
Mr. Justice Anantakrishna Ayyar and
Mr. Justice Curgenvven.

PILLA RAMASWAMI (ACCUSED), PETITIONER,

v.

THE PRESIDENT, TALUK BOARD, TADEPALLIGUDEM
(COMPLAINANT), RESPONDENT.*

Madras Local Boards Act (XIV of 1920), secs. 164 (1) and 221—Penalty under sec. 164 (1) for alleged encroachment—Proceedings under sec. 221 for recovery—Whether Magistrate competent to enquire if alleged encroachment true and justified imposition of penalty.

A magistrate acting under section 221 of the Madras Local Boards Act (XIV of 1920) in proceedings for the recovery of a penalty imposed by a Local Board under section 164 (1) of the Act in respect of an alleged encroachment is competent to enquire whether the alleged encroachment was true and justified the imposition of the penalty.

In re Raheem Sahib, (1929) I.L.R., 52 Mad., 714, approved. *Ramachandran Servai v. President, Union Board, Karaikudi*, (1925) I.L.R., 49 Mad., 888, dissented from.

* Criminal Revision Case No. 894 of 1929.

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PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment in Miscellaneous Case No. 44 of 1928, on the file of the Court of the Second-class Stationary Sub-Magistrate of Tadepalligudem at Pantapadu.

This Criminal Revision Case came on for hearing in the first instance before JACKSON J. who found that there were conflicting decisions with regard to the question at issue and, deeming it to be an important point which frequently arises, directed that the matter should be placed before the Chief Justice for orders. An order was thereupon made directing that the case be heard by a Full Bench.

The relevant sections of the Madras Local Boards Act are—

Section 164 (1).—If any person, without the previous sanction of the Local Board, occupies any land, which is not set apart for a public road, but is set apart for any other public purpose and is vested in or belongs to a Local Board, he shall be bound to pay in respect of such occupation such sum as may be demanded by the Local Board by way of penalty; such sum may be recovered in the manner hereinafter provided.

Section 221 (1).—In default of payment of any fee, toll, costs, compensation, damages, penalties, charges, expenses or other sums due to a Local Board under or by virtue of this Act, the same may be recovered, together with any further costs that the magistrate may award, under the warrant of a magistrate. The amount or apportionment of any such sum shall in case of dispute be ascertained by such magistrate.

V. Govindarajachari for petitioner.—Under section 221 of the Madras Local Boards Act it is open to the magistrate to enquire and determine whether the ownership of the land in dispute is vested in the Local Board or not, and if it is vested, what sum is due by way of penalty. There has been a conflict of decisions in this Court with regard to the powers of a magistrate acting under the section, but the trend of recent pronouncements is in my favour. The words of the section do not warrant the construction that the magistrate is merely an instrument for the purpose of collecting money coming under

any of the heads mentioned in section 221 (1). Nor is there anything in principle to support the view that the magistrate should not enquire into the basis of liability. The Legislature could never have intended that the magistrate should act on a mere allegation by the Local Board. The last sentence in section 221 (1) tends to show rather the contrary. A proceeding under the section is in the nature of a penal proceeding and a person affected by it cannot be precluded from raising the defence that no money is due.

: *Ramachandran Servai v. President, Union Board, Karai-kudi*(1) held that section 221 merely prescribed the manner of recovery and did not permit the reopening of the question of liability. That decision was followed in *Rangesa Rao v. Swaminatha Aiyar*(2) and *Narayana Aiyar v. Subramania Chetty*(3).

In *Union Board, Paramakudi v. Chellaswami Thevar*(4) WALLER J. doubted the correctness of the view in 49 Mad., 888, and DEVADOSS J. did not repeat the view taken by him in the earlier case. In *re Gopayya*(5) questioned the correctness of 49 Mad., 888. The point again came up for consideration before WALLER and KRISHNAN PANDALAI JJ. in *In re Raheem Sahib*(6), where it was held that a party appearing before a magistrate under section 221 was entitled to allege and prove that the money claimed was not due. It is submitted that that is the better view.

N. S. Mani for Public Prosecutor (*L. H. Bewes*) for the Crown.—The power of a magistrate under section 221 is restricted to issuing a warrant for collection of fee, etc., levied. He may not determine the question of liability though it may be open to him to determine the quantum of it. The wording of section 164 (1) would seem to indicate that the magistrate cannot constitute himself into an appellate authority. 49 Mad., 888 has expressed the correct view.

K. Kameswara Rao for respondent.

The JUDGMENT of the Court was delivered by

CURGENVEN J.—This Criminal Revision Case comes before this Full Bench in the following circumstances.

(1) (1925) I.L.R., 49 Mad., 888 (2) (1927) 27 L.W., 320.

(3) (1927) A.I.R., (Mad.), 1113.

(4) (1928) M.W.N., 676.

(5) (1927) I.L.R., 51 Mad., 866.

(6) (1929) I.L.R., 52 Mad., 714.

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Under sub-section (1) of section 164 of the Madras Local Boards Act the Taluk Board of Tadepalligudem imposed a penalty of Rs. 50 upon the petitioner in respect of an alleged encroachment in the village of Tadepalligudem. He is said to have erected a shed without permission upon ground belonging to the Taluk Board. The petitioner did not pay the penalty and accordingly the matter was referred to the magistrate's Court under section 221, which provides that, in default of payment of such a sum, it may be levied under the warrant of a magistrate. At the hearing of the case the point arose whether the magistrate was competent to go into the question whether the alleged encroachment was true and therefore justified the imposition of the penalty; and following certain decisions, the Court came to the conclusion that it was not open to it to enquire into an issue of this character, and accordingly although it recorded the evidence, it refused to give an opinion upon the matter and directed that a warrant should issue for the recovery of Rs. 50 together with Rs. 10 as costs. The petitioner thereupon presented this Criminal Revision Case, which came in the first instance before JACKSON J. That learned Judge found that there were conflicting decisions with regard to the question at issue and, deeming it to be an important point which frequently arises, directed that the matter should be placed before the Chief Justice for orders.

The case-law upon this subject has been laid before us and opens with the case of *Ramachandran Servai v. President, Union Board, Karaikudi*(1), decided by WALLACE and DEVADOSS JJ. They were of the opinion that, if a contention of this kind were allowed to prevail, the magistrate would be constituted as a sort of

(1) (1925) I.L.R., 49 Mad., 868.

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appellate authority over the Local Board in the matter of deciding whether or not there had been in fact an encroachment; and they pointed out what inconveniences would arise from such a situation. Nor did they think that the language of section 221 would justify such a construction. This case was followed by DEVADOSS J., sitting alone, in *Rangesa Rao v. Swaminatha Aiyar*(1), and again by myself in *Narayana Aiyar v. Subrahmania Chetty*(2). So far as my recollection of that case goes, no cases *contra* were cited before me and, sitting singly, I was of course bound to follow the ruling of a Bench. In the (1926) Madras Weekly Notes Volume will be found two succeeding cases, *Union Board, Paramakudi, v. Chellaswami Thevar*(3) and *Syid Mustapha Saheb v. Union Board of Kaveripatnam*(4), decided by DEVADOSS and WALLER JJ. In the judgments delivered by WALLER J. he was of opinion that under the parallel procedure by which a prosecution is instituted for breach of the law regarding encroachments and which is provided for in sections 164 (2) and 207 of the Act, it was open to an accused person to raise this question of whether the alleged encroachment was indeed an encroachment or not. But he was of opinion also that, anomalous though it might be, when the case came before the Court under section 221 the decision in I.L.R., 49 Mad., 888 was right and should be followed. The first Bench which seems to have taken a contrary view was in *In re Gopayya*(5), where PHILLIPS and MADHAVAN NAIR JJ. had to deal with circumstances which gave rise to proceedings under section 221, the petitioner in that case having erected a pandal without the permission of the Union Board. The decision

(1) (1927) 27 L.W., 320.

(3) (1926) M.W.N., 676.

(2) (1927) A.I.R. (Mad.), 1118.

(4) (1926) M.W.N., 678.

(5) (1927) I.L.R., 51 Mad., 866.

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proceeded substantially upon other grounds, but both the learned Judges, while acknowledging that this point did not really have to be decided, expressed their inability to follow I.L.R., 49 Mad., 888. PHILLIPS J. observes with reference to the alleged inconveniences mentioned by WALLACE and DEVADOSS JJ. in that decision:

"The anomaly pointed out by WALLACE J. is that such a view would amount to the magistrate being set up as a final Judge over the Local Board. When, however, it is remembered that the Board has applied to the magistrate for the recovery of the dues, it is not open to the magistrate to decide summarily and recover the amount without enquiry; and he must be satisfied before he issues the order that such order is correct. If the offender had been prosecuted under section 219, he would be able to plead that no offence had been committed by him and therefore on the facts of this case it is difficult to hold that he must be precluded from such a defence because a different form of procedure has been taken against him."

That, in other words, of course, is the anomaly detected by WALLER J. in (1926) M.W.N., 678. A similar case came before WALLER and KRISHNAN PANDALAI JJ. in *In re Raheem Sahib*(1) and there, after referring to all the previous decisions, the conclusion was come to that I.L.R. 49 Mad., 888 had been wrongly decided and the view was expressed that a magistrate should go into the question of the merits of the Board's action before enforcing the payment of the penalty. The same point has been decided in the same sense by WALLER and ANANTAKRISHNA AYYAR JJ. in Criminal Revision Case No. 1089 of 1923. As I have already said, it has not been disputed before us that, where a prosecution has been instituted for failure to comply with the terms of a notice, it is competent to the Court in disposing of the case under section 207 to undertake an enquiry of this character. This has been recently decided by a Bench

composed of the learned Chief Justice and CORNISH J. in a case so far unreported, Criminal Revision Case No. 247 of 1929.

It appears then that the recent trend of authority has been distinctly in the direction of holding that the nature of an alleged encroachment may be investigated. Mr. Mani, however, for the Crown has asked us to hold on the language of the Act itself that this view of the matter is incorrect. Under section 164 (1) the land which is occupied must be vested in or belong to a Local Board. It is only then that the occupant shall be bound to pay such sum as may be demanded of him by the local authority by way of penalty and, "such sum", the section goes on, "may be recovered in the manner hereinafter provided". This seems clearly to mean that the recovery of the sum must be contingent upon satisfaction of the conditions which the section lays down, namely, that the land must be vested in or belong to a Local Board, and, accordingly, it would be illegal for the Board to levy a penalty in respect of a so-called encroachment upon any land which does not satisfy that condition. Whether or not, however, it is open to the Court, which has to enforce this order under section 221, to enquire into whether the land was so vested or not must, of course, depend upon the terms of that section. It may be conceded that they are not very clear. The last sentence of sub-section (1) provides that "the amount or apportionment of any such sum shall in case of dispute be ascertained by such Magistrate". It is possible to give a narrow and also a broad meaning to that direction. But we think that it would be very reasonable to give it the construction which has been adopted by the learned Judges who decided *In re Gopayya*(1), namely, that where the

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Court has power to decide upon the amount or the apportionment of the sum "it is difficult to understand why it should not be open to it to decide that the amount is nil." It seems undesirable to go into the relative advantages and disadvantages of the two constructions. In the one case, it has been suggested that the magistrate would be converted into a Civil Court if he had to go into the difficult questions of title upon which many of these encroachment cases are founded; on the other hand, there is the disadvantage that, under section 164 a Local Board may, perhaps without due enquiry, impose and demand a penalty in respect of an alleged encroachment, and that if the power of the magistrate to enquire into the truth of the prosecution allegations is withheld, the party has no remedy except that of a slow and troublesome civil suit. The clear preponderance of opinion is in favour of the view that the magistrate has such a power, and we are of the opinion that it is the correct view.

In these circumstances, we set aside the order of the trial Court and remand the case for a finding on the evidence whether the alleged encroachment is true, and for disposal accordingly. Meanwhile, the fine and costs paid, if any, will be refunded.

B.O.S.

APPELLATE CIVIL--FULL BENCH.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
Mr. Justice Anantakrishna Ayyar and
Mr. Justice Curgenvven.

SUBRAMANIA CHETTIAR (PLAINTIFF), APPELLANT,

v.

SINNAMMAL AND TWO OTHERS (LEGAL REPRESENTATIVES
OF DEFENDANT), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XLI, r. 33—Discretionary power, under—Attaching decree-holder's right to redeem mortgage—Sec. 91, Transfer of Property Act (IV of 1882)—Suit on mortgage—O. XXXIV, r. 1, Civil Procedure Code—Attaching decree-holder, whether a necessary party.

Held by the Full Bench (BEASLEY C.J. ANANTAKRISHNA
AYYAR and CURGENVEN JJ.):—

An attaching decree-holder has no interest in, or charge on, the immovable property attached and as such is not a necessary party within the meaning of Order XXXIV, rule 1, Civil Procedure Code, to a suit by a mortgagee. Hence, if under the decree in the mortgage suit to which he is not a party, the property is sold before he redeems it, he loses the right to redeem which was given to him by section 91 (f), of the Transfer of Property Act (since repealed).

Held previously by the Full Bench (COUTTS TROTTER C.J.
BEASLEY and MADHAVAN NAIR JJ.):—

The powers given to an appellate Court by Order XLI, rule 33, Civil Procedure Code, are very wide and can be exercised in a proper case even in favour of a respondent who has neither appealed nor filed a memorandum of cross-objections. But the exercise of such extraordinary power is a matter of discretion with the appellate Court depending on the circumstances of the case.

* Letters Patent Appeal No. 72 of 1925.

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APPEAL under clause 15 of the Letters Patent against the judgment of SRINIVASA AYYANGAR J. in Second Appeal No. 88 of 1922, preferred to the High Court against the decree of the Court of the Additional Subordinate Judge of Madura in A.S. No. 96 of 1920 (A.S. No. 224 of 1920, District Court, Madura), preferred against the decree of the Court of the Second Additional District Munsif of Madura in O.S. No. 10 of 1918.

The Letters Patent Appeal coming on for hearing, the Court (COUTTS TROTTER C.J. and ANANTAKRISHNA AYYAR J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

ANANTAKRISHNA AYYAR J.—Plaintiff is the appellant in this appeal. In execution of a money decree obtained by the plaintiff against Subbiah Pillai in O.S. No. 650 of 1910, the plaintiff attached the suit properties in October 1913. Subsequently, the plaintiff himself purchased the property in court auction on 9th March 1914. The sale was confirmed on 9th April 1914, and the plaintiff got delivery of property in enforcement of the sale certificate on 2nd December 1914. The sale to the plaintiff was subject to a hypothecation in favour of Periya Ravutha Goundar for Rs. 200 over the suit property.

Periya Ravutha Goundar filed a suit (O.S. No. 537 of 1913) on 19th November 1913 to recover money due on his hypothecation bond, making Subbiah Pillai, party defendant. The present plaintiff, however, was not made a party to that suit. The defendant after obtaining the preliminary and final decrees in suit No. 537 of 1913, himself purchased the properties in court auction on 27th March 1916.

On the allegation that the defendant got into possession of the properties by trespass in May 1916, the plaintiff filed the present suit on 2nd February 1917 against Periya Ravutha Goundar for redemption of the defendant's mortgage for Rs. 200, dated 11th August 1905 mentioned above. The defendant pleaded that he was the owner of the properties and that the plaintiff was not entitled to redeem.

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The Court of first instance decreed redemption by the plaintiff on payment of Rs. 830-8-5 to the defendant.

The plaintiff preferred an appeal to the lower Appellate Court on the ground that the amount that he was directed to pay for redemption was too large and that he was entitled to redeem on payment of a smaller amount. At the hearing of the appeal, the learned Subordinate Judge came to the conclusion that the plaintiff was not entitled to any right of redemption at all, and consequently not only dismissed the plaintiff's appeal but reversed the decree of the first Court in plaintiff's favour and dismissed his suit *in toto*.

Two questions of law have been raised in the appeal to the High Court, one relating to the plaintiff's right to redeem and the other whether the lower Appellate Court had jurisdiction in an appeal preferred by the plaintiff, not only to dismiss the plaintiff's appeal but further to reverse the decree passed in plaintiff's favour by the first Court, even though the respondent has not preferred any memorandum of objections or an independent appeal questioning the decree of the first Court.

To appreciate the first question, it is necessary to state that the first Court, relying on the decision reported in *Venkata Seetharamayya v. Venkataramayya*(1), decided that a money decree-holder who had attached the mortgage properties ought to have been made a party to the suit subsequently filed by the mortgagee to recover money due on the mortgage and that such attaching decree-holder was entitled to redeem the mortgage. It would appear that a later decision of the High Court dissenting from the view taken in I.L.R., 37 Mad., 418, was reported in the Law Reports, *Chamiyappa Tharagan v. Rama Ayyar*(2), shortly before the appeal was heard by the lower Appellate Court. Consequently according to the later ruling of the High Court, the plaintiff could not claim any right of redemption and consequently his suit for redemption ought to have been dismissed.

But the defendant had not preferred any independent appeal nor filed any memorandum of objections in the plaintiff's appeal questioning that portion of the decree passed by the District Munsif upholding the plaintiff's right to redeem. The lower Appellate Court, however, was of opinion that under Order XLI, rule 33, Civil Procedure Code, the Appellate Court had

(1) (1912) I.L.R., 37 Mad., 418.

(2) (1920) I.L.R., 44 Mad., 232.

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jurisdiction to reverse even that portion of the first Court's decree though it had not been appealed against; and having regard to the circumstances of the case, it held that a case was made out for the exercise by it of the jurisdiction conferred by Order XLI, rule 33, Civil Procedure Code. Accordingly, the Appellate Court not only dismissed the plaintiff's appeal but proceeded further and reversed the first Court's decree and dismissed the plaintiff's suit altogether.

It was argued before us that there is a conflict between the decision in *Venkata Seetharamayya v. Venkataramayya*(1), and the decision in *Chamiyappa Tharagan v. Rama Ayyar*(2) on the question whether the right of redemption subsists in the plaintiff in such cases.

On the question of the power of the Appellate Court to interfere even with the portion of the decree not appealed against even if it thought that decision erroneous, in the absence of an appeal or memorandum of objections, various cases were quoted before us. The question relates to a matter of practice as regards jurisdiction and powers of Appellate Courts. It is essentially necessary and expedient that the law on such a point should be definitely and authoritatively laid down.

Having regard to the two questions of law aforesaid arising in this case, and for the reasons mentioned already, we think that this appeal should be decided by a Full Bench and we accordingly refer the whole case for the decision of a Full Bench.

ON THIS REFERENCE—

T. L. Venkatarama Ayyar for appellant, at the first hearing:—Order XLI, rule 33, Civil Procedure Code, should be read subject to rule 22 of Order XLI, and the provisions of the Court Fees Act and the Limitation Act. When a respondent has not filed either an appeal or a cross-appeal, no decree can be passed in his favour beyond what had been passed by the Court below. For the true scope and meaning of rule 33, see *Rangam Lal v. Jhandu*(3), *Gangadhar v. Banabashi*(4), *Abjal Majhi v. Intu Bepari*(5), *Ramalingam Chettiar v. Subrahmanya Chettiar*(6), and *Chockalingam Chetty v. Seethai Ache*(7).

- (1) (1912) I.L.R., 37 Mad., 418. (2) (1920) I.L.R., 44 Mad., 232.
(3) (1911) I.L.R., 34 All., 82. (4) (1914) 22 C.L.J., 390.
(5) (1915) 22 C.L.J., 394. (6) (1927) 53 M.L.J., 612.
(7) (1927) 54 M.L.J., 88 (P.C.).

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At the second hearing:—Section 91, Transfer of Property Act, includes two classes of persons; (1) those who have a mere right to redeem without having an interest in the mortgage property and (2) those who have an interest in the mortgage property. Both classes are given the right to redeem. Prior to this enactment an attaching creditor who had no interest in the mortgaged property had no right to redeem; *Soobhul Chunder Paul v. Nitye Churn Bysack*(1). This statutory right of his cannot be taken away by proceedings taken behind his back; and he is a necessary party to a mortgage suit as provided by Order XXXIV, rule 1, Civil Procedure Code; *Venkata Seetharamayya v. Venkataramayya*(2) is correct; see also *Suraj Bansi Koer v. Sheo Persad Singh*(3), *Ghulam Husain v. Dina Nath*(4), *Lakhpai Rai v. Fakhrudin*(5), *Shananda Chandra Pal v. Sri Nath Ray Choudury*(6).

P. R. Srinivasan for respondent, at the first hearing:—Order XLI, rule 33, gives the Court very wide powers and a decree in favour of a respondent beyond what he got in the lower Court can be given to him even when he had not appealed or preferred a memorandum of objections if such a course is necessary in the interests of justice or consistency requires it. Even the decisions quoted by the appellant recognise that the exercise of the power is discretionary with the Court according to the circumstances of each case; see also the illustration to the rule. In this case, in view of the ruling in *Venkata Seetharamayya v. Venkataramayya*(2), prevailing at the time of appeal I did not appeal; and I urged that the plaintiff was not entitled to redeem as soon as *Chamiyappa Tharagan v. Rama Ayyar*(7) was published. For the origin of the rule, see *Attorney-General v. Simpson*(8); see also *Jawahar Bano v. Shujaat Husain Beg*(9), *Debandra Narain Sinha v. Narendra Narain Sinha*(10), *Jogendra Kishore Roy v. Nasimuddin Sardar*(11) and *Gopala Iyengar v. Mummachi Reddiar*(12).

At the second hearing:—An attachment does not create any interest in the property attached; *Moti Lal v. Karrabuldin*(13).

- (1) (1880) I.L.R., 6 Cal., 633. (2) (1912) I.L.R., 37 Mad., 418.
(3) (1879) I.L.R., 5 Cal., 148 at 174 (P.C.).
(4) (1901) I.L.R., 23 All., 467. (5) (1917) I.L.R., 39 All., 538.
(6) (1912) 17 C.W.N., 871.
(7) (1920) I.L.R., 44 Mad., 232. (8) [1901] 2 Ch. D., 671.
(9) (1920) I.L.R., 48 All., 85. (10) (1919) 24 C.W.N., 110.
(11) (1920) 62 I.O., 628. (12) (1922) 17 L.W., 254, 272.
(13) (1897) I.L.R., 25 Cal., 179, (P.C.).

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Order XXXIV, rule 1, Civil Procedure Code, alone and not section 91 of the Transfer of Property Act provides who should be made parties to a mortgage suit. According to the former it is only persons who have an interest in the property or in the right of redemption that should be made parties; section 91 must be read subject to Order XXXIV, rule 1; and if before the attaching creditor chooses to redeem, the mortgage itself had been extinguished by a court sale he loses his right to redeem. If the attaching creditor purchases the mortgagor's right, he stands in the shoes of the mortgagor; and as the mortgagor was a party to the suit in which the property was sold, he cannot again claim a right to redeem. Moreover, his purchase would be *pendente lite*. The Transfer of Property Amendment Act has now abolished the right of an attaching creditor to redeem. *Chamiyappa Tharagan v. Rama Ayyar*(1) which has followed *Veyindramuthu Pillai v. Maya Nadan*(2) is correct.

T. L. Venkatarama Ayyar in reply:—The auction-purchaser's rights are as on the date of attachment; *Pennappa Pillai v. Pappurayyengar*(3). Hence the filing of a suit on a mortgage, after the attachment, will not create any *lis pendens*; *Ohinnu Pillai v. Venkatasamy Chettiar*(4).

The Court (COURTS TROTTER C.J. BEASLEY and MADHAVAN NAIR JJ.) delivered on the first occasion the following

JUDGMENT.

MADHAVAN
NAIR J.

MADHAVAN NAIR J.—The plaintiff is the appellant in the Letters Patent Appeal. He obtained a money decree against Subbiah Pillai and one of his sons in Original Suit No. 650 of 1910 on the file of the District Munsif's Court of Madura. In execution of that decree he attached the suit property in October 1913. Subsequently he himself purchased it in court auction on 9th March 1914. The plaintiff's purchase of the property was subject to a hypothecation in favour of the

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defendant for Rs. 200, dated 11th August 1905. The sale was confirmed on 9th April 1914 and in the enforcement of the sale certificate he obtained delivery of the property on the 2nd December 1914. In the meanwhile, the defendant filed a suit (Original Suit No. 537 of 1913) on his hypothecation on 19th November 1913 and got a decree on 18th December 1913. To this suit the present plaintiff was not made a party. In execution of his decree, the defendant purchased the property on 27th March 1916. Alleging that the defendant was in unlawful possession of the land the plaintiff filed the present suit against him for the redemption of his mortgage for Rs. 200. The defendant pleaded that he was the owner of the property and that the plaintiff was not entitled to redeem. The first issue in the case was "whether the plaintiff has the right to redeem." When the case came on for trial, the defendant conceded this point in favour of the plaintiff as, under the ruling in *Venkata Seetharamayya v. Venkataramayya*(1), an attaching creditor had a right to redeem. The District Munsif passed a decree for redemption in favour of the plaintiff on payment of Rs. 830-8-5 to the defendant.

The plaintiff then preferred an appeal to the lower Appellate Court on the ground that the sum he was ordered to pay was too large and that he should have been allowed to redeem on payment of a smaller amount. At the hearing of the appeal the defendant's *vakil* contended that the plaintiff's suit for redemption itself was not maintainable; and he represented that it was in view of the decision in *Venkata Seetharamayya v. Venkataramayya*(1), that an attaching creditor had a right to redeem, that he conceded before the lower

(1) (1920 I.L.R., 44 Mad., 232. (2) (1910) I.L.R., 43 Mad., 693.

(3) (1891) I.L.R., 4 Mad., 1 (F.B.) at 65.

(4) (1915) I.L.R., 40 Mad., 77, 97.

(1) (1912) I.L.R., 37 Mad., 418.

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Court the plaintiff's right to redeem, but that the decision in *Chamiyappa Tharagan v. Ruma Ayyar*(1) has now negatived such a right on the part of the attaching creditor. In the circumstances, the learned Subordinate Judge allowed the defendant to raise the contention under Order XLI, rule 33, Civil Procedure Code; and though there was no cross-appeal or memorandum of objections by him, he upheld his contention and not only dismissed the plaintiff's appeal but reversed the decree of the first Court in plaintiff's favour and dismissed his suit *in toto*.

Against the above decree of the lower Appellate Court, the plaintiff preferred Second Appeal No. 88 of 1922, and urged before SRINIVASA AYYANGAR J. that the Subordinate Judge was wrong in holding that the plaintiff had no right to redeem and that he had no jurisdiction under Order XLI, rule 33, Civil Procedure Code, to allow the respondent to raise this new plea. The learned Judge overruled both arguments and dismissed the Second Appeal. The present Letters Patent Appeal is against the judgment and decree of the learned Judge.

The same arguments have been addressed to us. It is first contended that the learned Judge erred in holding that the lower Appellate Court had jurisdiction to dismiss the plaintiff's suit under Order XLI, rule 33, Civil Procedure Code, when the respondent had filed neither an appeal nor a memorandum of cross-objections challenging the decree for redemption passed by the District Munsif and that the provision of this rule should be read subject to rule 22 of the said Order, the Court Fees Act and the Limitation Act, etc. In support of this contention reliance is placed upon the true scope and meaning of Order XLI, rule 33, as

(1) (1920) I.L.R., Mad., 232.

illustrated by the decisions in *Rangam Lal v. Jhandu*(1), *Gangadhar v. Banabashi*(2), *Abjal Majhi v. Intu Bepari*(3), *Ramalingam Chettiar v. Subrahmanya Chettiar*(4) and *Chockalingam Chetty v. Seethai Ache*(5).

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Order XLI, rule 33, reads as follows :—

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

Illustration.—A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y."

The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the Appellate Court ample discretion to pass any decree or make any order to prevent ends of justice from being defeated. By the very terms of the Order, involving as it does an exercise of judicial discretion, the question whether the Appellate Court should exercise the powers conferred by them in a particular case would no doubt depend upon the special facts and circumstances of that case. The illustration to the rule is a type of one class of cases, which calls for the exercise of the powers conferred by Rule 33; but it does not by any means exhaust the class of cases in which the powers of the Appellate Court under this rule may be invoked. Having regard to the wide language of the rule it is inexpedient to lay down

(1) (1911) I.L.R., 34 All., 32.

(2) (1914) 22 C.L.J., 390.

(3) (1915) 22 C.L.J., 394.

(4) (1927) 52 M.L.J., 612.

(5) (1927) 54 M.L.J., 88 (P.C.).

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any hard and fast rule regarding the true scope of this provision. In a *proper case* the Court should not hesitate to use the powers conferred upon it by this rule. The basis for the rule may be found in Order LVIII, rule 4, of the Rules of the Supreme Court in England. *Attorney-General v. Simpson*(1) is an instance of another class of cases justifying action under this rule. In that case, an action was brought by the Attorney-General on behalf of the public for two reliefs: (1) for a declaration that the public were entitled to the right of passage along a river including the locks without the payment of tolls, and (2) that the defendant was under an obligation to maintain the locks in an efficient state by repair. In the first Court a decree was passed declaring that the public were entitled to use the locks without payment of tolls but it was also declared that the defendant was under no obligation to repair the locks. The defendant preferred an appeal against this decree. The plaintiff did not file either a cross-appeal or a memorandum of objections. The Court of Appeal found that the public were not entitled to use the locks without payment of tolls to the defendant; at the same time the Court expressed the opinion that the defendant was under an obligation to repair the locks, and passed a decree to that effect. The learned Judges pointed out that under Order LVIII, rule 4, they were entitled to make this declaration notwithstanding the fact that there was no appeal by the plaintiff "against so much of the judgment which declared that the defendant was not bound to repair and maintain the works."

In none of the cases brought to our notice has it been laid down that in an appeal preferred by the

(1) [1901] 2 Ch. D., 671.

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plaintiff against a portion of the decree, the Appellate Court has no jurisdiction in the absence of a cross-appeal or cross-objection to dismiss the whole suit and that the utmost that the Appellate Court is competent to do is to dismiss the appeal. No doubt, learned Judges have remarked that the provision embodied in this rule should be used with care and caution; but that does not mean that the Appellate Court has no jurisdiction under it to dismiss the plaintiff's suit *in toto*. The Court is not bound to interfere in every case in which it has the power to do so; it is in this connexion that the question of judicial discretion comes in. There may no doubt be cases where no excuse or justification could be found for a party not having preferred an appeal or a memorandum of objections, in which cases justice may not require the exercise of powers under Order XLI, rule 33, and the Appellate Court will be well advised in not exercising such powers. The decision in *Rangam Lal v. Jhandu*(1) does not support the extreme contention urged by the appellant. In that case, the plaintiff brought a suit against the defendant for rent of a holding and obtained a decree for a portion of his claim. The plaintiff then appealed with respect to the portion of his claim dismissed by the first Court. The defendant submitted to the order in so far as it was against him and neither filed a cross-appeal nor took objections under Order XLI, rule 22, Civil Procedure Code. The District Judge remitted certain issues to the first Court and on return of the findings dismissed the entire suit of the plaintiff holding that he had power to do so under Order XLI, rule 33, even though the defendant had not appealed against that part of the decree which was against him. On appeal by the plaintiff, the learned Judges held that it was not competent to the Appellate Court acting

(1) (1911) L.L.B., 84 All., 83.

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under Order XLI, rule 33, to interfere with the decree obtained by the plaintiff in so far as it had not been challenged by the defendant. The true purport of that decision is explained in *Jawahar Bano v. Shujaat Husain Beg*(1), in these words :—

“The Full Bench in that case held, that, although the words of Order XLI, rule 33, were very wide and the Judge, strictly speaking *had jurisdiction to pass the decree which he had made*, still there was not a proper exercise of jurisdiction by him in that case. It was pointed out that in a case where there is no sufficient reason for a respondent neglecting either to appeal or to file objections, the Court will hesitate before allowing him to object at the hearing of the appeal.” (The italics are ours.)

Distinguishing the case in *Rangam Lal v. Jhandu*(2), with these remarks, the learned Judges upheld in *Jawahar Bano v. Shujaat Husain Beg*(1) the exercise of power by the Appellate Court under Order XII, rule 33, Civil Procedure Code. In that case, a decree was passed for varying amounts against three defendants, of whom two only appealed, the third not being made a party to the appeal. It was held that it was competent to the Appellate Court to modify the decree in favour of the defendant who had not appealed by decreeing the whole sum due to the plaintiffs against the defendants who had. The decisions in *Gangadhar v. Banabashi*(3) and *Abjal Majhi v. Intu Bepari*(4) also do not, in our opinion, support the extreme contention urged by the appellant. The learned Judges, while pointing out that

“ordinarily, the power contained in Rule 33 should be limited to those cases where, as the result of the Appellate Court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience ;”

(1) (1920) I.L.R., 43 All., 85.
(3) (1914) 22 C.L.J., 390.

(2) (1911) I.L.R., 34 All., 39.
(4) (1915) 23 C.L.J., 394.

do not deny the Appellate Court's jurisdiction to interfere in a proper case. JENKINS C.J. says in *Gangadhar v. Banabashi*(1),

“There is no doubt that the words of that rule are widely expressed, but they must be applied with discretion.”

And later on, the learned Judge adds “no hard and fast rule can be laid down.” A similar opinion is expressed by MOOKERJEE J. in *Abjal Majhi v. Intu Bepari*(2). It would thus appear that the statement of the learned Judges in *Ramalingam Chettiar v. Subrahmanya Chettiar*(3), that the two Calcutta decisions just now mentioned laid down that the exercise of the rule should be limited to cases where the Court had interfered in favour of the appellants and further interference was required to adjust the rights of parties, is not—with all deference to the learned Judges—quite accurate. There is no warrant for limiting the very wide terms of the rule only to this class of cases, though *ordinarily* it may be that it is in those cases occasions arise for exercising powers under the rule. The decision in *Debandra Narain Sinha v. Narendra Narain Sinha*(4) recognizes the extensive jurisdiction of the Court under rule 33 of Order XLI, Civil Procedure Code. The latest decision of the Calcutta High Court in *Jogendra Kishore Roy v. Nasimuddin Sardar*(5) shows unmistakably the view of that Court on this matter. The facts of that case are thus summarized in the head-note :

“In a suit for the rent of a holding the first Court passed a decree in favour of the plaintiff for a proportionate amount of the rent payable in respect of the land included in the plaint, on the ground that the holding covered more lands than were included in the plaint. There was no appeal or cross-objection

(1) (1914) 22 C.L.J., 390.
(3) (1927) 52 M.L.J. 612.

(2) (1915) 22 C.L.J., 394.
(4) (1919) 24 C.W.N., 110.

(5) (1920) 62 I.C., 623.

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by the defendant, but on an appeal by the plaintiff the Appellate Court held that having regard to the manner in which the suit had been framed, the plaintiff would be entitled to no relief and accordingly dismissed the entire suit of the plaintiff."

The High Court held,

"that having regard to the very wide powers given to an Appellate Court under Order XLI, rule 33, Civil Procedure Code, the decision of the Appellate Court dismissing the whole of the plaintiff's suit, in the absence of a cross-appeal or cross-objection by the defendant, was not without jurisdiction."

The following observation appearing in the judgment gives a complete reply to the arguments urged by the appellant before us:

"There can be no doubt that the wording of Rule 33 is very general and in this respect gives very wide powers to the Court of Appeal. But the learned Vakil for the appellant, however, urges in reply that Rule 33 is controlled by Rule 22 and that the wide powers given by Rule 33 can only be exercised in case the whole matter is brought into controversy before the Appellate Court by a cross-appeal or a cross-objection filed under Rule 22. I am not satisfied that this is a correct view of the scope of Rule 33."

Our own Court has not dealt with this question except in the decision in *Ramalingam Chettiar v. Subrahmanya Chettiar*(1) already referred to. In *Gopala Iyengar v. Mummachi Reddiar*(2) the learned Judges, "to be consistent" gave relief to a defendant though he had not appealed or joined in the memorandum of objections filed by some of the respondents. The Privy Council in *Ohockalingam Chetty v. Seethai Ache*(3) observes that under Order XLI, rule 33, Civil Procedure Code, the Appellate Court is empowered, in a proper case, to add a defendant as respondent to the appeal, for the purpose of passing a decree against him though their Lordships "saw no sufficient reason for interfering

with the refusal of the Appellate Court to do so" in that instance. On the whole, we are satisfied that in a proper case the lower Appellate Court has jurisdiction to exercise its powers in favour of the respondent by dismissing the plaintiff's case *in toto*, though the respondent did not prefer a cross-appeal or memorandum of objections challenging the decree, passed by the first Court.

As already stated, whether interference was justified or not would depend upon the particular circumstances of each case. In the case before us, the Subordinate Judge came to the conclusion that at the time when the appeal was filed the law that prevailed in Madras with regard to the plaintiff's right to redeem was what was laid down in *Venkata Seetharamayya v. Venkataramayya*(1) and that, therefore, the respondent could not take exception to the District Munsif's decree by preferring an appeal or cross-appeal. But by the time the appeal came on for hearing before him, the report of a decision of this Court refusing to follow *Venkata Seetharamayya v. Venkataramayya*(1) appeared in *Chamiyappa Tharagan v. Rama Ayyar*(2). Relying on this decision, the respondent raised the question before the lower Appellate Court. In these circumstances, the Subordinate Judge held that there was sufficient excuse or justification for the respondent not having preferred an appeal or a memorandum of objections. With this view SRINIVASA AYYANGAR J. also agreed. If, therefore, the Subordinate Judge's decision that the case in *Chamiyappa Tharagan v. Rama Ayyar*(2) really has overruled the decision in *Venkata Seetharamayya v. Venkataramayya*(1) is correct, then we cannot say that he was wrong in exercising his discretion under

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(1) (1927) 52 M.L.J., 612.

(2) (1922) 17 L.W., 254 at 272.

(3) (1927) 54 M.L.J., 88 (P.O.).

(1) (1912) I.L.R., 37 Mad., 418.

(2) (1920) I.L.R., 44 Mad., 232.

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Order XLI, rule 33, and dismissing the plaintiff's suit *in toto*, though the respondent had not filed an appeal or a memorandum of cross-objections. The question for decision in this Letters Patent Appeal therefore reduces itself to this: Has the plaintiff-appellant in this case no right to redeem in view of the decision in *Ohamiyappa Tharagan v. Rama Ayyar*(1)?

As already indicated, this question was decided against him both by the lower Appellate Court and by the learned Judge whose decision is now under appeal.

The case will be posted for further hearing on this point.

COUTTS TROTTER C.J.—I agree.

BEASLEY J.—I agree.

The Letters Patent Appeal again coming on for hearing, the Court (BEASLEY C.J. ANANTAKRISHNA AYYAR and CURGENVEN JJ.) delivered the following

JUDGMENT.

ANANTA-
KRISHNA
AYYAR J.

ANANTAKRISHNA AYYAR J.—This Letters Patent Appeal raised two important questions of law, one turning on the construction to be placed upon Order XLI, rule 33, Civil Procedure Code, and the other on section 91 of the Transfer of Property Act read with Order XXXIV, rule 1, Civil Procedure Code.

The first question has been answered in favour of the respondents and against the appellant by a Full Bench of this Court at an earlier stage of this Letters Patent Appeal.

The only other question that remains for decision is whether the plaintiff, on the facts stated in the Order of Reference, is entitled to redeem the first defendant's

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mortgage. The plaintiff was a money decree-holder against the judgment-debtor, the mortgagor, and in execution of his money decree he attached the mortgaged properties.* Pending the attachment, the first defendant, the mortgagee, filed a suit to recover the money due upon his mortgage but he failed to make the plaintiff, who was then the attaching decree-holder, a party to his suit on the mortgage. In course of time the plaintiff became purchaser in Court auction in execution of his money decree and obtained possession. The mortgagee, the plaintiff in the other suit, also became purchaser in execution of the decree passed on foot of his mortgage. The question that arises in the present suit is whether the plaintiff, the attaching decree-holder, who subsequently became also the auction purchaser in execution of the money decree, has got the right to redeem the mortgage on the ground that section 91 (f) of the Transfer of Property Act gives him such a right to redeem, since he was not made a party to the mortgage suit.

The first point that arises for consideration in this connexion is as to the exact scope of the expressions appearing in section 91 (a) and (b) of the Transfer of Property Act, namely, "a person having any interest in or charge upon the property" and "any person having any interest in or charge upon the right to redeem the property" read along with Order XXXIV, rule 1, Civil Procedure Code, "all persons having an interest either in the mortgage security or in the right of redemption." I am clear that the cases contemplated by section 91 (a) and (b) exhaust the class of cases contemplated by Order XXXIV, rule 1, Civil Procedure Code, and that it is only persons interested in the mortgage-security or in the equity of redemption that have necessarily to be made parties to a suit under Order XXXIV, rule 1,

(1) (1920) I.L.R., 44 Mad., 282.

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Civil Procedure Code. This is the view that has been taken in *Chamiyappa Tharagan v. Rama Ayyar*(1) and in *Veyindramuthu Pillai v. Maya Nadan*(2). It is also clear that attachment in execution of a money decree does not of itself create any interest in or a charge over the properties which are the subject-matter of the attachment. This has been decided by the Privy Council in *Moti Lal v. Karrabuldin*(3) and is not open to question. Having regard to the construction placed on section 91 (a) and (b) of the Transfer of Property Act, and to the view taken regarding the scope of Order XXXIV, rule 1, Civil Procedure Code, it seems to me that it could not be said that a person in the position of the plaintiff, namely, an attaching decree-holder in execution of a money decree against the mortgagor is a necessary party to a suit under Order XXXIV, Civil Procedure Code. The question then arises whether the plaintiff, simply because under clause (f) of section 91 he is given a right to redeem, as an attaching decree-holder, is entitled in the circumstances that have happened in this case to claim redemption. It has been held by OLDFIELD J., in *Veyindramuthu Pillai v. Maya Nadan*(2) that any rights he might have *qua* attaching decree-holder are not available to him when the properties have been sold in execution through Court; and that view has been accepted by two learned Judges of this Court, WALLIS C.J. and SESHAGIRI AYYAR J. in *Chamiyappa Tharagan v. Rama Ayyar*(1). It was argued that, if under clause (f) an attaching decree-holder has been given a right to redeem, then, whatever might be the exact category under which the right could be placed, not having been a party to the mortgagee's suit his rights could not vanish. The answer

(1) (1920) I.L.R., 44 Mad., 232. (2) (1919) I.L.R., 43 Mad., 696.
(3) (1897) I.L.R., 25 Cal., 179 (P.C.).

to this is furnished in the judgment of OLDFIELD J., and the other learned Judge in *Veyindramuthu Pillai v. Maya Nadan*(1). The Legislature evidently saw the impropriety of retaining clause (f) of section 91 after the Privy Council made it clear that an attachment as such does not create any title to, or interest in or charge on, the properties attached in favour of the attaching decree-holder, and has accordingly omitted clauses (f) and (g) from the section in the Transfer of Property (Amendment) Act, 1929. The case is not consequently of any general importance and could not arise under the present law; and I am not prepared in the circumstances to reconsider the point decided by the three learned Judges of this Court in 43 Mad. 696 and 44 Mad. 232, whose observations I have already referred to, and I respectfully follow their opinion on this point. It follows that this contention raised by the learned Advocate for the appellant should fail. This Letters Patent Appeal should, for these reasons, be dismissed.

But, having regard to the fact that the lower Appellate Court exercised the rather extraordinary jurisdiction that Courts have under Order XLI, rule 33, Civil Procedure Code, and granted a decree in favour of the respondents, though the respondents had not preferred an appeal to it, and for that reason directed that they should have no costs of the litigation, I think that this Letters Patent Appeal should, in the circumstances, be dismissed without costs.

BEASLEY C.J.—I agree and have nothing further to add.

CURGENVEN J.—I agree.

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(1) (1919) I.L.R., 43 Mad., 693.

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APPELLATE CIVIL.

*Before Mr. Horace Owen Compton Beasley, Chief Justice,
Mr. Justice Anantakrishna Ayyar and
Mr. Justice Curgenvven.*

1930,
April 24.

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FIRST APPELLANT), APPELLANT,

v.

KOTTAPALLI ANKAMMA (RESPONDENT), RESPONDENT.*

*Civil Procedure Code (Act V of 1908), O. XXI, rr. 71 and 84—
Resale under r. 84, after proclamation—"Forthwith" in
r. 84, meaning of.*

Where, on the failure of an auction purchaser to deposit the twenty-five per cent of the price, the Court is required under Order XXI, rule 84, Civil Procedure Code, to hold a resale "forthwith", it means that the Court should hold the resale "as expeditiously as the circumstances permit". Though it is not obligatory on the Court to issue a fresh proclamation in every case of such resale, yet it is competent to do so in the circumstances of a particular case in the interests of the defaulting purchaser; and when it does so, the resale held immediately after the fresh proclamation should be deemed to be one held "forthwith" within the terms of rule 84.

APPEAL under clause (15) of the Letters Patent against the judgment of JACKSON J., passed in Appeal against Appellate Order No. 6 of 1926, preferred to the High Court against the decree of the District Court of Guntūr in Appeal Suit No. 253 of 1924, preferred against the Order of the District Munsif of Narasaraopet in Execution Application No. 1088 of 1923 in Original Suit No. 945 of 1921.

The material facts appear from the judgment.

Ch. Rayhava Rao for appellant.—As the resale was not held immediately after the default, it cannot be said to have

been held "forthwith" within the meaning of Order XXI, rule 84, Civil Procedure Code.

[CHIEF JUSTICE.—This is a question of fact to be decided according to the circumstances of each case.]

[ANANTAKRISHNA AYYAR J.—A fresh proclamation was issued in this case, only in your interests. If the sale had been held immediately on the very day, there would have been no bidders and you would have lost heavily.]

That is problematical. The statute must be satisfied. If, as both the learned Judges held, there is no obligation to issue a fresh proclamation, how can we say that a sale held two months after the default, under a fresh proclamation, is one held "forthwith". A fresh proclamation is necessary only when the remaining seventy-five per cent is not paid and not when the initial twenty-five per cent is not paid.

No one appeared for respondent.

The JUDGMENT of the Court was delivered by

BEASLEY C.J.—This Letters Patent Appeal comes before us on account of a difference of opinion between JACKSON and THIRUVENKATACHARIAR JJ., upon one point.

The facts of the case are as follows:—The appellant bid at a court sale; his bid was accepted but he failed to pay the twenty-five per cent deposit as is prescribed by Order XXI, rule 84, Civil Procedure Code. Having defaulted in the payment of the deposit, a fresh proclamation was issued and a resale of the property held. This sale resulted in a deficiency of Rs. 630 and the appellant was ordered under Order XXI, rule 71, Civil Procedure Code, to make good the deficiency. He objects to that order on the ground that the sale was not held "forthwith" to use the word which appears in Order XXI, rule 84, Civil Procedure Code, which provides that, upon failure of a bidder to pay the twenty-five per cent deposit, the property shall "forthwith" be resold. The sale at which the appellant defaulted was held on the 1st September 1923 and closed at 5 p.m.

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that day. The appellant, as before stated, failed to pay the twenty-five per cent deposit; the next day and the day after that, were holidays, and on the 4th September a fresh proclamation was directed to be issued proclaiming the property for sale, and the sale was held on the 5th November 1923 and resulted, as before stated, in a deficiency. The District Munsif, before whom the matter came, after going in detail into the facts and into the law, seems to us to have come to the conclusion that, although a fresh proclamation was not obligatory, it was necessary in the interests of the defaulting bidder to proclaim the property again for sale. We may say at once, that we think, that in the interests of the defaulting bidder it was necessary for the property to be again proclaimed for sale. Had the property been put up for sale on the 4th September, clearly there would have been no notice to prospective bidders and very likely no bidders would have attended the sale at all. In the lower Appellate Court, however, the District Judge took the view that, where a bidder defaults in payment of the deposit, the property cannot be resold unless there has been a fresh proclamation of sale; and he held upon that basis that, as the sale of the property had to be freshly proclaimed, the sale had been held "forthwith". When the matter came before JACKSON and THIRUVENKATACHARIAR JJ., they agreed that a fresh proclamation was not necessary under such circumstances, but disagreed on the question as to whether the property had been sold "forthwith". JACKSON J. took the view that although it was not obligatory to freshly proclaim the sale, nevertheless, in the interests of the defaulting auction-bidder, it should be freshly proclaimed, that there had been no unnecessary delay and that the sale should be said to have been held "forthwith". He gave his understanding of the word

"forthwith" and rendered it as follows: "as expeditiously as circumstances permit"; and that, in our view, would be a good rendering of the word. It is very difficult to say how the word "forthwith" should be defined; but we think that the rendering of it by JACKSON J. is probably as good a one as there can be and that "as expeditiously as circumstances permit" is probably the correct definition of that word. Another rendering might be "such time as appears to be reasonably early having regard to all the circumstances." Obviously in some cases it might reasonably be held that the resale should take place immediately following on the abortive sale. For instance, take the case of a sale of ten lots of property where the first lot is put up for auction, the bid of a bidder is accepted but he then and there defaults in payment of the deposit. Under these circumstances, probably, it could quite reasonably be held that the property should be sold "forthwith", meaning that it should be sold then and there, before the sale of the other nine lots is proceeded with; but it must depend entirely upon the circumstances of each case. In this case, we think that although it was not obligatory for a fresh proclamation of sale to be issued, yet it was in the interests of the auction-bidder that there should be a fresh proclamation for sale; that being so, there was no unnecessary delay, and in these circumstances the sale can be said to have been held "forthwith". The appeal must therefore be dismissed. No costs, as the respondent is unrepresented before us.

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SPECIAL BENCH.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
Mr. Justice Anantakrishna Ayyar and
Mr. Justice Curgenvven.

1930,
May 1.

S. P. S. RAMASWAMI CHETTIAR AND OTHERS,
PETITIONERS

v.

THE COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.*

*Indian Income-tax Act (XI of 1922)—Money-lending business—
Theft of money kept in the business premises—Loss, whether
can be deducted in computing income-tax.*

Held by BEASLEY C.J. and CURGENVEN J. (ANANTAKRISHNA
AYYAR J. dissenting):—

that the loss incurred by theft of money used in a money-lending business, and in the business premises, should not be allowed for in computing the income-tax, where the theft was committed by persons who were not at the time of the offence employed as clerks or servants in the business of the assessee.

CASE referred under section 66 (2) of the Indian Income-tax Act, 1922, to the High Court, in the matter of the Indian Income-tax Act, 1922, and in the matter of the Income-tax Assessment of S. P. S. Ramaswami Chettiar and others, Karaikkudi.

The material facts appear from the judgment of ANANTAKRISHNA AYYAR J.

V. Rajagopala Ayyar (with T. V. Ramayya), for assessee.—The question is whether money collected in a money-lending business, and stolen from the business premises, can be deducted under the Indian Income-tax Act, 1922. Such a deduction or allowance falls under section 10 (2), (ix) of the Act. Even otherwise it should be deducted under the general wording of section 10 (1). The law in England and in America allows

* Original Petition No. 275 of 1928.

deduction in such cases. In this case it is found that money was stolen and the thieves were convicted. The list given in section 10 (2) of the Act is not exhaustive; "Bad debts" are allowed under the Act, though not specifically mentioned in the section. The case of *Jagarnath Therani v. Commissioner of Income-tax*(1) is a direct decision on the point; it is the case of an embezzlement by a gumastah of the assessee. Reference was made to *Curtis v. J. & G. Oldfield, Limited*(2); *Konstam on Income-tax Law*; *Dowell on Income-tax*, page 399. Money in money-lending business is stock-in-trade. Irrecoverable outstandings are exempted. Loss of stock-in-trade is allowed for in computing profits. So also money stolen should be deducted in computing profits.

M. Patanjali Sastri for Commissioner of Income-tax.—There are no cases on the exact question raised in this case; but there are some cases in analogous circumstances. The loss must be incidental to the carrying on of the business. It has been held that damages paid by a company for accidental falling of a chimney on a guest is not loss in the course of the business. See *Strong and Co., Ltd. v. Woodfield*(3). The test there laid down is whether the loss is incidental to the trade or business of an inn-keeper. It was held in that case that it was not incidental to the business. The decision in *Inland Revenue Commissioners v. Warnes & Co.*(4) shows that the loss must be a contemplable and commercial loss, and not a loss by way of a penalty for transgressing a rule of restriction. Each case must depend on its own circumstances, and no hard and fast rule can be laid down. The decisions in the English cases show that the loss should be connected with or arising out of the trade. The case in *Jagarnath Therani v. Commissioner of Income-tax*(1) is distinguishable, on the ground that the embezzlement there was by a gumastah of the firm, an employee who should necessarily be engaged for carrying on the business. The theft here was by strangers and not by employees entrusted with money in the usual course of business.

V. Rajagopala Ayyar in reply.—The loss in this case is incidental to the trade. The money was kept in the strong room in the business premises for lending out in the usual course of business.

(1) (1925) I.L.R., 4 Pat., 385. (2) [1925] 9 T.C., 319 at 330.
(3) [1906] A.C., 448; 5 T.C., 215.
(4) [1919] 2 K.B., 444; 12 T.O., 227.

JUDGMENT.

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BEASLEY C.J.—The facts in this case have been sufficiently set out in the answers, to the question referred to us, of my learned brothers ANANTAKRISHNA AYYAR and CURGENVEN JJ., which I have had the advantage of seeing, and I, therefore, do not propose to state them. The question seems to me to resolve itself into one as to whether the loss sustained by the assessee in this case was one which can be described as incidental to his business. If it was, then he is entitled to have his profits upon which he is liable to pay income-tax reduced by the amount of that loss. It was argued for the assessee (1) that the robbery of the assessee's money was one which was incidental to his business of a money-lender and (2) that the money stolen was his "stock-in-trade" because it was money which, had it not been stolen, was available to him for the purpose of lending to borrowers and making a profit thereby. There is no evidence in this case that this sum was "stock-in-trade" at all and the money would seem to me to be capital plus the profits collected by the assessee. If this money was capital, then the assessee would not be entitled to a deduction on account of its loss. So far as the money stolen was the profit of the assessee, unless it can be shown that its loss was incidental to the business he carried on, he cannot claim a deduction in respect of it. If any one is paid a sum due to him as profits and he puts that in his pocket and on his way home is robbed of it, it would be, I think, difficult to contend that such a loss was incidental to his business. Still more so when he has reached his home and put those profits in a strong room or some other place regarded by him to be a place of safety. I can well understand that, in cases where the collection of profits or payment of debts due is entrusted to a gumastah or servant

for collection and that person runs away with the money or otherwise improperly deals with it, the assessee should be allowed a deduction because such a loss as that would be incidental to his business. He has to employ servants for the purpose of collecting sums of money due to him and there is the risk that such servant may prove to be dishonest and, instead of paying the profits over to him, convert them to his own use. But I cannot distinguish the present case from the case of any professional man or trader who, having collected his profits, is subsequently robbed of them by a stranger to his business. In this case none of the thieves were the then servants of the assessee, although one of them had formerly been his cook. This is no doubt a very hard case, and, whilst I have every sympathy with the assessee, I am unable to answer the question except in the negative. The question referred to us is rather too general, but upon the facts of this case, which, in my opinion, are not at all adequately set out, that must be my answer.

The result is that the answer of this Full Bench is in the negative and the assessee is directed to pay the costs of the Income-tax Commissioner which we fix at Rs. 250.

ANANTAKRISHNA AYYAR J.—I have the misfortune in this case to differ from the opinion of my Lord the learned Chief Justice and of my learned brother CURGENVEN J.

The question referred for our decision under section 66 of the Indian Income-tax Act is "Whether the loss incurred by theft of money used in the money-lending business, and in the business premises, should be allowed for in computing the income-tax."

The question raised is one of very great importance, and the case is one of first impression, no case directly deciding the point having been brought to our attention.

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One should have liked that more facts were available; the facts, as they appear in the records before us, are the following:—

The petitioners are a registered firm of Nattukottai Chettis carrying on money-lending business at Karaikkudi and other places in British India, and at Kuala Lumpur in the Federated Malay States, the headquarters being at Karaikkudi in the Rāmnād District. On the night of the 21st of October 1926, certain persons broke into the strong room of the house at Moulmeingyum (Burma) occupied by the petitioners and by two other firms, and stole cash and currency notes of the value of Rs. 9,335 besides certain jewels which had been pledged with the firm, as security, by certain customers. On 5th August 1927, four persons were convicted of the said offence by the Magistrate. One of these persons had been employed as a cook at the abovementioned premises. Though he was not so employed at the time of the offence, he was convicted, in addition, under section 328, Indian Penal Code, of administering drugs to the inmates of the house to facilitate the commission of the theft. The Commissioner of Income-tax stated that he had, since the decision of the income-tax officer, ascertained that the loss of the cash and the jewels was genuine. He, however, was of opinion that there was no provision of law under which the assessee would be entitled to deduction claimed in respect of the cash and currency notes, that the loss could neither be said to be a business-loss nor expenditure incurred for earning profits; and that the loss in question is loss of capital. The decision in *Jagannath Therani v. Commissioner of Income-tax* (1) was distinguished on the ground that the loss in

the present case could not be said to have been incurred in the business at all, and that such a loss could not be said to have been incurred solely for the purpose of earning the profits and gains of the business. He, therefore, held that the loss due to theft committed by persons unconnected with the business is not allowable as a deduction.

The learned Counsel, who appeared in support of the assessment, argued that the allowance now claimed could not be brought under any of the clauses of section 10 of the Act, which, he argued, exhausted the headings under which allowances could be claimed by assesseees. I am unable to accede to that contention. Section 10, no doubt, directs that the allowances mentioned in the section should be made in favour of the assessee; but, in my view, it does not necessarily follow that the assessee is not entitled to the allowances now in question simply because it is not specifically mentioned in section 10. Under clause (1) of section 10, tax is payable only in respect of the profits or gains of any business carried on by the assessee. The Court has to find out what the profits or gains of the business amounted to. In the absence of any specific provisions in the Act, the profits or gains of a business have to be ascertained by the ordinary commercial methods. If the argument advanced on behalf of the Crown be accepted, it would follow that no allowance could be claimed, for instance, for bad debts actually written off during the year, since there is no specific provision in section 10 for allowing such deduction. But it could not be, and in fact was not, contended that allowance should not be made for such bad debts. The practice of making allowance for such bad debts has become firmly established. As the Court has to find out the amount of profits or gains of the business during the

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period, the question arises whether the loss by the theft in question should be deducted when the profits are ascertained.

As pointed out in Konstam's book,

"The net profits of the trade or business should be computed by reasonable business methods, subject to any specific directions contained in the Income-tax Act."

LORD HERSHELL observed in *Russell v. Town and County Bank*(1) as follows:—

"The profit of a trade or business is the surplus by which the receipts from trade or business exceeded the expenditure necessary for the purpose of earning those receipts . . . Unless and until you have ascertained that there is such a balance, nothing exists to which the name of profits can properly be applied."

Similar observations were made by Lord PARKER in *Usher's Wiltshire Brewery, Limited v. Bruce*(2).

"Where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed . . . provided there is no prohibition against such an allowance."

It was argued for the assessee that the allowance claimed would come under section 10, (2) (ix):—

"Any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

It was also argued that, in the case of money-lending business of Nattukkottai Chettis, the loss in question must be taken to be loss of stock-in-trade. On the other side, it was argued for the Crown that the loss in question could not be said to be an expenditure incurred, much less, solely, for the purpose of earning such profits or gains, and that, in any event, it should be taken to be expenditure in the nature of "capital" expenditure. It was also argued that the moneys in question could not be said to be "stock-in-trade" in the

ordinary sense of the expression. Having regard to the way in which such people carry on their money-lending business, it would seem to be essential for the successful carrying on of their business to have cash with them even after "the usual banking hours." They carry on their business operations, as is well known, even after the offices of the European banks are closed for business for the day. Keeping moneys with them for purposes of their trade after such office hours could not, therefore, in my view, be said to be anything else than keeping moneys in the usual course of their business. The profits made by them by doing business after the usual office banking hours are surely liable to income-tax. The finding, as I understand it, is that in the usual course of business the remaining cash, etc., on hand and the jewels received on pledge from the customers were kept in "the strong room" of the business premises, and that thieves broke into the strong room and stole the cash and currency notes and the jewels. The fact of theft having been found, I think that the loss in question should be taken to be a loss connected with or arising out of the money-lending trade or business of the assessees. With reference to the jewels thus lost, the income-tax authorities have, and, in my opinion, rightly, made allowance; but I think that allowance should be made also for the cash and currency notes amounting to Rs. 9,335 thus lost. I am unable to agree with the contention of the Crown that the loss in question should, if at all, be taken to be loss of "capital." It is true, as pointed out on behalf of the assessees, that the profits of the Moulmeingyum business for the period in question was computed by the income-tax authorities to be over Rs. 20,000. But that circumstance by itself is no ground for holding that the item in question should be taken as loss of profits and

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not loss of capital. Whether a particular item is really capital expenditure or not has to be decided having regard to various considerations. Of course, it is well established that when once profits have been earned during the period, it does not matter how the same is dealt with subsequently.

I am inclined to the view that, in the case before us, the cash and currency notes, etc., lost should be taken to be "stock-in-trade" of the assessee's business. What should be considered as stock-in-trade of a business should be decided after having regard to the nature of the particular business, its requirements, and other circumstances essentially connected with the successful carrying out of the particular business.

In *Punjab National Bank v. The Crown*(1), the question was raised whether allowance should be made for depreciation in the case of certain Government securities held by a firm. The answer would depend on the question whether those securities were held by the firm (bank) with the object of dealing with them from day to day in the ordinary course of its business, including that of buying and selling Government securities in the usual course, or whether such Government securities were purchased by the firm (bank) with the object of constituting the same as a sort of reserve in lieu of cash; in the former case, allowance should be made for depreciation (the reason being that the Government securities should, in such a case, be treated as "stock-in-trade" of the bank), but not in the latter case.

In the case of a money-lending business such as the one before us, I think that the reasonable view to take as regards stock-in-trade is the one indicated by me above.

(1) (1926) I.L.B., 7 Lah., 227.

The decision in *Jagarnath Therani v. Commissioner of Income-tax*(1), so far as it goes, also supports this view. There, some money was entrusted to a gumastah of a firm in the usual course of business, with instructions to pay the same to a creditor of the firm. The gumastah embezzled the money. He was criminally prosecuted, but was acquitted, his defence being that he was robbed of the money. The case in *Jagarnath Therani v. Commissioner of Income-tax*(1), however, was comparatively a plainer case than the one before us, and the Court, if one may say so with respect, very properly held that the loss was connected with, and arose out of, the business, and was not *prima facie* a loss in the nature of capital expenditure.

On behalf of the assessee, the decision of ROWLATT J. in *Curtis v. J. & G. Oldfield, Limited*(2), was referred to before us. At page 330 the learned Judge observed as follows:—

"I quite think, with Mr. Latter, that if you have a business . . . in the course of which you have to employ subordinates, and owing to the negligence or the dishonesty of the subordinates some of the receipts of the business do not find their way into the till, or some of the bills are not collected at all, or something of that sort, that may be an expense connected with and arising out of the trade in the most complete sense of the word."

Stress was laid on the words "something of that sort" occurring in that judgment. But the words are too wide, and one cannot be certain that the learned Judge had a case like the present in his view. Too much importance should not, I think, be attached to the above observation in the circumstances. It was argued, on behalf of the Crown, that theft should not be taken to be anything connected with or arising out of the

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(1) (1925) I.L.B., 4 Pat., 885.

(2) [1925] 9 T.C., 319.

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assessee's money-lending business. In my view that is stating the position rather too broadly. In the case of Railway Administrations and other common carriers, the practice seems to be to make allowance for losses sustained by them in compensating passengers for accidents in travelling over the railway, etc. That the practice is to make such allowance in favour of common carriers is taken for granted in the judgment of Lord LOREBURN, L.C., in *Strong and Co., Ltd. v. Woodfield*(1).

At page 452, the Lord Chancellor observed as follows:—

"In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with, in the sense that they are really incidental to, the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted."

If losses sustained by a railway company in compensating passengers for accidents in travelling over its line could be deducted, it would seem to follow that losses similarly sustained by a railway company in compensating owners and consignees of goods entrusted to them for carriage, but which were lost during transit by theft, could also be deducted in proper cases. That would seem to resemble the present case, and the observations of the Lord Chancellor, I think, *prima facie* support the contention of the assessee before us.

(1) [1906] A.C., 448; 5 T.O., 215.

No doubt, the further observations made by the Lord Chancellor should also be kept in view. It was remarked later on, at page 452:—

"Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to solve at sight all the cases that may arise."

The loss must be something in the nature of a commercial loss. Whether a particular loss is of that nature or not would have to be decided with reference to all the circumstances of the case.

In *Royal Insurance Company v. Watson*(1), Lord SHAND expressed the opinion that damages awarded to an employee for wrongful dismissal would be allowable as a deduction. Damages for Libel against a newspaper proprietor would appear to be loss in the ordinary course of business of proprietors of newspapers. See Pratt and Redman's Income-tax Law, 10th Edition, page 112.

To the argument urged on behalf of the Crown that it is no part of the assessee's business to deal with thefts, the following observations of Lord BUCKMASTER in *J. Gliksten and Son v. Green*(2), may be referred to. There, the question was whether the amount received by a firm of timber merchants from Fire Insurance Company in respect of stock of timber destroyed by fire could be assessed to income-tax. At page 384 Lord BUCKMASTER observed as follows:—

"If this results in a gain, as it has done, it appears to me to be an ordinary gain—a gain which has taken place in the course of their trade—none the less because, as Mr. Macmillan put it, and as I think Sir John Simon before him appears to have put it, it is no part of a timber merchant's business to trade in fires."

If, in the present case, the stock-in-trade of the assessee before us including balance on hand each day and the jewels, etc., received on pledge from customers,

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(1) [1897] A.C., 1 at 9. (2) [1929] A.C., 381 at 384; 14 T.O., 265.

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had been insured at a particular figure against fire or theft, and the amount was accordingly received from the insurers on the occurrence of fire or theft, then the amount so received would, according to the decision in *J. Gliksten and Son v. Green*(1), be *prima facie* taxable. The premium paid in respect of such insurance is allowed to the assessee [see section 10 (2) (iv)], and, in return, the amount received by the assessee from the insurance would seem liable to be assessed to income-tax. If no insurance had been effected by the assessee, no premium is paid and no allowance is made on account of premium; and in case of loss, the assessee receives no amount from insurers, and therefore no such amount could be included in the assessment. The reasoning would seem to lead to the conclusion that the loss, even if uninsured, should be deducted, as I have come to the conclusion that the loss is connected with the business and is really incidental to the trade itself, having regard to the nature of the trade or business of the assessee.

Turning to the English text-books on Income-tax Law, I find the following statements in Sanders' Income-tax, 3rd edition. At page 310, it is stated that "a deduction is allowed in respect of employees' theft." At page 196, it is stated, that "loss from embezzlement is deductible." Similarly at page 163,

"Deduction is allowed in practice for the loss arising from defalcations of employees."

At page 203, there are two passages which are rather important,

"A deduction is permitted in practice for fire insurance premiums."

Also,

"Loss of stock through fire is deductible in so far as it is not recovered by insurance, but loss of building does not form an admissible deduction."

(1) [1929] A.C., 881; 14 T.C., 365.

I also note that, "loss by flood or tempest" is allowed in case of assessments under Schedule A. The above statements, so far as they go, would seem to lend support to the assessee's contention in the present case.

Each case has to be decided with reference to the facts and circumstances relating thereto, and having regard to the nature and methods of the trade or business in question. Having regard to the circumstances of the present case, and the findings of fact arrived at by the Income-tax Commissioner, I think that the assessee is entitled to the deduction of Rs. 9,335 claimed by them and I would answer the question in the affirmative.

CURGENVEN J.—The question which the Commissioner refers is: "Whether the loss incurred by theft of money used in the money-lending business and in the business premises should be allowed for in computing the income-tax."

The Commissioner rightly observes that a loss of this character is not included within any of the deductions permissible under section 10 (2) of the Act. But that does not conclude the matter, because section 10 provides for the taxation of the profits of a business, and we have, therefore, to consider whether, in computing profits, the amount of such a loss may be deducted from them. It is settled, for instance, that a bad debt incurred by a money-lender may be so deducted, on the ground that it is a loss incidental to his business, so that it is fair, in assessing his net profits, to take account of losses as well as gains. Such a loss, it appears to me, must satisfy two conditions, (1) it must be a loss of part of the stock-in-trade of the business, and (2) it must be a loss of such a kind as is incidental to the business.

As regards (1), the question describes the money lost as "money used in the money-lending business," and,

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taking this to mean money actually in use in the carrying on of the business, I feel no difficulty in holding that it was part of the money-lender's stock-in-trade. It may have included profits earned in previous transactions, but if those profits were themselves to be applied to the business, and were kept in hand for that purpose, they would not, I think, be any the less part of the stock-in-trade.

Requirement (2) presents greater difficulties, because I think it is clear that not all kinds of losses of stock-in-trade can be said to be incidental to the business. A loss, to be incidental, must be such as, in the ordinary course, and having due regard to the peculiar risks attendant upon the conduct of the business, is likely from time to time to occur. Cases of embezzlement by subordinates, such as formed the subject of *Jagarnath Therani v. Commissioner of Income-tax*(1), would be losses of this nature, because the employment of clerks and servants is unavoidable, and the employer is likely sooner or later to be the victim of their dishonesty or negligence. That such a loss might be classed as a form of expense arising out of trade was recognized in *Curtis v. J. & G. Oldfield, Limited*(2), although in the particular circumstances of that case, as I read it, the money lost no longer formed part of the stock-in-trade. The test whether the loss was, in the language of the English rule, "connected with or arising out of trade," was applied in two other English cases, *Strong and Company, Ltd. v. Woodfield*(3), and *Inland Revenue Commissioners v. Warnes & Co.*(4). The former related to damages claimed from an inn-keeper in respect of injuries caused to a customer by the falling of a chimney;

(1) [1925] I.L.R., 4 Pat., 385.

(2) [1925] 9 C.O., 319.

(3) [1903] A.O., 448; 5 T.O., 215.

(4) [1919] 2 K.B., 444; 12 T.O., 227.

the latter to a penalty incurred by a trading firm for negligently failing to observe certain conditions imposed during war-time on the export of goods to neutral countries. The loss was held, in the language of the English rule, to be a loss "not connected with or arising out of trade." These cases do not help us further than to show what manner of test should be applied. Now, in the present case, it may be conceded that a money-lender's business requires that he should keep a considerable sum in cash on his premises. Even if a bank is accessible to him, it would unduly restrict his activities to transact his affairs only within banking hours. The practice is certainly otherwise, and it is only fair to have regard to custom in deciding what the exigencies of a business require. That means that cash must be kept in a safe or strong room—the receptacle in the present case is described as a strong room—and the question resolves itself into whether theft from a strong room may form the foundation of a claim to remission of tax. I exclude cases of theft by a clerk or servant employed in the business and having access to the strong room, because that is not in question here and special considerations might apply. In general, I am not prepared to say that theft by some external operator, with or without the complicity of domestic servants, ought to be recognized as the basis of a claim. To recognize it we must, I think, find not only that the cash had to be kept on the premises, but that its loss by theft was a circumstance which was so far probable as to be an occurrence incidental to, if not inseparable from, the manner in which it had to be kept. In my experience, the abstraction of money by theft from properly constructed safes or strong rooms is not within the competence of the ordinary thief or house-breaker, and we have not yet in this country to reckon with gangs of

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safe-breakers such as may be found elsewhere. Perhaps the circumstance that no decision upon a case of this nature is to be found suggests the infrequency of such claims. The only test to apply, in order to see whether a loss of this kind is one incidental to the business, is, I think, the comparative likelihood of its occurrence, the requirements of the business being what they are. For example, injury to life and limb, and probably theft too, must occur sooner or later in the running of a railway. Bad debts and embezzlement have already been adverted to. Very likely the theft of stock-in-trade which have to be kept exposed to the public would fall into the same category. But I doubt whether cash kept in a safe should, if it should happen to be stolen, be allowed for.

We have not been furnished with any adequate narration of the facts of the present case, so that the question has had to be answered, as indeed it is put, in general terms. So considering it, I agree with my Lord in returning a reply in the negative.

K.R.

APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice
and Mr. Justice Ourgenven.

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v.

THE COLLECTOR OF TANJORE (RESPONDENT), RESPONDENT *

*Land Acquisition Act (I of 1894), sec. 9 (2) and (3)—
Necessity to give fifteen days' notice under—Absence of such
interval, effect of, on sec. 25—Waiver, requisites of.*

A public notice under section 9 (2) of the Land Acquisition Act (I of 1894) requires at least fifteen days' interval between its publication and the time at which claimants to the land are required to state their objections and make their claims.

Section 9 (3) which enacts that "the Collector shall also serve notice to the same effect" on the occupier and others interested in the land, means that there must be in the case of such personal notices also a similar interval of at least fifteen days between the date of the service of such notices and the date when they are required to state their objections and claims.

It is only when such interval has been given by the notices under section 9 (2) and (3) that the stringent provisions of section 25 (2) can be applied.

Where in answer to a notice issued under section 9 (3) which gave only nine days' interval, a claimant appeared before the Land Acquisition Officer and replied to a question of his that he did not know the value of his land, and the Government did not show that the claimant knew that he was entitled to at least fifteen days' notice, when giving the reply,

Held, that though by the above reply the claimant failed to make a claim to compensation there was no waiver of the requisite notice.

* Appeal No. 361 of 1928.

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APPEAL by the claimant against the order of the Court of Subordinate Judge of Tiruvarur in Land Acquisition Original Petition No. 16 of 1926.

The facts are fully given in the judgment.

T. Rangachari (with him *R. Seturama Sastri*) for appellant.—The notice served on me did not call upon me to make a claim. The notice gave me only 9 days' time to make my objections. It is invalid as I am entitled to at least 15 days' notice under section 9 (3) of the Land Acquisition Act. Even if I appeared before the officer on insufficient notice, the trial could not go on unless I had waived my right to a proper notice. There is no evidence in this case that I knew that I was entitled to at least 15 days' notice and that I waived it. I rely on *Krishna Sah v. The Collector of Bareilly*(1), *Collector of Chingleput v. Kadir Mohideen Sahib*(2) and *Rameswar Singh v. Secretary of State for India*(3). Section 25 can apply only if the notice is proper.

Government Pleader (P. Venkataramana Rao) for respondent.—The notice that was served demanded the claimant to state his objections and to make a claim. Fifteen days' interval is required only in cases coming under section 9 (2) and section 10 (1) and not by section 9 (3). The public notice under section 9 (2) gives sufficient time and that is sufficient for all purposes. Even if 15 days' notice was necessary it must be deemed to have been waived by the claimant appearing within the 15 days and making a statement before the Officer. Absence of 15 days' notice may be a "sufficient reason" within section 25 (2) and (3) to make a claim later but does not vitiate the proceedings. The claimant had really no claim to make and this technical objection is an afterthought. The cases quoted by the appellant can be distinguished; see also *Birbal v. The Collector of Moradabad*(4).

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The petitioner's lands in Naduvacheri village were acquired to the extent of 47 cents in accordance with the scheme sanctioned in G.O. No. 3559, Revenue, dated the 10th November 1917. The award of the Land Acquisition Officer is dated the

(1) (1917) I.L.R., 30 All., 531.

(3) (1907) I.L.R., 34 Cal., 470.

(2) (1920) 50 M.L.J., 566.

(4) (1926) I.L.R., 49 All., 145.

17th November 1925. After the award was made, the petitioner put in an application on the 22nd December 1925 under section 18 of the Land Acquisition Act (I of 1894), requiring the matter to be referred to the Subordinate Court on the ground that there had been a gross undervaluation of the properties acquired. Under section 25 (2) of the Act, when an applicant has omitted without sufficient reason to make a claim, the amount awarded by the Court, i.e., the Subordinate Court, shall in no case exceed the amount awarded by the Collector. The learned Subordinate Judge held that the appellant had omitted to make a claim under the Act and that such omission was without sufficient reason. Upon that finding he could not under the Act award an amount in excess of the amount awarded by the Collector but nevertheless he proceeded to deal with the case on its merits.

Two preliminary questions have to be decided here before the case can be considered on its merits. The first point is whether the notice issued by the Collector under section 9 of that Act complies with the provisions of sub-sections (2) and (3) of that section, as it is contended on behalf of the appellant that the notice did not call upon him to make a claim for compensation. The second point is that the notice does not comply with the provisions of those sub-sections because the notice served upon the appellant was served upon him only on the 17th October 1925 whereas he was called upon to appear before the Collector, in this case, the Labour Officer, on the 26th October and hence he was only given nine days' notice and it is contended that he was entitled to not less than fifteen days' notice after the date of the publication of the notice.

With regard to the first point, the personal notice to the appellant is Exhibit N. It is a notice issued under

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sections 9 (3) and 10 of the Land Acquisition Act and it states as follows:—

“The Government are going to acquire the lands mentioned in the list hereunder under Act I (India) of 1894. You shall appear either in person on the 26th October 1925 before me at Nannilam camp or by an authorized agent and inform the nature of the right you possess in these lands, the amount due to you out of the amount of compensation to be given for the said right, and objections if any in respect of the measurements made according to section 8. You should prepare a written statement and the same signed either by you or by your authorized agent should be presented.”

The notice then goes on to call for the particulars required under section 10 of the Act. It is contended by Mr. Rangachariar that this notice does not call upon the appellant to put in his claim. Section 9 (2) of the Act says—

“Such notice shall state the particulars of the land so needed, and shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interest, and their objections (if any) to the measurements made under section 8. The Collector may in any case require such statement to be made in writing and signed by the party or his agent.”

Sub-section (3) states—

“The Collector shall also serve notice to the same effect on the occupier (if any) of such land and on all such persons known or believed to be interested therein, or to be entitled to act for persons so interested, as reside or have agents authorized to receive service on their behalf within the revenue district in which the land is situate.”

The notice under sub-section (2) is the public notice and that under sub-section (3), the personal notice. Exhibit N is the personal notice and it is to be observed

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that it is to be to the same effect as the notice in sub-section (2). The particulars of the land so needed were set out in the list sent with that notice and in it the applicant was told to appear either personally or by an authorized agent on a date mentioned, namely, the 26th October and at a place mentioned, namely, the Nannilam camp and to state the nature of the right he possessed in the land, the amount of compensation to be given for such right and objections, if any, to the measurements made under section 8. He was further required to prepare a written statement and sign it and present it. Mr. Rangachariar contends that this notice does not call upon the appellant to state his claim to compensation because he is merely called upon to inform the nature of the right he possesses in the land and the amount due to him out of the amount of compensation to be given for the said right. He contends that this is not the same thing as calling upon him to state the amount and the particulars of his claim to compensation for his interest in the land. It seems to me that such an argument is wholly untenable. No other construction can be put upon Exhibit N except that it is a notice calling upon the appellant to claim an amount of compensation due to him for such interest as he possesses in the land under acquisition. In my view, the notice in this respect clearly is in accordance with the provisions of section 9 and I cannot for one moment credit the statement that it is ambiguous and likely to be misunderstood by the appellant. This contention therefore fails.

On the second point, what has to be considered is whether it is necessary for the Collector to give at least fifteen days' notice from the service of the notice to the date of the appearance of an applicant before him, for admittedly Exhibit N gave only nine days' notice; and

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if fifteen days' notice is requisite, then it is contended by Mr. Rangachariar on behalf of the appellant that the omission to give that notice must be held to be a sufficient reason for the omission of the appellant to make a claim. It is conceded by Mr. Rangachariar that he did not make the claim required by the Act. It is quite clear that the Act requires a claimant to state the amount of compensation he is claiming, and on page 1 of the pleadings there is the statement of the appellant made to the Labour Officer on the 26th October 1925 and there he said that he received a notice directing him to submit his objections, that no one had any right over his lands under acquisition by way of mortgage, that he had not got any sale-deed to show the price of land in the village and that he could not state the value of the land. This statement was made by him in answer to questions put to him by the Labour Officer. He therefore clearly did not make such a claim as is required by the Act. But Mr. Rangachariar contends that the personal notice under section 9 (3) of the Act makes it requisite that an applicant should have at least fifteen days' notice. The sub-section does not state that he must have such a notice but it is argued that as it is provided that the notice must be to the same effect as in section 9 (2), all the conditions of the latter notice apply to the notice under sub-section (3). On the other side, the learned Government Pleader argues that fifteen days' notice is not necessary in the case of the notice under section 9 (3) of the Act, because the notice thereunder is merely to be to the same effect as the notice under sub-section (2) and that the notice under the latter sub-section, although it must give an interval of at least fifteen days, does not state in the body of it that the interval is one of at least that time. That, of course, is quite true because the notice merely states the

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date and the time of the appearance of the applicant. He argues that it is only necessary that there should be an interval of fifteen days from the date of publication of the notice under section 9, sub-sections (1) and (2) and, if that notice has been given, then it does not matter if the notice under sub-section (3) gives a shorter time to the applicant. But if it is important for the applicant in the public notice to have fifteen days' notice at least, it is difficult to see why he should have any shorter notice in the notice served upon him personally. On the contrary, it appears to be more important that he should have the requisite notice in the personal notice than in the public notice. The latter he may never see and therefore the former may be the only notice he receives calling upon him to make his claim. For example, there are cases, which must by no means be uncommon, where the applicant either lives in another place or has gone away on business to another place. If such a person has to rely merely on the public notice, he may receive no notice at all. On the other hand, the personal notice does, or ought to, reach him wherever he may be, and it seems to me obvious that in such cases he must have sufficient time in which to prepare his claim. Section 9 (2) by providing for a notice of at least fifteen days makes that a reasonable notice and I cannot see why in the case of the personal notice the applicant should not be entitled to an equally reasonable notice. The learned Government Pleader argues that, in the case of which I have given an example, it might be a ground for holding that the applicant had sufficient reason for omitting to make a claim but the intention of the Act is to get persons to come forward with their claims and not to enable them to be absent and make no claim and thereafter be excused. It seems to me that the spirit of the Act is that a person should have a

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reasonable notice served upon him in order to give him time to formulate his claim. The importance of the fifteen days' notice was considered in *Krishna Sah v. The Collector of Bareilly*(1), where it was held that, under section 9 (3) of the Act, the occupier of land concerning which a public notice has been given under sub-section (1) of the section is entitled to such notice as will give him, in the same manner as the person mentioned in sub-section (2), fifteen days' interval in which to state before the Collector the nature of his interest in the land and the particulars of his claim for compensation. In that case, the publication of the notice was on the 18th July and the date required for appearance before the Collector was the 24th of July, clearly a much shorter period than that prescribed by the section. The personal notice, namely, that under sub-section (3), was served on the 16th July and that was also less than fifteen days' notice. On page 535 of that case, in the judgment, it is stated:—

“There is no reason why the occupier should not have the same time allowed him within which to make his objection as other persons. We think that the words ‘to the same effect’ in clause (3) really mean that the second notice should have the same matters mentioned in it, including the time, as the first notice.”

It is not clear from this judgment whether the Court decided that the applicant in the personal notice should have at least fifteen days from the date of the public notice or whether he should have at least fifteen days from the date of the service of the personal notice upon him. But I think that it must follow that the fifteen days must be from the date when the matter is brought to his attention, because, as I have already stated, the public notice may escape the appellant's attention. This

question was also considered by a Bench of this Court in *Collector of Chingleput v. Kadir Mohideen Sahib*(1), where it was held that where the notification under section 9 does not give the claimant the fifteen days' notice as required, it amounts to “sufficient cause” within the meaning of section 25 (3) of the Act for the claimant's omitting to make a claim and he thereby escapes the application of the stringent provisions of section 25 (2). KRISHNAN J. in his judgment states:—

“The objection based on section 25 (2) of the Land Acquisition Act (I of 1894) is clearly untenable. Clause (1) says that the claim for compensation has to be made ‘pursuant to the notice given under section 9’ and this makes a proper notice a pre-requisite. Now, as shown by the District Judge and by my learned brother, such a notice was not given in this case, the notices all being defective in one way or another. The claimant's omission, therefore, to make a claim before the Deputy Collector was not without ‘sufficient reason’ and he escapes the application of the stringent provisions of clause (2) to his case.”

It must be noted that in this case, in addition to not giving the claimant fifteen days' notice, the property intended to be acquired was not clearly defined. But that does not affect this question. There is however a later decision of the Allahabad High Court, *Birbal v. The Collector of Moradabad*(2), in which a view contrary to that taken by the same Court in *Krishna Sah v. The Collector of Bareilly*(3) was taken. There it was held that the rule requiring an interval of fifteen days between the issue of the public notice provided for by clause (2) and the hearing of claims by the Collector does not apply to the personal notice issued under clause (3). *Krishna Sah v. The Collector of Bareilly*(3) does not appear to have been brought to the notice of the Court and there is no reference to it whatever in the judgment and I am not

(1) (1926) 50 M.L.J., 566.

(2) (1926) I.L.R., 49 All., 145.

(3) (1917) I.L.R., 39 All., 534.

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inclined to accept this case as accurately deciding this question. In *Rameswar Singh v. Secretary of State for India*(1) there are some very valuable observations. That was a case under the Land Acquisition Act and the notice under section 9 of the Act did not contain the material facts which would enable the land-owner to identify the land intended to be taken up and the notice fixed less than the prescribed time to prefer claims. It was held that these were irregularities and a suit for damages for permanent injury caused by the acquisition of the land was maintainable in the Civil Court. In dealing with the irregularity of the notice in point of time, in the judgment of the Court on page 480, it is stated that:—

“Where the Statute requires that the notice should give the owner a prescribed time, after the expiry of which claims and objections might be preferred, a notice which fixes a shorter time is in contravention of the Statute, and is consequently defective. The principle is that no man shall have his rights determined without the opportunity to be heard in his defence and where the Statute prescribes the minimum period, which the person affected is to have, for submission of his defence, such time cannot be allowed to be reduced. In order to give validity to the proceedings and finality to the award in which they terminate, the power of acquisition with all statutory limitations, and directions for its use, must be strictly pursued; every essential pre-requisite to the jurisdiction called for by the Statute must be strictly complied with.”

In that case, the judgments of the Privy Council in *North Shore Railway Co. v. Pion*(2) and of the House of Lords in *Herron v. Rathmines*(3) were referred to. In the latter case, Lord MACNAGHTEN observed that where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with

by virtue of that authority has a right to require that the promoters shall comply with the letter of the appointment so far as it makes provision on his own behalf. I entirely agree with the views expressed by the Calcutta High Court in *Rameswar Singh v. Secretary of State for India*(1), the Allahabad High Court in *Krishna Sah v. The Collector of Bareilly*(2), and this High Court in *Collector of Chingleput v. Kadir Mohideen Sahib*(3). The stringent provisions of section 25 (2) of the Act can only be applied after a notice which is strictly in compliance with section 9, sub-sections (2) and (3) has been served upon the landowner.

A further point arises however, and that is whether the appellant by appearing before the Labour Officer, notwithstanding the fact that he had not received the requisite notice, must be held to have waived that requirement. The learned Government Pleader contends that he has done so and that this is merely a technical objection which ought, under the circumstances, to be brushed aside. In my view, it lies upon the Government Pleader to show that the waiver has been clearly established. It is not sufficient to show that the appellant appeared before the Labour Officer and answered certain questions that were put to him. It has not been shown that the appellant knew that he was entitled to at least fifteen days' notice; nor has it been shown that, if he had known that he was, he would not have asked for an adjournment and there is nothing to show that there has been any waiver by the appellant. The learned Government Pleader further argues that this objection is a mere afterthought and that it was never put forward until the argument was addressed to the lower Court at the close of the case. But, in my

(1) (1907) I.L.R., 84 Cal., 470.

(2) (1917) I.L.R., 89 All., 534. (3) (1926) 50 M.L.J., 566.

(1) (1907) I.L.R., 81 Cal., 470.

(2) (1860) 14 A.C., 612.

(3) (1892) A.C. 498.

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opinion, this cannot affect the value of the objection. It was argued by Government in the lower Court that the appellant was shut out from any enhancement of the Labour Officer's award by reason of his omission to make a claim. When that objection to the appellant's claim in the lower Court was urged, it was open, in my opinion, to the appellant to raise the point that the notice served upon him was defective in any respect even though that point had not been raised before. The appellant was therefore entitled to have the case considered on its merits. [After dealing with the evidence as to the value of the land acquired, his Lordship concluded as follows:—]

In the result, the claimant will get compensation at the rate of Rs. 18 per cent. for the sites in the Sudra quarters and Rs. 12 per cent. for the sites in the Cheri, besides the 15 per cent. compensation due to him. With regard to damages, I do not think that any case for awarding damages has been made out by the appellant and therefore he will get nothing in that respect. The claims for severance and for the value of trees were given up here in the course of the argument. The appellant is ordered to pay half the costs of the respondent. Interest is allowed on the amount awarded at six per cent. per annum from the date of possession, namely, the 2nd December 1925, up to the date of payment.

CURGENVEN J. —The first contention raised in this appeal is that the learned Subordinate Judge was wrong in deciding, with reference to the terms of section 25 (2) of the Land Acquisition Act, that the applicant had omitted without sufficient reason to make a claim, with the result that the Court was precluded from awarding more to him than the sum fixed by the Collector. In support of this contention, two reasons are given for the applicant's failure. The first has

reference to the wording of the notice, Exhibit N, issued under sub-section (3) of section 9 and section 10 of the Act. I agree that the notice clearly calls upon him to state the amount of compensation which he claims, although the language may not be a verbatim transcript from section 9 (2), and that there is no substance in this objection. The second point taken is that, whereas the latter provision prescribes an interval of fifteen days, the applicant was given only nine days from the 17th October, when the notice was served upon him, to the 26th October when he was required to appear to make his claim. The learned Government Pleader takes up the position that whereas a fifteen days' interval, reckoned from the date of publication, is prescribed for the public notice under sub-section (2) of section 2, no such condition attaches to a notice issued under sub-section (3) to the owner or occupier of the land. I think that this view must be rejected upon a right construction of the Act. Sub-sections (1) and (2) of section 9 enumerate the various particulars which a public notice must comprise; in particular it—

“shall require all persons interested in the land to appear personally or by agent before the Collector at a time and place therein mentioned (such time not being earlier than fifteen days after the date of publication of the notice), and to state the nature of their respective interests in the land” etc.

Sub-section (3) says that the Collector shall also serve notice *to the same effect* on the occupier, etc. The learned Government Pleader would have us construe this as meaning that the latter notice must be in consonance with the public notice as regards the date of appearance, but that service of the notice is not thereby required to be not less than fifteen days before the date of hearing. I do not think that such a notice would be “to the same effect” as the public notice, because what the public notice in effect does is to give claimants a

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minimum period of fifteen days within which to present their claims. It is difficult to suppose that the intention of the Act is to deprive persons who are dependent for their information of the proceedings upon a personal notice of this right, while conceding it not only in the case of the public notice but also, as a reference to the section will show, in the case of requisitions under section 10 (1). This is the view that was taken in *Krishna Sah v. The Collector of Bareilly*(1), and although a later Allahabad case, *Birbal v. The Collector of Moradabad*(2), records a decision in the opposite sense, it is noteworthy that no reference is made in it to the earlier decision of the same Court and, except for the observation that the provision in clause (2) of section 9 relating to the fifteen days is not repeated in clause (3), the construction of the section is not further discussed. In *Collector of Chingleput v. Kadir Mohideen Sahib*(3), a Bench of this Court held that a claimant must be given at least fifteen days in the notice issued to him and, adopting this view, I conclude that, in this respect, the notice issued to the applicant was not in accordance with the terms of the Act.

It has then to be decided whether this defect furnished the applicant with sufficient reason to omit to make his claim. The notice was served on him, as I have said, on the 17th October and on the 26th he appeared before the Labour Officer, who was the Collector appointed for this acquisition, and made a statement which admittedly did not comprise a "claim" as that word is used in section 25. All that he said on the question of valuation was

"I have not brought any sale-deed to show the price of land in the said village. I cannot say the value of the land in my village."

(1) (1917) I.L.R., 39 All., 534. (2) (1928) I.L.R., 49 All., 145.
(3) (1926) 50 M.L.J., 566.

In order to amount to a claim, the applicant should have assessed the value of the property in definite terms. In the two cases cited above, which held that a notice under clause (3) must give a minimum period of fifteen days, the claimant failed to make any statement at all and it is not difficult to hold that such a failure is attributable to the insufficiency of the time given, and therefore that he had sufficient reason for the omission. The learned Government Pleader argues that the present case is distinguishable because the claimant did appear and made a statement, and that it cannot be said that the inadequacy of this statement as a claim is traceable to any shortness in the notice. He draws attention also to the late stage at which exception was taken on the score of insufficiency of time and argues that the point was a mere afterthought and in no way affected the applicant's interests. It is no doubt true that the defectiveness of the statement given on the 26th is not clearly traceable to the cause pleaded, but I am not satisfied that this disposes of the applicant's objection. If a person makes no claim at all and the notice issued to him is found to have offended against the fifteen days' rule he may be deemed to have had sufficient reason for the omission, and it is difficult to see why another person, similarly handicapped, who does something more towards making a claim should be penalized, unless it be by an application of the doctrine of waiver. To apply this doctrine, it must, I think, be found that the applicant knew what his legal rights were and consented to forego them. In the present case I can find no sufficient reason to make this assumption, or to infer with certainty against the claimant that, if he had had due notice, he would not have presented a claim within the meaning of the Act. Where an officer whose duty it is to apply the provisions of an Act such as the Land

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Acquisition Act commits an error of procedure, I think that every presumption should be made in favour of the party likely to have been prejudiced by the error. This principle, in its application to the Act, will be found set forth and supported by the citation of a number of English and American cases in *Kamini Debi v. Pramatha Nath Mookerjee* (1) and, although that case dealt with the matter from the point of view of jurisdiction, I think, the observations are equally pertinent here where the application of section 25 is in question. Expressed in general terms, the conclusion I would reach is, therefore, that although it may be doubtful whether the insufficiency in the notice and the defectiveness of the statement were related as cause and effect, the presumption that this must have been so has not been successfully rebutted.

Apart from the question of insufficiency of notice, it appears to me that the applicant may be said to have had another sufficient reason for not making a claim. When he appeared, the Labour Officer took an oral statement from him which, had it comprised the necessary particulars, would have amounted to making a claim. It may be taken, I presume, that the Labour Officer knew what those particulars should be, and in particular that they should have included the applicant's own valuation of his property. The officer must be taken to have known also the penalty to which the applicant subjected himself by not furnishing this information. Did he explain to the applicant that it was necessary that he should put a price on his land and the consequences to him of the failure to do so? If not, may it not be said that he allowed the applicant to go away in the belief that he had complied with the

requirements of the Act, and that the adoption of such a course provided the applicant with sufficient reason for not having complied with them? On this ground too, I think, the applicant should not be precluded by the terms of section 25 (2) from questioning the Labour Officer's valuation.

There is finally another consideration, not adverted to in the arguments but which seems to me a valid objection to the application of section 25 (2). The claim contemplated in each of the three sub-sections of that section is to be "pursuant to any notice given under section 9," and where, as here, the notice issued is in some respect in contravention of the terms of section 9, I think the only logical conclusion is that the penalty which section 25 (2) imposes cannot be taken advantage of by the Government. [His Lordship then discussed the evidence as to the value of the lands acquired and concurred with the decision of the Chief Justice on this point and also as regards costs.]

N.B.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

In re K. RAMARAJA TEVAN AND FIFTEEN OTHERS
(ACCUSED), APPELLANTS.*

1980,
February 11.

Code of Criminal Procedure, 1898, sec. 537—Assumption of failure of justice if mandatory provision infringed.

Section 537 of the Code of Criminal Procedure affords no real ground for the assumption that, if a mandatory provision of

* Referred Trial No. 155 of 1929 and Criminal Appeal No. 556 of 1929.

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the Code is infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. The impugned procedure must be one that is not only prohibited by the Code but also works an actual injustice to the accused.

Abdul Rahman v. King-Emperor, (1926) 54 I.A., 96; I.L.R., 5 Rang., 53, followed.

N. A. Subramania Ayyar v. King-Emperor, (1901) 28 I.A., 257; I.L.R., 25 Mad., 61, referred to.

TRIAL referred by the Court of Session of the Rāmnād Division at Madura for confirmation of the sentence of death passed on the first and third accused and appeal by accused 1 to 16 against their conviction and sentence by the same Court in Sessions Cases Nos. 42 and 49 of 1929.

Nugent Grant (*U. Somasundaram* with him) for appellants.

Public Prosecutor (*L. H. Bewes*) for the Crown.

JUDGMENT.

The sixteen appellants do not dispute the lower Court's findings of fact.

On 11th April 1929, at Khansapuram, twenty to thirty persons came from the north armed with guns and sticks with the common object of shooting Sangiah Tevan and looting his house. When they were fifty yards off the house, one Sundara Tevan, P.W. 10, tried to dissuade them, and Krishna Tevan, P.W. 11, who belongs to Sangiah's faction, abused them. Krishna Tevan was hit on the head by accused 13, and then two more of the opposite faction, Alagu and Sangiah, ran up. The first appellant shot Alagu, and the third shot Sangiah. Then the fourth fired into seven persons who came to help them, after which there was a general stampede. Alagu was shot through his heart and died immediately. Sangiah had his leg broken and died of gangrene on the 14th.

The learned Judge has found that the shooting, and the assault upon Krishnan, were the sudden outbreaks of individual members of the assembly, and, therefore, presumably, were not in prosecution of its common object. Accordingly, he has acquitted all the appellants of rioting. But he has found them all guilty of being members of an unlawful assembly under section 143, Indian Penal Code, and inasmuch as the men who fired (appellants 1, 3, 4) undoubtedly had guns, he has found all guilty, either directly, or constructively by the provision of section 149, of being armed with deadly weapons while being members of an unlawful assembly, the offence under section 144, Indian Penal Code.

Accused 1 and 3 are found guilty of murder, section 302, Indian Penal Code, and accused 4 guilty of attempted murder, section 307, Indian Penal Code.

Accused 13 is found guilty under section 323. It is argued by Mr. Nugent Grant that none of those convictions can stand because the two murders, the attempted murder and the hurt were several and independent transactions which had no real connexion with the unlawful assembly. For every distinct offence of which any person is accused there must be a separate charge (section 233), unless they are so connected together as to form the same transaction (section 235), and the misjoinder of charges in this case has, in fact, occasioned a failure of justice.

To this plea there would seem to be three sound answers. In the first place, it cannot be said that there has been a failure of justice. Supposing that the murders and assaults were quite unconnected with the object of the unlawful assembly, a Court which had joined them all together in one trial might well have been led to attribute to the assembly force and violence of which it was entirely innocent, and so might have found it guilty

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of rioting; and, had this one terminated in a conviction of rioting, it would be impossible to say that the irrelevant consideration of the extraneous offences had not influenced the mind of the Court. But the charge of rioting was dismissed, and it must be said that the mind of the Court, though dangerously exposed to infection, proved absolutely immune.

No doubt, ever since the pronouncement of the Judicial Committee in *N. A. Subramania Iyer v. King-Emperor*(1), it has been the general practice to assume that, if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. Section 537 affords no real ground for any such assumption, and the Judicial Committee itself, when it had occasion to refer to 28 I.A., 257 in *Abdul Rahman v. The King-Emperor*(2), clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused. In the latter case the Code was clearly infringed, but the curative provision of section 537 was considered a sufficient remedy.

In the second place, whatever conclusion was finally arrived at by the learned Judge, it is clear that, before the evidence was heard, it must have been a very open question whether the shooting was or was not in prosecution of the common object. It is a question of degree. If the men who protested had been ranged on the doorstep of Sangiah's house, it would be hard to say that shooting them was not in prosecution of the looting. What if they were five, ten, fifty yards away? It is a matter that could only be decided after a most careful consideration of the evidence as a whole; and it

cannot be said that to have accused these persons of shooting in prosecution of the common object was in any way frivolous. If the charge could be postponed till after the conviction, a more perfect symmetry might be attained, but unfortunately that cannot be; and the charge, of necessity, must be founded upon the accusation. [cf. *Abdul Salim v. Emperor*(1).] It cannot be said, therefore, that there has been any misjoinder in contravention of section 233, Criminal Procedure Code.

In the third place, even supposing that the ultimate finding governs the charge, so that the Court was precluded from charging as though the shooting had been in prosecution of the common object, still it cannot be said that the whole affair was not in the course of the same transaction. The accused formed themselves into a body with the intention of looting and shooting Sangiah Tevan and frightening away any one who tried to prevent them; otherwise, there is no explanation for such a display of force. It has never been held that in a transaction all the persons engaged must have a common object. Taking the transaction to be the adventure of private war upon which the appellants embarked on April 11th, a historian of that transaction would hardly omit all mention of the shooting as belonging to a totally different transaction. As BENSON J. observes in *Choragudi Venkatadri v. Emperor*(2), it is neither necessary nor advisable to attempt to define the expression "the same transaction" which the Legislature had left undefined. Each particular case must be tried by common sense and common knowledge of language, and if these tests be applied, the whole affair from the formation to the disruption of this assembly seems obviously to be one transaction.

(1) (1901) 28 I.A., 257; I.L.R., 25 Mad., 61.
(2) (1926) 54 I.A., 96; I.L.R., 5 Rang., 53.

(1) (1921) I.L.R., 49 Cal., 573 at 596. (2) (1910) I.L.R., 33 Mad., 502.

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Therefore, the plea of misjoinder is not sustainable.

It is next argued that the appellants who are not found to have been armed cannot be constructively held guilty under section 144 by the provision of section 149. There can be no doubt that if a member of an unlawful assembly, liable under section 143, Indian Penal Code, to six months' rigorous imprisonment, is armed with a deadly weapon, he is punishable with two years' rigorous imprisonment under section 144. Therefore, being so armed is a thing made punishable by the Penal Code and, consequently, under section 40, an offence.

Now, is the offence so committed by the member of the unlawful assembly in prosecution of the common object of that assembly? Prosecution, in plain English, is following up. They assembled and formed the common object of shooting a man. What did they do to follow it up? Some of them came to the assembly with guns, or stayed in the assembly with guns, and, at any rate, took care not to be parted from their guns. That seems to be clear following up. Mr. Grant would say that it was mere preparation, but after people have formed themselves into an unlawful assembly, and decided upon their common object, preparation towards that common object is prosecution or following up, and if the preparation happens to be an offence, then they are all equally liable. Suppose they burst in a door, that is not mere innocent preparation for the intended looting. It must be held, therefore, that this plea also fails.

There remain two pleas *ad misericordiam* on behalf of the murderers sentenced to death. It is clear from the medical evidence that accused 1 shot Alagu with various pellets through the heart and thigh. He may be taken to have aimed at his stomach and it cannot be said that he did not intend his death. Accused 3 shot

Sangiah five inches below the knee and shattered the bones. He had said, "why do you shoot him who was keeping quiet," and for that innocent protest was shot. Mr. Nugent Grant says that the murderer only hoped to maim him, only hoped perhaps to cripple him for life. It was a murderous act, without the smallest justification and it resulted in murder. We see no reason to interfere.

It cannot be said that any of the appellants has been treated with undue severity, and we dismiss their appeals.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

KUMMAKUTTY AND ANOTHER (FIRST AND SECOND
DEFENDANTS), APPELLANTS,

v.

NEELAKANDAN NAMBUDRI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Application under rule 89—Money specified in the rule, deposited in Court—Security bond taken by order of Court from the decree-holder for repayment of amount—Suit by applicant to establish his title to property sold, decreed in his favour—Suit by applicant to recover money on the security bond, if maintainable—Security bond, if valid—Competency of Court to take the security bond.

Where a person, other than the judgment-debtor, entitled to apply under Order XXI, rule 89, Civil Procedure Code, to set aside a sale in execution of a decree, applies and pays the amount specified in the rule, the Court has no jurisdiction to direct the

* Second Appeal No. 1521 of 1928.

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decree-holder to execute a security bond for repayment of the amount to the applicant in the event of the latter succeeding in a suit instituted by him to establish his right to the property sold in execution; and the security bond is not legally enforceable in a suit by the applicant against the executant; *Narayan v. Amganda*, (1920) I.L.R., 45 Bom., 1094, followed.

Where it appeared that the applicant was a purchaser of the property from the judgment-debtor, that he undertook to pay the debt of the decree-holder and had improperly obstructed and refused to pay the debt, there was no ground of equity to entitle him to enforce the security bond executed under the order of the Court.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of South Malabar in Appeal Suit No. 131 of 1927, preferred against the decree of the Court of the District Munsif of Tirur in Original Suit No. 619 of 1923.

K. P. Ramakrishna Ayyar for appellant.

A. Parameswaran for respondent.

JUDGMENT.

This appeal raises a question in regard to Order XXI, rule 89, Schedule I, Civil Procedure Code. If a person other than a judgment-debtor pays money into Court under that section, can he insist that the decree-holder shall not draw the sum out without furnishing security? The facts of the case take us so far back as 1905. One Sri Devi of Mudathode Illam conveyed in jenm to Thuppan Nambudiri, the brother of the plaintiff, her entire property (consisting of 140 items). The sale-deed (Exhibit I), is dated 16th October 1905 and mentions the consideration as Rs. 16,000. The purchaser by that deed is directed to pay certain specified debts of the vendor and it then provides that he shall also be bound to pay up all other lawful debts due by her. Eramutti, the brother of the first defendant, filed against Sri Devi, O.S. No. 561 of 1905, claiming a certain amount

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as due. It was to Thuppan's interest, having regard to Exhibit I, to get the suit dismissed. He accordingly fought the case on behalf of Sri Devi and lost it in spite of his vigorous defence. As the District Munsif points out, the case was fought out up to the High Court and it was decided that the debt claimed by Eramutti was due. Thuppan then became, under the terms of Exhibit I, instantly liable to discharge this decree-debt. He, however, committed default and the decree remained unsatisfied. Sri Devi, as I have said, by the sale deed completely deprived herself of all property. Eramutti, in the circumstances, followed the only course open to him, that of attaching some items bought by Thuppan. The latter, thereupon, preferred a claim under Order XXI, rule 58. The Court rejected it, observing that, the debt not having been discharged, the property conveyed under Exhibit I remained liable. Even then, Thuppan did not honestly pay up the debt. He filed a regular suit (O.S. No. 414 of 1911) contesting the order rejecting the claim. In the meantime the attached property was brought to sale. Thuppan applied in his suit that the sale might be stopped. On 23rd October 1911, his application was dismissed. Every dilatory method was resorted to; he next applied that the sale might be adjourned. The petition he filed (Exhibit 3) contains the following significant statement:—

"The properties obtained by me from the defendant are proclaimed. The sale must be adjourned to enable me to produce the decree amount."

This application met with the same fate as the previous one. Thuppan then, determined to save his property, applied under Order XXI, rule 89, for the setting aside of the sale. He made the deposit prescribed by that rule. But, before it could be drawn out by the persons entitled, he applied that security should be taken

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from the decree-holder. The Court, for some reason not disclosed, complied with this request and directed that security should be furnished. Exhibit A, dated 18th December 1911, was thereupon executed by the heirs of Eramutti, including the first defendant. It contains the clause that they would bring back the amount into Court, if Thuppan should succeed in the regular suit then pending. The rest of the story may be briefly told. Thuppan won O.S. No. 414 of 1911, which dragged a weary length. The case went up as far as the High Court. All the Courts, that dealt with the suit in its various stages, held that the sale was valid; but the point to note is that the sale was upheld on the sole ground that Sri Devi acted honestly and got Thuppan to undertake by the deed to discharge her debts. There is one further fact which is important. Sri Devi's reversioners (Attaladakkam heirs) filed a suit questioning the alienation evidenced by Exhibit I. Thuppan having died, his brother, Nilakandan, the present plaintiff, filed a written statement (Exhibit 4). Seeking to justify the sale, he asserts that the terms of the sale-deed were carried out *and that the amount due to Kunhutti was fully paid up*. This statement (made in March 1921) implies that the deposit made by Thuppan under Order XXI, rule 89, had the effect of discharging the decree debt. Whether this result follows in law or not, it shows that the plaintiff was conscious that he was under a moral duty to pay up the debt. It now suits him to suggest that he made a false allegation in the written statement, to defeat the claim of the reversioners. In any event, that allegation is inconsistent with the present claim based on the security bond. That claim is shortly this. Under the bond, if Thuppan's suit was decreed, the executants bound themselves to bring back the money. Now, Thuppan having

succeeded, the plaintiff seeks to enforce the bond and claim the amount from the first defendant. It may be mentioned that this suit was filed in 1923.

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The first question that arises is, was it competent to the Court to have taken the bond in question? To answer this question, one must have regard to the object and scope of Order XXI, rule 89. The Code, in various sections, lays down in what circumstances a judgment-debtor may contest the sale of his property. Similarly, there are sections under which, a person claiming adversely to a judgment-debtor, may object to attachment and sale. But Order XXI, rule 89, enacts a special provision. Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property; the decree-holder's claim is satisfied and the auction purchaser is compensated. The section would be frustrated if the person paying money under it is permitted to do so under protest. Clause 2 of rule 89 enacts:—

“Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.”

This shows that the two proceedings referred to in this clause are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decree-holder nor of the purchaser are sacrificed. It follows from this that, when the judgment-debtor pays the amount specified, he pays it unconditionally. The payment followed by the order setting aside the sale has the effect of automatically extinguishing the decree debt. If an application is made under rule 89 and the

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deposit required by that rule is made within thirty days from the date of the sale, the Court has no option but to make an order setting it aside. (See rule 92.) This assumes that the decree-debt is discharged and the decree-holder's remedy is gone. The section, then, is inconsistent with the notion that payment can be made either under protest or coupled with conditions. I have so far dealt with the question on the footing that the person making the deposit is a judgment-debtor; but, under the rule, any person owning an interest in the property by virtue of a title acquired before the sale can make the application. Supposing such a person happens to be not a judgment-debtor but a third party, even then he is subject to the same restrictions. If the property is not liable to be attached for the debt, he can ignore the attachment and sale. If, on the other hand, it is liable, or he believes it to be liable, he can avail himself of this provision and get rid of the sale. But, in that case, he must be taken to have admitted the validity of the sale and it is not open to him either to dispute the sale or to get back the money. Take the case, for instance, of a debtor who, before the decree, had conveyed his property to trustees for the benefit of his creditors. The trustees, if they choose, may dispute the attachment and the Court-sale. But they may gain nothing by such a course, and, being under a duty to pay up the debt, may choose to take advantage of this provision. To hold that they would still be entitled to contest the sale or to claim a refund of the money would be wholly opposed to the principle underlying the section.

This view receives support from several decisions. In *Narayan v. Amgauda*(1), the property was sold in

execution of a decree obtained by the defendant against a third party, and purchased by the former. The plaintiff, claiming to be the owner of the property, protested against the sale and ultimately got it set aside under Order XXI, rule 89, by paying the required amount into Court. The money having been paid over to the defendant, the plaintiff sued for a refund of it, as having been involuntarily paid. It was held that the amount must be taken to have been deposited *voluntarily and unconditionally*, and therefore no suit could lie for its recovery. MACLEOD C.J. observes:—

"If, then, the plaintiff, to suit his own convenience, got rid of the sale of the judgment-debtor's right, title and interest in the property by paying the decretal amount into Court, it is quite clear that he could not recover the amount as having been involuntarily paid."

In *Raghu Ram Pandey v. Deokali Pande*(1), a decree had been obtained by defendants 1 and 2 against defendant 3. In execution of that decree, a certain property was brought to sale and the plaintiff objected, stating that it belonged to him and not to the debtor, but his objection was disallowed. He then deposited the decretal amount and five per cent under Order XXI, rule 89, and got the sale set aside. The money was withdrawn by defendants 1 and 2, and the plaintiff filed the suit in question for a declaration that the property belonged to him and for a refund of the amount withdrawn. In spite of a finding that he was the owner of the property, his suit was dismissed on the ground that he was not entitled to get the money back. I quote the following passage from the judgment:—

"Once a payment is made under Order XXI, rule 89, it is clear that the person making the payment cannot be heard to say that the sale was not a valid sale and that the money deposited should not be paid to the decree-holder. The judgment-debtor

(1) (1927) I.L.R., 7 Pat., 30.

(1) (1920) I.L.R., 45 Bom., 1094 at 1100.

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or the person interested is under no compulsion to make the deposit under Order XXI, rule 89. Such a deposit is a voluntary deposit and the person making the deposit cannot in my opinion maintain a suit for a refund of the money deposited by him."

The same view was taken in *Kunja Behari Singha v. Bhupendra Kumar Dutt*(1). The case relied upon for the plaintiff, *Kanhaya Lal v. National Bank of India Ltd.*(2), does not help him. The defendant bank had obtained a decree against the Delhi Cotton Mills Company and attached certain mills. The plaintiff, claiming to be the owner of the mills, paid the decree amount under protest and, having freed his property from the attachment, brought an action claiming a return of the money so paid. The Judicial Committee held that the procedure provided in the Code, in regard to claims to attached property is merely permissive and the fact that such a procedure is open to him, if he chooses to adopt it, interferes in no way with his right to take any other lawful alternative. In that case, the money was paid before the sale and the payment was not made under Order XXI, rule 89. The decision has clearly no application.

If this be the correct view, it follows that the Court had no right to take the security bond in question. It acted clearly in excess of its powers. But it may be contended that, though its action was illegal, there is a higher rule which is called into play, namely,

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors,"

See *Rodger v. The Comptoir D'Escompte De Paris*(3).

But the facts to which I have referred take the case clean out of this principle. The claim of the plaintiff

is utterly inequitable and unjust. The District Munsif has carefully analysed the facts and stated them in detail. The Subordinate Judge, who has reversed his judgment, does not advert to them, and, confining his attention merely to the security bond, thinks that there are equities in favour of the plaintiff. The truth is, as I have shown, not only is there no equity in the plaintiff's claim, but all the equities appear to be the other way. The facts, I have fully set forth, and I do not propose to repeat them. It would suffice to point out again that, first, in 1911, Thuppan stated, when applying for an adjournment of the sale, that he would bring into Court the decree amount, and that, in 1921, ten years later, the plaintiff himself (Thuppan having in the meantime died) asserted in the reversioner's suit, that the decree debt had been fully paid up. These assertions show that Thuppan as well as the plaintiff were fully conscious of their obligation under Exhibit I. The present claim is not only unjust but inconsistent with their own declarations.

The suit is dismissed, but I direct the plaintiff to pay only the costs of this Second Appeal. Some blame attaches to the first defendant who voluntarily executed the security bond and that is the reason why I do not propose to give him costs in the Courts below.

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(1) (1907) 12 O.W.N., 161. (2) (1918) I.L.R., 40 Cal., 598 (P.C.).
(3) (1871) L.R., 2 P.O., 465 at 475.

APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Curgenven.

1930,
February 14.

NANDURI SARADAMBA (DEFENDANT), APPELLANT,

v.

PARAKALA PATTABHIRAMAYYA (PLAINTIFF), RESPONDENT.*

*Trespasser paying debts due by deceased owner of an estate—
Right to reimbursement—Necessity to prove bona fides when
paying—Judgment in a previous suit—Admissibility of, to
prove deposition or admission contained therein—Evidence
Act (I of 1872), ss. 21, 63, 65 and 145.*

Where A's title to the estate of B (deceased) based upon an alleged will in his favour by B is found to be false owing to A's inability to prove the will, and A is not able to prove that he held the estate believing in good faith in his title, A cannot recover from B's heirs payments made by him, while he was in possession, to discharge debts due by B, whether secured or unsecured, unless such payments were made to avert an imminent loss to the estate.

The judgment in the suit, which declared that the will was not proved, but which contained an abstract of the oral evidence given by A to the effect that the will was genuine, is not admissible even as secondary evidence within the meaning of sections 63 and 65 of the Evidence Act to prove the deposition which can be proved only by the production of the original or of a certified copy thereof. The deposition itself can be used only either to contradict the witness under section 145 or as an admission under section 21 of the Act; and if for the latter purpose, it can be used only to confirm what the deponent stated, viz., that the will was genuine and not to prove that it was a forgery.

APPEAL against the decree of the Court of the Subordinate Judge of Narasapur in Original Suit No. 34 of 1926.

* Appeal No. 225 of 1928.

The facts are fully given in the judgment.

M. Appa Rao (with B. T. M. Raghavachari and V. Viyyanna) for appellant.—The judgment in the previous suit which gives an abstract of the plaintiff's deposition is admissible under section 35 of the Evidence Act to prove that the plaintiff knew that the will was forged.

[Court.—How is it admissible, when you did not conform to section 145 of the Act?]

It was not objected to, when filed. See *Seethapathi Rao Dora v. Venkanna Dora*(1); *Krishnasami Ayyangar v. Rajagopal Ayyangar*(2); *Gopu Nataraja Chetty v. Rajammal*(3); *Mulji Purshotum v. Cursandas Natha*(4); *Neamut Ali v. Gooroo Doss*(5); *Ibraime v. Parameswara Bavannavar*(6). The plaintiff had no title to the property and he did not believe and could not have bona fide believed that he had a good title to the property when he made the payments; hence he is a mere volunteer and cannot recover the payments made by him [Reference was made to *Ram Tahul Singh v. Biseswar Lall Sahoo*(7); *Desai Himatsingji Joravar singji v. Bhavabhai Kayabhai*(8); *Binda Kuar v. Bhonda Das*(9); *Chedi Lal v. Bhagwan Das*(10); *Dakhina Mohan Roy v. Saroda Mohan Roy*(11); *Abdul Wahid Khan v. Shaluka Bibi*(12); *Ammami Ammal v. Ramaswami Naidu*(13); *Janki Prasad Singh v. Baldeo Prasad*(14); *Gopala Iyengar v. Mummachi Reddiar*(15); *Viswanadha Vijia Kumara Bangaroo v. R. G. Orr*(16); *Mollaya Padayachi v. Krishnaswami Iyer*(17); *Secretary of State for India in Council v. Laxmibai*(18); *Muthuswami Kavundan v. Ponnayya Kavundan*(19); *Chinna Alagumperumal Karayalar v. Vinayagathammal*(20); and *Punjabhai v. Bhagwandas*(21).]

S. Varadachari (with V. Suryanarayana) for respondent.—The judgment is not admissible to prove the admission abstracted from the evidence; sections 33 and 145, Evidence Act,

(1) (1922) I.L.R., 45 Mad., 832.

(3) (1922) 43 M.L.J., 448.

(5) (1874) 22 W.R., 365.

(7) (1876) 2 I.A., 131.

(9) (1895) I.L.R., 7 All., 660.

(11) (1893) I.L.R., 21 Cal., 112 (P.O.).

(13) (1918) 37 M.L.J., 113.

(15) (1922) 17 L.W., 254, 266.

(17) (1924) 47 M.L.J., 622.

(19) (1928) I.L.R., 51 Mad., 815.

(2) (1894) I.L.R., 18 Mad., 73.

(4) (1900) I.L.R., 24 Bom., 563.

(6) (1924) 85 I.C., 996.

(8) (1880) I.L.R., 4 Bom., 643.

(10) (1888) I.L.R., 11 All., 234.

(12) (1898) I.L.R., 21 Cal., 496 (P.O.).

(14) (1908) I.L.R., 30 All., 167.

(16) (1917) 45 I.C., 786.

(18) (1922) 27 L.W., 405.

(20) (1928) 55 M.L.J., 861.

(21) (1928) I.L.R., 53 Bom., 309.

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Seethapathi Rao Dora v. Venkanna Dora(1), and *Bal Gangadhar Tilak v. Shrinivas Pandit*(2). An admission must be taken as a whole; and it does not go to establish either that the plaintiff knew that the will was a forgery or that he believed he had no good title to the property. The plaintiff was a minor at the date of the previous suit. The onus is on the other side to prove want of bona fides. If a person, who is not an owner, makes a payment, he can recover it in three cases; (a) when he represents an estate, (e.g.) as executor *de son tort* or a trustee *de son tort*, (b) when he pays to preserve a particular property and (c) when he pays on behalf of another at his implied request. The last clause alone comes under sections 69 and 70 of the Contract Act. An example of first class, under which this case comes, is *Dakhina Mohan Roy v. Saroda Mohan Roy*(8); examples of the second class are *Ammani Ammal v. Ramaswami Naidu*(4); *Syamalarayudu v. Subbarayudu*(5); *Ohama Swami v. Padala Anandu*(6); *Palamalai Mudaliyar v. The South Indian Export Company*(7); and *Abdul Wahid Khan v. Shaluka Bibi*(8). These cases show that bona fides is not absolutely necessary and that possession, however got, gives an interest to pay. [The cases quoted by the appellant were explained and distinguished.]

M. Appa Rao in reply quoted *Gorinda Padayachi v. Lokanatha Aiyar*(9).

The JUDGMENT of the Court was delivered by CURGENVEN J.—

One Viyyanna died without issue in November 1915 leaving a widow, Saradamba, who is the present defendant. Viyyanna's sister, Bayamma, upon his death took possession of his estate, which included about six acres of land, on behalf of her minor sons under a will alleged to have been executed in favour of the boys by Viyyanna on the 17th July 1915. In Original Suit No. 885 of 1920 on the file of the Principal District Munsif's Court, Tanuku, the widow sued for recovery of the

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property together with mesne profits on the ground that the will was a forgery, and obtained a decree on 6th February 1922. Of Bayamma's sons, the elder, Lachanna, died during the suit and the younger brother is the present plaintiff. He has brought the suit, out of which this appeal arises, to recover from Viyyanna's estate in the defendant's hands a sum of Rs. 5,000 and odd on the ground that he paid this amount to Viyyanna's creditors while he and his brother were in possession of the estate. The payments alleged are four in number and further particulars of them will be found in the schedule attached to the plaint. The learned Subordinate Judge has found that the payments alleged are true and that, since the plaintiff made them in good faith, he is entitled to be reimbursed from the estate. The defendant appeals against a decree framed in these terms.

It is necessary in the first instance to decide what is the true foundation for a suit of this character, and in what circumstances, apart from the question of proof of the debts, the plaintiff can succeed. Mr. Varadachari for the plaintiff, now respondent, suggests that every suit for reimbursement of such payments falls into one of three categories:—

(1) Where the person making the payment may be deemed to represent the estate, as in the case of a trustee or executor *de son tort*;

(2) Where the payment is necessary for the preservation of the property;

(3) Where the payment is made on behalf of the defendant and there is an implied contract for reimbursement. Suits of this character are provided for by sections 69 and 70 of the Contract Act.

He concedes that class (3) has no application to the present suit, and that class (2) will only apply where the debt is, for instance, a mortgage decree under which

(1) (1922) I.L.R., 45 Mad., 332 at 344 (F.B.).

(2) (1915) I.L.R. 39 Bom., 441 (P.O.). (3) (1893) I.L.R., 21 Cal., 142 (P.O.).

(4) (1918) 37 M.L.J., 113.

(5) (1897) I.L.R., 21 Mad., 143. (6) (1908) I.L.R., 31 Mad., 489.

(7) (1909) I.L.R., 33 Mad., 334 at 337.

(8) (1893) I.L.R., 21 Cal., 496 (P.O.). (9) (1920) 40 M.L.J., 114.

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the sale of the property has to be averted. The claims, he argues, fall under class (1), the payments made being recoverable on the ground that the plaintiff made them as representing the estate. In order to make good this position, it is further admitted that the Court must be satisfied of the plaintiff's bona fides, embracing in that term not only his good faith in making the payments in the interests of the estate but also his belief in his own title to the estate. The question first arising, therefore, is whether that good faith may be presumed or has been proved.

Upon this point, the case of the appellant is that, in the litigation by which the defendant recovered the property, it was found that the will was a forgery and that the plaintiff and his brother were privy to its fabrication. The respondent's case is that they were innocent instruments in the hands of others, or at least that there is no proof of their complicity. As a preliminary to the discussion of this matter, some questions relating to the admissibility of evidence have to be decided. The judgment of the District Munsif in the will suit is Exhibit II and the appellate judgment is Exhibit S, and the appellant wishes to make use of certain of the contents of the former of these two judgments in order to show the plaintiff's guilty knowledge. For all that appears, the only object with which these judgments were filed was to prove the decision in the will suit, which of course is *res judicata* in the present proceedings. That this is so is probable from the circumstance that the learned Subordinate Judge refrained in his judgment from any reference to their further contents. Nor is there anything to show that in the lower Court the defendant argued that those contents were admissible in evidence. Now however she wishes to use Exhibit II as proof not only that the will is a

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forgery but that the second defendant knew it. It is open to question whether this judgment, or the appellate judgment, is, strictly speaking, legal evidence even of the first of these propositions. The issue tried was "Whether the will set forth in the defendant's statement is true, valid and binding on the plaintiff," and it is clear that, speaking generally, a finding on an issue so framed, to give the plaintiff a decree, need not necessarily involve more than the conclusion that the will was not proved to be either true or false. The affirmative finding that it was false, clearly expressed by the District Munsif, less clearly by the Subordinate Judge, was not really necessary for the purposes of the decree. Inasmuch, however, as the question substantially between the parties was whether the will was true or false, it may be taken to have been settled between them that it was a forgery. It remains to be seen whether there is evidence that the plaintiff and his brother were privy to it. The plaintiff was examined as P.W. 2 in the suit, but no effective questions were put to him in cross-examination under this head, a seemingly inexplicable omission on the part of the defendant's *vakil*. In particular, he was not questioned with reference to statements made by him as a witness in the prior litigation. That being the position, it is now sought to import into the present case not indeed his deposition in the will suit but an abridged version of it contained in the judgment, Exhibit II. This version relates to the circumstances in which the rough draft of the will was alleged to have been prepared and, so far as appears, the plaintiff, as the second defendant in that suit, deposed to these circumstances from first hand knowledge. We are clearly of opinion that no such use may be made of this extract. In the first place, the circumstances did not resemble those in *Gopu Nataraja Chetty v.*

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Rajammal(1), where the recital in a judgment of the terms of a codicil was allowed in proof of the contents of the document on the exceptional ground that it was admissible by consent of parties, no objection having been taken to its admission. As we have said, for all that appears, no attempt was made to use this portion of the judgment in this manner at the trial, so that the question of the unchallenged admission of legally inadmissible evidence does not arise. We have not been referred to any provision of the Evidence Act under which a statement of a witness abstracted in a judgment can be made use of in lieu of the original statement itself. Indeed, it seems clear from section 63 of that Act that such a record is not even secondary evidence of the statement and, even if it had been, the conditions laid down by section 65 for its use had not been fulfilled. We think, therefore, that if the defendant wanted to prove what the plaintiff had said as a witness in the will suit, she could have done so only by the production of the original deposition or of a certified copy. Apart however from this difficulty, it seems that the statement could have been used only in one of two ways—either under section 145 of the Evidence Act to contradict the witness or as an admission under section 21. For the former purpose, it was incumbent upon the party examining the witness, before proving the writing, to call his attention to those parts of it which were to be used for the purpose of contradicting him. It has been pointed out by the Judicial Committee in *Bal Gangadar Tilak v. Shrinivas Pandit*(2), that this is an essential step in the procedure, the omission of which is likely to cause grave injustice. In point of fact, not only was his prior statement or even the version of it given

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in the judgment not put to the plaintiff but he was not asked a single question as to what he said. It may be that, as an admission, the original deposition might have been filed in evidence without putting it to the party, but, even assuming that the version in the judgment could be made use of in its place, it is clear that it would be an admission not that the will was a forgery but that it was genuine. We think, then, that it is not open to the appellant to make use of Exhibits II and S, further than to show, at most, that the will was a forgery, in order to establish the plaintiff's lack of good faith. This seems to have been the view taken by both parties and the Court at the trial, because the learned Subordinate Judge seems deliberately to have abstained from drawing any conclusions from the contents of those records. Had the vakil for the defendant obtained a copy of the deposition and cross-examined the plaintiff upon it, it may be that he would have been able to show from his answers that he must have known about the fabrication of the will; but it is even doubtful whether this conclusion should be drawn from what the plaintiff said in the prior suit, because it does not follow that because he gave false evidence in support of its genuineness he must have known that was a forgery. We think, accordingly, that the footing upon which the learned Subordinate Judge deals with the question of good faith in paragraph 12 of his judgment is correct in so far as he disregards the findings of fact in the previous suit and bases his conclusion in the plaintiff's favour merely upon the grounds that he and his brother Lachanna were minors at the time of Viyyanna's death and were not shown to have had any hand in bringing the will into existence. The question is whether, upon the evidence which we are entitled to consider, this is a correct conclusion.

(1) (1922) 43 M.L.J., 448.

(2) (1915) I.L.R., 39 Bom., 441.

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We think it is clear from a variety of cases cited before us that, in order to qualify for a decree for reimbursement, the Court must be satisfied of the plaintiff's abundant good faith. In the Privy Council case, *Dakhina Mohan Roy v. Saroda Mohan Roy*(1), the plaintiff enjoyed a period of possession under a decree of the High Court of Calcutta which was subsequently reversed by the judgment of the Privy Council. In the interval, although he received only a trifling sum on account of rents and profits, he was called upon to pay and did in fact pay large sums for Government revenue and other charges assessed upon the estate. In a suit to recover the amounts of these disbursements he obtained a decree which was reversed on appeal to the High Court. In further appeal to the Privy Council their Lordships said that—

“it seems to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents.”

They point out that in the interval between the High Court and the Privy Council decrees he was not in wrongful but in rightful possession. So much so that the defendants acted wrongfully when they interfered with the tenants upon the estate. The circumstances of that case were, we think, widely different from the present one. A person who gets possession of property under a forged will can in no sense be said to be in rightful possession; and in so far as their Lordships base their decision upon the danger to the estate which would have been involved by the plaintiff's refusal to pay the Government revenue, the case falls rather under Mr.

(1) (1893) I.L.R., 21 Calc., 142 (P.C.).

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Varadachari's second category. Here, in respect of at least the majority of the debts, the plaintiff cannot assert that payment was unavoidable in order to avert loss of the property. In another Privy Council case in the same volume, *Abdul Wahid Khan v. Shaluka Bibi*(1), where one of two co-sharers who was in possession of the whole property was sued for the other half share and counter-claimed in respect of certain litigation expenses defrayed which, it was claimed, were necessary to protect the property, it was held that the mere circumstance that the plaintiffs had got a benefit therefrom was not a ground for making them liable for any portion of those costs:

“The proceedings were taken by the defendant for his own benefit, and without any authority express or implied from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs of the plaintiffs.”

This case, it is true, does not deal with the question of bona fides and seems to have been decided with reference to the terms of section 69 of the Contract Act. Instances of cases where the claim has failed from lack of bona fides are *Chinna Alagumperumal Karayalar v. Vinayagathammal*(2), and, if we take the judgment of DEVADOSS J., *Gopala Iyengar v. Mummachi Reddiar*(3). The learned Judge held that the plaintiff who took a conveyance of the property from the first defendant's vendee after the first defendant had warned him that the sale to the vendee was nominal was no better than a speculative volunteer and could not have made in good faith certain subsequent payments to the first defendant's creditors. This view was not agreed in by SPENCER J., who considered that the plaintiff could

(1) (1898) I.L.R., 21 Calc., 496 (P.C.). (2) (1928) 55 M.L.J., 861.

(3) (1922) 17 L.W., 254.

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recover under sections 69 and 70 of the Contract Act, but it seems clear that, if the test of good faith should have any application, the plaintiff was out of Court. Special considerations, arising out of the repurchase of the property by the ostensible owner at a court sale, were held by KUMARASWAMI SASTRI J. in *Mollaya Padayachi v. Krishnaswami Iyer*(1) to qualify a mortgagee from that owner to a charge upon the property; but we think it is clear from the learned Judge's observations that in the absence of those circumstances he would have held that the knowledge of the mortgagee of the infirmity of his mortgagor's title would have been fatal to his claim.

A number of other cases have been cited before us by the learned Advocate for the appellant, but they do not, in our view, throw any further light upon the question before us, which is, indeed, a question to be answered upon general considerations of justice, equity and good conscience. The plaintiff gained possession of the property under a false title and, while so holding it, claims that he made several voluntary payments to discharge debts that would be enforceable against it, voluntary in the sense that the payments, with one exception, were not made to avert the imminent loss of the property. Whether or not it is enough that the plaintiff should prove, to entitle him to recover the money from the real owner, that he believed in his own title, it seems indisputable that before granting him a decree the Court must be satisfied that that condition was fulfilled. Unless he establishes the most unquestionable good faith, he can have no claim in equity to reimbursement. Now it seems to us that, in view of the finding that the will is not genuine, which we must

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adopt here as *res judicata*, the only footing upon which the plaintiff can get the relief for which he asks is by avowing the falsity of the will, or at the least conceding that it is not genuine, and by pleading that he set up a title to Viyyanna's property, and paid the debts, in the belief that it was true. In the plaint, however, he adheres to the falsehood that the will is true, alleging in unqualified terms that it was executed by Viyyanna; and necessarily there is no disavowal of knowledge that the will was not genuine. He repeats in his deposition as P.W. 2 the story that Viyyanna executed the will. That being so, it seems scarcely open to him now to contend that he at least acted in ignorance that the will was false. The two positions are irreconcilable.

It may be objected that this line of reasoning is based upon too strict a standard of pleading and conduct; let us therefore see whether, in spite of the plaintiff's attitude, there are grounds upon which to infer his good faith. The learned Subordinate Judge thinks that as the plaintiff and his brother Lachanna were minors at the time of Viyyanna's death and as they were not shown to have had any hand in bringing the will into existence they should be held to have made the payments in good faith. The test proposed should be, we think, not whether or not they had a hand in the fabrication but whether at the time or within the period to which the payments relate they had knowledge that the will was false. It must in our opinion be inferred against an ordinary party who holds property under a false will that he has knowledge of the true state of affairs. How far, if at all, does the inference hold good in the case of a minor? To accept the mere fact of minority as sufficient to exonerate a person from the imputation of guilty knowledge is to go a great deal further than, for instance, the Indian Penal Code goes

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in section 83, under which a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, is to be deemed not to have committed an offence. Youthfulness, it is true, must always be taken into consideration in inferring knowledge and intention; but in this respect no hard and fast line can be drawn, we think, between persons above and persons below the age of eighteen.

The few facts which the evidence in this case discloses are these. The elder brother, Lachanna, is shown as of age when he executed the promissory note, Exhibit B, on 14th November 1915, a few months after the date of the will. The plaintiff himself gives his age, when he deposed in 1927, as 26. In the receipt, Exhibit A, passed to his brother and himself on 28th January 1918, he is no longer described as a minor with his mother as guardian. He was probably, therefore, about fifteen when Viyyanna died and the alleged will came into existence. It may perhaps be a fair inference that he was too young to bear a part in the fabrication of the will, although no such inference would arise, we think in the case of Lachanna. But confining ourselves to the real essential knowledge of the facts and remembering that the mother must be assumed to have known them it appears to us impossible to draw the affirmative conclusion, on grounds of abstract probability that the two sons, who alone stood to gain by the fraud, would have been kept in ignorance of them. This part of the case is very difficult to deal with, owing to what we cannot but regard as its mishandling by the defendant's advisers. But that is no reason why the plaintiff should get a decree to which he is not entitled, and giving the matter the best consideration we can, we do not think that upon the record as it stands the requisite

good faith has been established. This, in our view, disentitles the plaintiff from recovering in respect of any debts payment of which by him was voluntary and not affected by any special considerations.

It remains to apply these conclusions to the four instances in which the plaintiff claims reimbursement for debts paid. Two of these items, Nos. 3 and 4, were debts upon promissory notes, and it is not claimed that payment of them was forced upon the plaintiff by immediate threat to any part of the property. The claims in respect of them, assuming them to be true, must accordingly be disallowed. Item 2 is a decree debt, in settlement of which the plaintiff and his brother are said to have paid Rs. 200 on 28th January 1928 and obtained the receipt, Exhibit A-1.

[His Lordship then discussed the evidence and held that the payment was made and that it was to avert an impending court sale of a portion of the estate.]

Since, further, when payment was made the sale was imminent, we think that here no question of good faith arises, but that the defendant is bound to honour an obligation incurred for the purpose of saving the estate.

Finally, there is item No. 1, which relates to a settlement of two debts due to one Rapaka Viyyanna under a mortgage and a decree respectively. The decree was for a sum of Rs. 1,278 on a promissory note, and is dated 4th May 1912. Execution of this decree was taken out in 1912 by warrants of arrest and for attachment of movables, but nothing was realized; and the decree-holder subsequently assigned the decree to one Lakshminarayanamurthi. It has not been contended that in execution of this decree matters ever reached the stage of proclaiming any part of the estate for sale, much less that the payment was rendered unavoidable by the need to avert such a proceeding. We do not

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think that the mere fact that a debt is secured by a decree will render applicable the principle which we have accepted in the case of item No. 2. Even admitting, therefore, the truth of this payment, we do not consider that the amount can be recovered.

There remains the question whether upon any special considerations the plaintiff can claim refund of a payment of Rs. 1,593-6-6, assuming it to have been made, on the ground that the debt was under a mortgage secured upon the property. Our attention has been drawn to three cases decided by this Court, *Syamalarayudu v. Subbarayudu*(1), *Ohama Swami v. Padala Anandu*(2) and *Palamalai Mudaliyar v. The South Indian Export Company*(3) in which a claim of this kind was allowed, and it is argued that at least so far as title to the property was concerned the element of good faith was not deemed to be requisite. The first of these cases related to a sale found invalid as antedated to an agreement. The circumstances of the second do not appear in full, but it was a case of a sale found to be invalid. In the third, there was a sale which was set aside as in fraud of creditors. It will be observed that in each of these cases the plaintiff acted under colour of a sale deed, voidable no doubt but apparently supported by consideration, and occupied a position quite other than that of a mere trespasser. This distinction was stressed by DEVADOSS J. in *Gopala Iyengar v. Mummachi Reddiar*(4). That, as has been already said, was a case of a purchaser whose vendor had, to the purchaser's knowledge, only a nominal sale deed in his favour, and who discharged certain encumbrances on the property. SPENCER J. considered that the payments fell within the terms of section 69 of the Contract Act,

(1) (1897) I.L.R., 21 Mad., 143.

(2) (1908) I.L.R., 31 Mad., 439.

(3) (1909) I.L.R., 33 Mad., 334.

(4) (1923) 17 L.W., 254.

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a contention which, as I have explained, is not advanced here. DEVADOSS J. differed, and since it was clear that the plaintiff's object was to sustain his claim to the property, held that he did not make them bona fide for the purpose of preserving the property. He distinguishes between a person holding under a title voidable or defeasible and a volunteer who knows that his so-called title is a mere sham. We must take it that the plaintiff's title in the present case is of this latter description. In *Narayana Kutti Goundan v. Pechiammal*(1), SUNDARA AYYAR J. has discussed in what circumstances a person having no actual vested interest in the property—the case was one of a reversioner—may discharge a mortgage upon it, and on what principles he may recover the money. He decided that a reversioner is not entitled to be subrogated to the mortgagee's rights, and that he is not among the persons whom section 91 of the Transfer of Property Act permits to redeem. Finally he held that where the mortgagee held a decree under which he was proceeding to sell, and the reversioner intervened in order to save the property, he has sufficient interest in it to entitle him to a charge for repayment. The decision is based upon the interest possessed by the reversioner, and there can be little doubt from the learned Judge's observations that he would have held that no such relief could be granted to a holder under a false title. We have been referred to no authority for the view that, where the plaintiff's alleged title is found to have been false, and he has not succeeded in showing that he held possession of the property in good faith believing it to be true, a payment made to discharge a mortgage debt stands on any better footing than a payment made to discharge an unsecured debt. Nor do there seem to be any grounds

(1) (1911) I.L.R., 36 Mad., 426.

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based upon general principles of equity to make any such distinction. We must therefore disallow the claim in respect of the whole of item 1.

On the issue of limitation we agree with the learned Subordinate Judge that article 61 has no application but that the correct article is article 120, under which the suit was within time.

The result of our findings is that except as regards item 2, a claim to a sum of Rs. 200 and interest thereon as allowed by the lower Court, the appeal must be allowed and the plaintiff's suit dismissed. The appellant will get her costs throughout.

N.R.

APPELLATE CIVIL.

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

1930,
February 13.

VENKATARAMI REDDI (DEFENDANT), APPELLANT,

v.

SRI MAHARAJA SEETHARAMA BHUPAL RAO (RAJA
OF GADWAL) AND TWO OTHERS (PLAINTIFF AND
HIS LEGAL REPRESENTATIVES), RESPONDENTS*.

Civil Procedure Code (V of 1908), sec. 84—Gadwal State, whether a foreign State within the meaning of—Promissory note executed in Gadwal without stamp—Enforceability of, in British Indian Court—Note in favour of Ruler of Gadwal represented by his officer—Suit by Ruler, maintainability of.

On the finding that the Gadwal State, situate within the territories of, and subject to the suzerainty of, His Exalted Highness the Nizam of Hyderabad was wanting in some of the characteristics of a sovereign State, i.e., that it had no independent powers of legislation, that its Judges were appointed

* Appeal No. 192 of 1924.

by the Nizam, and that the decisions of its Courts were subject to the appellate jurisdiction of the Nizam's Courts, their Lordships held (a) that the Gadwal State was neither a sovereign State nor a foreign State within the meaning of section 84 of the Civil Procedure Code and (b) that a suit by its Ruler for moneys due to him on certain toddy contracts entered into by the defendant, a resident in British India, was maintainable in British India.

A promissory note, executed in the Gadwal State, but unstamped, which is according to the law of that State not void, but only inadmissible in evidence, can be sued upon in British Indian Courts. *Dhondiram Chatrabhuj v. Sadasuk Savatram*, (1918) I.L.R., 42 Bom., 522, followed.

A promissory note executed in favour of the Ruler of Gadwal represented by his excise officer for the time being, without describing the payee by name is valid and is enforceable by the Ruler. *Mahanth Damodar Das v. Benares Bank, Ltd.*, (1920) 5 Pat. L.J., 536, followed.

APPEAL against the decree of the Court of the Subordinate Judge of Kurnool in O.S. No. 34 of 1922.

The Advocate-General (A. Krishnaswami Ayyar) and W. Kodanduramayya for appellant.

O. S. Venkatachari and R. Srinivasa Ayyangar for respondents.

This appeal coming on for hearing, the Court (DEVADOSS and MACKAY JJ.) made the following

ORDER.

The suit is by the proprietor of Gadwal Samasthanam for an amount due by the defendant. The lower Court decreed the suit and the defendant has preferred this appeal. In his written statement, the defendant pleaded that "the plaintiff being of a foreign State and the subject-matter of the suit being one relating to the State revenue of that State, the plaintiff has no right to institute this suit in this Court." The plaintiff relied on section 84 of the Civil Procedure Code as enabling him to file the suit. Section 84 applies to cases of foreign

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States recognized by His Majesty or by the Governor-General in Council. In order to enable a foreign State to sue in a British Court, two conditions have to be fulfilled: (i) the foreign State must be recognized by His Majesty or by the Governor-General in Council and (ii) the object of the suit must be to enable a private right vested in the head of such State or in any officer of such State in his public capacity. Though the lower Court acted on the representation of the plaintiff that section 84 applied to the case and granted a decree, yet as section 84 casts upon the Court the duty of taking judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor-General in Council, we referred the matter to the Government and the information we have received is that section 84 of the Civil Procedure Code does not apply to Gadwal Samasthanam in Hyderabad State. We hold section 84 has no application to the present case. The defendant's contention that Gadwal Samasthanam is a foreign State is a question of fact and this question of fact has not been tried by the lower Court. It is but fair that the appellant should have an opportunity of adducing evidence to show that Gadwal Samasthanam is a foreign State and we therefore direct the Subordinate Judge of Kurnool to record a finding on the following issue:—

“Is Gadwal Samasthanam a foreign State” and to submit the finding in the course of four weeks. Fresh evidence may be adduced by both the parties. Ten days for objections.

In compliance with the order contained in the above judgment the Subordinate Judge of Kurnool submitted the following finding:—

“The Gadwal Samasthanam is not a State or a foreign State.”

[His reasons for the above finding were, in the main, as follows:—

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(1) Gadwal has no independent military or foreign policy of its own. It is a tributary State.

(2) Gadwal has no independence in its executive (revenue) administration, and that its executive is controlled by the Nizam. It has no power of coinage, no postal or telegraph system, no customs or stamp duties of its own.

(3) Gadwal has no independent judicial administration. Its judicial officers are appointed by the Nizam, and their decisions are subject to appeal to the Nizam's High Court.

(4) Gadwal has no independent legislature but its subjects are subject to the laws of the Nizam's State.]

This appeal coming on for hearing again the Court delivered the following

JUDGMENT.

REILLY J.—In this suit the Raja of Gadwal sued the defendant, a resident of the Kurnool District, on ten documents, which are called shokhas. The defendant admitted liability on one of them, Exhibit K, and disputed liability on the others. The Subordinate Judge made a decree for the plaintiff for the full amount claimed. The defendant appeals.

Before the Subordinate Judge in his written statement the defendant objected to the suit on the ground that Gadwal was a foreign State and that the plaintiff was suing, not to enforce a private right, but to enforce a State right arising out of a liability to pay revenue due to the State. The learned Subordinate Judge did not consider at the trial the question whether Gadwal was a foreign State. He found that

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the right which the plaintiff was suing to enforce was a private right. When the appeal came on for hearing in this Court, the defendant raised a rather different objection, which was not set out in his appeal memorandum, namely that Gadwal is a foreign State,* but not a foreign State recognized by His Majesty the King-Emperor or the Governor-General in Council, and so the plaintiff as the ruler of that State could not sue in British India to enforce a private right, because he did not come within section 84 of the Code of Civil Procedure. At first sight it seems not very likely that within the borders of the Indian Empire there should be a foreign State the establishment of which has not yet been recognized by His Majesty or the Governor-General in Council. But Mr. Kothandaramayya, who appears for the defendant, has urged that the Gadwal Samasthanam is a State, not in direct relations with His Majesty or the Governor-General in Council, but a State under the suzerainty of the Nizam of Hyderabad. It is possible that there might be a State, not itself recognized by His Majesty or the Governor-General in Council, but subject to the suzerainty of some other State within the borders of the Indian Empire, which was so recognized. But it is not disputed that, if Gadwal is to be found to be such a State, we must find that at any rate some degree of sovereignty has been preserved to it. When the case came on first before DEVADOSS and MACKAY JJ. they thought that it was necessary to inquire of the Government whether Gadwal was a State recognized by His Majesty or the Governor-General in Council for the purpose of section 84 of the Code of Civil Procedure; and in reply to an inquiry made by the Registrar on that question a letter was received from the Chief Secretary to Government of Madras saying—

"I am directed to state that the Government of India have intimated that section 84 of the Civil Procedure Code, 1908, does not apply to Gadwal Samasthanam in Hyderabad State."

It will be seen that there are various implications in that letter, but that it does not directly meet the point raised by Mr. Kothandaramayya. If we received through the regular official channel any intimation in regard to the relations of a foreign State with His Majesty or with the Governor-General in Council or any statement that a foreign State had or had not been recognized by His Majesty or the Governor-General in Council, I need hardly say that we should accept that intimation as conclusive. But in this case it happens that the answer to the inquiry made does not conclude the contention raised by the defendant. Having received that answer, DEVADOSS and MACKAY JJ. thought it well to frame an issue, "Is Gadwal Samasthanam a Foreign State?", and send it to the Subordinate Judge for a finding. The Subordinate Judge after taking further evidence has submitted a finding that Gadwal Samasthanam is not a "State" or a "Foreign State". The defendant has raised objections to that finding and has urged before us that Gadwal is a State, a foreign State, but not one recognized by His Majesty or the Governor-General in Council, and that therefore the plaintiff as the ruler of that State could not bring this suit in a Court in British India.

The position is rather curious because the defendant is trying to thrust upon the plaintiff an honour which the plaintiff does not claim. The plaintiff maintains that the Raja of Gadwal is a subject of the Nizam of Hyderabad, a subject indeed with a long and very distinguished history behind him, a subject in a very special position, a subject with special rights and privileges and exercising some of the powers usually

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exercised by ruling sovereigns, such as the rights of escheat and wardship, and the right to hold judicial Courts, but nevertheless a subject, not a sovereign. We must remember that in many parts of the world such powers as I have just mentioned have been exercised by subjects in feudal or quasi-feudal relations with their sovereigns; but nevertheless their legal position has been that of a subject. In the circumstances of this case it does not appear necessary to me to enter into any elaborate discussion of the character and essence of sovereignty. But I think it cannot be denied that any State which has preserved any degree of sovereignty—and various attributes of sovereignty may have been ceded to their suzerains by different States—must have at least three characteristics. First, the people of the territory concerned must owe allegiance to the ruler of the supposed State, and in the term “ruler” I include any person in whom, or body in which, the sovereign power resides. Secondly, the laws enforced in the State must be the ruler’s laws, either made or recognized by him, not laws imposed by any outside authority, nor laws made by him in virtue only of a delegated authority. And thirdly, those laws must be enforced by his Courts, that is, Courts deriving their authority from him and not subject to the judicial control of any outside authority. Mr. Kothandaramayya in the course of his argument referred to federated States. What I have said in regard to the power of law-making does not relate directly to federated States; but I do not think it is in any way in conflict with the position of a body of federated States. A group of co-ordinate sovereign States can agree together that the whole body shall make laws which are to run in the territory of each member; but those laws are made, not by any external authority,

but by virtue of authority derived from the sovereign members themselves.

If we look at the evidence regarding the laws which run in Gadwal and the judicial Courts which are established there, we shall find, I think, no difficulty in deciding the question before us. Diwan Bahadur Aravamudu Ayyangar, an Advocate of this Court, whose father was a judicial officer of the Gadwal Samasthanam and who himself has been legal adviser of the Samasthanam for nearly thirty years, has given evidence as P.W. 5. He states that the Raja of Gadwal has no legislative power; and he has also given evidence to the effect that the Nizam’s laws run in the Gadwal territory, instancing the Nizam’s Criminal Procedure Code and the Nizam’s Land Revenue Act. D.W. 3, a Vakil called by the defendant, has stated that Gadwal is governed by the laws prevailing in the Nizam’s State and that there is no independent power in the Gadwal Samasthanam to frame laws. In regard to Courts, Mr. Aravamudu Ayyangar has stated that judicial officers in Gadwal are nominated by the Raja but not appointed by him: they are appointed by the authorities of the Nizam’s State. He has also stated that for more than thirty years there has been a right of appeal from the Courts of Gadwal to the Nizam’s Courts—it must be noticed, not to the Nizam as suzerain in any political or executive capacity, but the Nizam’s Courts. The defendant himself as D.W. 2 has made a similar statement regarding the position of the Gadwal Courts. I think that evidence is quite conclusive to show that the Gadwal Samasthanam is in no sense a sovereign State or a foreign State for the purpose of section 84 of the Code of Civil Procedure.

Besides this objection to the maintainability of the suit, the defendant has urged a number of points in

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regard to the shokhas before us. The learned Subordinate Judge has treated all the nine shokhas in dispute as promissory notes. But I think it is quite clear, when they are examined, that all except three of them are not promissory notes. Exhibits A, B and H do contain unconditional promises to pay for a certain consideration named, that is trees assigned. But the other shokhas except Exhibit K are offers for date trees. I think it will be convenient to deal first with the shokhas which are promissory notes, Exhibits A, B and H. The defendant maintains that there was no consideration for these notes. But consideration is recited in them. In the ordinary way it is for him to prove want of consideration. He is a witness whose evidence does not read in a very convincing way, and the attitude he has taken up in this suit has shifted from time to time. The learned Subordinate Judge has not believed him on this point. I can see no sufficient reason why we should differ from the Subordinate Judge as regards that.

But apart from the question of consideration Mr. Kothandaramayya has urged other points. One is that the defendant executed these notes only as the agent of another man called Rangayya. [His Lordship then discussed the evidence on this point and held as follows:—] In these circumstances I think that the contention that Exhibits A, B and H were executed only as agent for Rangayya clearly fails.

Another objection taken for the defendant is that these three promissory notes are made in favour of the "Mohathameem Sahib Garu of Gadwal Samasthanam," that is the officer holding that post, and not in favour of any person by name. It is contended that to make a note in favour of a person described by his office is not to make it in favour of a certain person as required by section 4 of the Negotiable Instruments Act. But in

Mahanth Damodar Das v. Benares Bank Ltd.(1) it was decided that a promissory note made in favour of "the manager or acting manager of the Benares Bank, Limited" was properly made and the person who was certainly indicated was the Benares Bank. Following that I am quite prepared to find that these promissory notes were executed in favour of the Raja of Gadwal, sufficiently described through his officer by the name of the office. It must be remembered that in this country we have the last part of section 5 of the Negotiable Instruments Act to help us in this matter, which provides that, if it is clear to whom payment is to be made, he may be a "certain person" within the meaning of section 4 of the Act although he is mis-named or only designated by description. In *Ramanadhan Chetty v. Katha Velan*(2) it was held that a note drawn in favour of a trustee of a temple by name and office was really in favour of the trust and could be sued on by a successor of the trustee. In my opinion this objection also fails.

Another objection to these notes is that none of them is stamped, though they were all executed in the Nizam's Dominions where promissory notes must be stamped in a manner similar to the way in which they have to be stamped in British India. The result of this is that none of these three notes could have been admitted in evidence according to the Negotiable Instruments Act in force in the Nizam's territories to prove the plaintiff's claim. It appears that there is a provision in the Negotiable Instruments Act of the Nizam's Dominions that, although other documents which have not been stamped at the time of execution may be made admissible in evidence by paying a fee or penalty, the defect of want of stamp cannot be cured in that way in

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(1) (1920) 5 Pat. L.J., 536.

(2) (1917) I.L.R., 41 Mad., 353.

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the case of promissory notes. Mr. Kothandaramayya suggests that the result of that is that these notes were void in the Nizam's territories. But that is not what the Act says. It merely makes them inadmissible in evidence. If they were void in the Nizam's Dominions, the place where they were made, certainly they could not be used as the basis of a suit instituted in British India. But if they are merely inadmissible in evidence in Courts in the Nizam's Dominions because they are not stamped, it does not follow that they are inadmissible in Courts in British India. A note made in British India and unstamped would be inadmissible in our Courts; but we cannot stretch the provisions of our Negotiable Instruments Act to exclude on that basis a promissory note executed in foreign territory. This particular point came before the Bombay High Court in *Dhondiram Chatrabhuj v. Sadasuk Savatram*(1), and it was there decided that a promissory note made in the Nizam's Dominions, but unstamped and so inadmissible in evidence in any of the Nizam's Courts, could be proved in a Court in British India. That is the principle which has been adopted in England, as may be seen from *Bristow v. Sequeville*(2). I cannot agree with Mr. Kothandaramayya's contention that, because these promissory notes being unstamped could never have been admissible in any of the Nizam's Courts and so were practically unenforceable in his territory, they must be regarded as void. That is not, so far as I can see, the effect of the penalty imposed in the Nizam's territory for failure to stamp them.

So far in regard to Exhibits A, B and H. There remain the other six shokhas. [His Lordship then discussed the evidence and held that four of these

shokhas were offers in respect of which there was acceptance by performance to the defendant's knowledge, but that in respect of Exhibits C and J that was not proved and proceeded as follows.]

In my opinion therefore this appeal should be allowed in respect of the amounts concerned in Exhibits C and J but in other respects should be dismissed, and in the circumstances the parties should pay and receive proportionate costs throughout.

KUMARASWAMI SASTRI J.—I agree.

N.R.

ORIGINAL JURISDICTION.

Before Mr. Justice Venkatasubba Rao and Mr. Justice Madhavan Nair.

PENUGONDA VENKATARATNAM AND ANOTHER,
PETITIONERS,

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v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
AND OTHERS, RESPONDENTS.*

Writ of certiorari—Jurisdiction of High Court to issue—Application for the writ against the Minister, Public Health, Government of Madras—Proper form of application—Exemption of Governor acting with Ministers in a transferred subject—Government of India Act (5 and 6 Geo. V, c. 61), ss. 106 (1) and 110—Construction of Original Jurisdiction in sec. 110, if includes jurisdiction in certiorari—"Governor and Council", in Act of Parliament, if includes "Governor acting with Ministers"—General Clauses Act (X of 1897), as amended by Act XXXI of 1920, sec. 31, if applicable to Act of Parliament.

Subject to a statutory exception in respect of the acts or orders of the Governor-General and Council and of the Governor

* Civil Miscellaneous Petition No. 2447 of 1929.

(1) (1918) I.L.R., 43 Bom., 523. (2) (1850) 5 Exch. Rep., 275; 155 E.R., 118.

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and Council, done or made by them in their public capacity, the High Courts in India possess the same jurisdiction to issue writs of *certiorari* as the Court of King's Bench in England.

Under the Indian High Courts Act, 1861 (24 and 25 Vict., c. 104), section 9, the High Court of Madras derived all the jurisdictions and the powers of the Supreme Court of Madras, which was abolished on the establishment of the High Court. But the Supreme Court of Madras, which had been established under the Government of India Act, 1800 (39 and 40 Geo. III, c. 79) and the Charter of 1800 issued in pursuance of that Act, had no jurisdiction or authority over the Governor of Madras and his Council in respect of orders or acts made or done by them in their public capacity only, just as the Supreme Court of Fort William in Bengal had no jurisdiction or authority over the Governor-General and his Council in respect of similar acts or orders done or made by them in their public capacity, under the exemption enacted in 1780 by a statute, viz., 21 Geo. III, c. 70. Consequently, the High Court of Madras derived no jurisdiction or power in *certiorari* over the Governor of Madras and Council from the Supreme Court of Madras.

Under section 106 (1) of the Government of India Act, 1915 (5 and 6 Geo. V, c. 61), the High Court of Madras has only such powers and authority as were vested in it at the commencement of that Act.

As the High Court of Madras has no jurisdiction to issue the writ of *certiorari* against the Governor of Madras under section 106 (1) of the Government of India Act, 1915, it has equally no jurisdiction to issue the writ against "the Governor acting with the Ministers," as the issue of a writ in the latter case would involve the exercise of such a jurisdiction against the Governor himself.

Under section 110 of the same Act, the Governor-General and each member of his Executive Council or the Governor and each member of his Executive Council (and a minister appointed under this Act) shall not be subject to the "*Original Jurisdiction*" of the High Court in respect of anything counselled or ordered or done by any of them in their public capacity; a writ of *certiorari* is issued in the exercise of the *Original Jurisdiction* of the High Court within the meaning of that expression in section 110; consequently a writ of *certiorari* cannot be issued by

the High Court against "the Governor acting with Ministers", by reason of the exemption contained in that section.

Per VENKATASUBBA RAO J. (MADHAVAN NAIR J. *dissent- ing*):—Section 31 of the General Clauses Act (X of 1897), as amended by Act XXXI of 1920, may be relied on, for construing the expression "The Governor and Council" as including "the Governor acting with Ministers", even though the former expression occurs in an Act of Parliament, because the Parliament is "an authority in British India" within the meaning of the section.

Per MADHAVAN NAIR J.:—An application for a writ of *certiorari* in respect of proceedings in a transferred subject relating to public health, can, as a matter of form, be properly directed only against the Government of Madras, Ministry of Public Health, and not against the Honourable the Minister of Public Health, Government of Madras.

PETITION under clauses 2 and 7 of the Letters Patent (Madras) and sections 106 and 107 of the Government of India Act, 1915, praying that the High Court may be pleased to issue a writ of *certiorari* to the Hon'ble the Minister of Public Health, (1) calling for the records in the matter of G.O. Mis. No. 673, Public Health, dated 11th March 1929, cancelling G.O. No. 1214, Public Health, dated 9th June 1928, and (2) to quash the proceedings in the said G.O. Mis. No. 673, Public Health.

Sir C. P. Ramaswami Ayyar (with him *P. Satyanarayana Rao*) for petitioner.—This is an application for a writ of *certiorari* against the Government of Madras, Ministry of Public Health. The Government's order, passed on review, is one passed without jurisdiction. There is no power of review given by any statute to the Government. Unless a statute expressly gives a power of review, it does not exist. The High Court has power to issue a writ of *certiorari* against a statutory body when it exceeds its jurisdiction in the performance of its duties. The writ of *certiorari* lies against quasi-judicial bodies as well as judicial bodies. It applies to judicial and administrative acts, though not to executive acts. Reference was made to Halsbury's Laws of England, Vol. X, pages 161 and 171, section 338; Short

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and Mellor's Crown Practice, second edition, pages 81 and 82. The Court of King's Bench in England possessed the power to issue these prerogative writs. The Supreme Courts in India were invested with such powers as were possessed by the Court of King's Bench, and the Indian High Courts derived this power and Jurisdiction from the Supreme Courts.

If a body is empowered to act under a statute, there must be an authority to keep it within the due limits prescribed by the statute, unless such power is taken away by a statute.

Even if other remedies are available, *certiorari* can be resorted to: see *The Queen v. Corporation of Dublin*(1); *White v. Steele*(2); and *Rex v. North. Oakley, Ex parte*(3). The writ of *certiorari* is an Original writ, issuing from the King's Bench Division; but it is still in the exercise of a supervising jurisdiction. It implies an action or order of an inferior tribunal, over which the King's Bench Division exercises its revisional jurisdiction. The act of the Government complained of is a judicial or at least an administrative act. The fact that a body has a discretionary right to decide a matter is not alone sufficient to make the act non-judicial: see *Rex v. Sunderland Justices*(4), and *Rex v. Woodhouse*(5).

The jurisdiction in *certiorari* and other prerogative writs possessed by the Court of King's Bench in England was vested in the Supreme Court of Fort William in Bengal; and a similar jurisdiction was conferred on the Supreme Court of Madras, when it was created in 1800, under 39 and 40, Geo. III, c. 79, and the Letters Patent based on the Statute; clause 8 of the Letters Patent, 1800, is wider than clause 23, which is only a proviso to clauses 21 and 22. The Indian High Courts Act of 1861 (24 and 25 Vict., c. 104), section 9 continued such powers in the High Courts established under the Act and the Letters Patent based on it. Section 106 (1) of the Government of India Act refers to all the jurisdictions and the powers exercised by the High Court in 1915; these jurisdictions are mentioned in contradistinction to the Appellate and Original, Civil Jurisdictions. It is, therefore, not correct to say that the jurisdiction in *certiorari* and other prerogative writs possessed by the High Court must be either Appellate or

Original Jurisdiction. The decision in *In the matter of Ameer Khan*(1), shows that the jurisdiction in *Certiorari* or *Habeas Corpus* is different from Original or Appellate jurisdiction; see *In re Nataraja Iyer*(2), (Per SADASIVA AYYAR J.) *In re Mrs. Besant*(3) and *Chappan v. Moidin Kutti*(4).

Section 110 of the Government of India Act, does not apply to proceedings taken against the Governor acting with ministers, or the Government of Madras, Ministry of Public Health, as in this case. The section does not apply to proceedings taken to set aside the acts; but the section gives only a personal immunity to the Governor and other officials mentioned therein. The exemption should be strictly construed. Unless the issue of *certiorari* is in the exercise of Original Jurisdiction, section 110 does not bar the proceedings. The section does not apply to a proceeding against the official acts as such acts. It gives only a personal protection to the officers from the consequences of their illegal acts. The exemption under the section is only personal and it is available in the Original Jurisdiction; but *certiorari* is not in the Original Jurisdiction of the High Court; nor is the proceeding personal against the officers: see *Collector of Sea Customs v. P. Chithambaram*(5), and *The Secretary of State for India v. Hari Bhanji*(6).

Government Pleader (P. Venkataramana Rao) for third respondent, with B. T. M. Raghavachari and P. V. Rajamannar for fourth respondent.—The Indian High Courts have no jurisdiction over the Governor and Council in respect of acts, orders or things done by them in their public capacity only. Historically the Supreme Court of Fort William in Bengal had no power or authority over the acts of the Governor-General and Council in respect of such acts. This exemption was specially made as early as 1780 by 21 Geo. III, c. 70. When the Supreme Court of Madras was established in 1800 under 39 and 40 Geo. III, c. 79, the powers of the Supreme Court were subject to the same limitations and restrictions in respect of acts, etc., of the Governor of Madras and Council. The said exemption was continued by the Indian High Courts Act, 1861, (24 and 25 Vict., c. 104), sections 8 and 9. Hence, the Supreme Court of

(1) (1870) 6 Beng. L.R., 392. (3) (1913) I.L.R., 36 Mad., 72 at 91.
(2) (1916) I.L.R., 39 Mad., 1164; on app. 48 Mad., 146.
(4) (1898) I.L.R., 23 Mad., 68 (F.B.). (5) (1875) I.L.R., 1 Mad., 89 (F.B.).
(6) (1893) I.L.R., 5 Mad., 273.

(1) (1878) L.R. 2 Ir., 371 at 382.
(2) (1862) 12 C.B. (N.S.), 383; 142 E.R., 1191 (1202).
(3) [1827] 1 K.B., 491. (4) [1901] 2 K.B., 357, 370.
(5) [1906] 2 K.B., 501, 534.

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Madras had no jurisdiction or authority over the public acts, etc., of the Governor and Council. The High Court of Madras, consequently, derived no such power from the Supreme Court. Section 106 (1) only continues such powers in the High Court, as it had in 1915, which did not include jurisdiction over the Governor and Council in respect of their public acts, orders, etc.

Under section 110 of the Government of India Act, the Governor and Council, or the Governor acting with ministers, are jointly and severally exempted from the Original Jurisdiction of the High Court. A writ of *certiorari* is issued in the exercise of the Original Jurisdiction of the High Court. It is considered to be in the exercise of the Original Jurisdiction when it is issued by the King's Bench Division in England. So here also, it is in the exercise of the Original Jurisdiction when it is issued by the High Courts in India.

In respect of transferred subjects, the Governor acts with Ministers; but he can disregard their advice; and so the act is solely the act of the Governor; under section 106 (1) and section 110 of the Government of India Act, the Governor is exempted from the jurisdiction of the High Court in respect of the acts done in his public capacity. Further, under section 31 of the General Clauses Act (X of 1897), the Governor and Council includes "the Governor acting with Ministers" under the Government of India Act, 1919. In any event, as the Governor is exempted from the jurisdiction of the High Court, effect can be given to it only by exempting the act of the whole body even when it is done by the Governor acting with Ministers.

P. Satyanarayana Rao replied.

JUDGMENT.

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VENKATASUBBA RAO J.—This is a rule calling upon "the Minister, Public Health, Government of Madras," to show cause why an order made by him on the 11th of March 1929 should not be quashed on *certiorari*. The ground on which the rule was obtained may be shortly stated. The Nuzvid Union Board granted permission to a certain person to establish a rice mill within its jurisdiction. The Collector suspended the

resolution of the Board, as, in his opinion, the establishment of a mill in the locality in question "was likely to be detrimental to public health." The Local Government passed proceedings under sections 38 and 196 of the Local Boards Act (1920), on the 9th of June 1928, directing that the Collector's order "shall continue in force *permanently*". Subsequently, this order was rescinded on the 11th of March 1929, the result being that permission to establish the mill was accorded. This rule was issued at the instance of certain residents of the locality who complained that they were prejudicially affected by the order in question. The point of law raised by them is that the order impeached was one made without jurisdiction. They contend that there is no power of review enabling the Local Government to rescind its order purporting to be "permanent" under section 38.

The order was issued by "the Government, Ministry of Public Health."

Section 46 of the Government of India Act of 1915, as amended by Government of India Act of 1919, prescribes that the Presidency of Madras shall be governed, in relation to reserved subjects, by the Governor in Council, and, in relation to transferred subjects, by the Governor acting with Ministers. We are now concerned with a transferred subject.

Section 49 provides that orders and proceedings of the Government of a Governor's province shall be expressed to be made by the *Government of the province*. It further enacts that the Governor may make rules for the convenient transaction of business, in his Executive Council and with his Ministers. It says that every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the *Government of the province*.

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It is clear from this, that the application made to us is wrong in form. Sir C. P. Ramaswami Ayyar, for this reason, asks us for leave to amend his petition, by substituting "The Government of Madras, Ministry of Local Self-Government" for the words "The Minister, Public Health, Government of Madras." I shall deal with the real substance of the issue, as if the amendment has been allowed.

Two main questions arise :—

(1) What is the jurisdiction of the High Court in *certiorari* ?

(2) Can *certiorari* issue against the Governor acting with Ministers ?

As regards the first point, the nature of this writ is thus described in Short and Mellor's Crown Practice (2nd Edition, page 14)—

"The writ of *certiorari* is the process by which the King's Bench Division, in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below."

The Court of King's Bench (or Queen's Bench when a Queen is on the Throne), as the learned authors explain, derives its title from the fact that the Sovereign himself formerly sat in the Court. They then add—

"The theory of the Sovereign's presence has always been kept up . . . The jurisdiction of this Court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority . . . It commands Magistrates and others to do what their duty requires in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition." (Page 2.)

I am prepared to adopt and apply the law on this subject as laid down in the English books and decisions. It is unnecessary to deal with the numerous cases which Sir C. P. Ramaswami Ayyar has quoted. The law has been most succinctly stated in some of the most recent decisions on the point.

In *Frome United Breweries Co. v. Bath Justices*(1), Lord ATKINSON quotes with approval the following passage from the judgment of MAY C.J. in *The Queen v. Corporation of Dublin*(2)—

"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connexion the term "judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

Similarly in *Rex v. Minister of Health. Davis, Ex parte*(3), Lord HEWART C.J. cites with approval the following passage from the judgment of ATKIN L.J. in *Rex v. Electricity Commissioners. London Electricity Joint Committee Co.* (1920), *Ex parte*(4)—

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The latest case on the point is *Rex v. North Worcester-shire Assessment Committee. Hadley, Ex parte*(5), and

(1) [1926] A.C., 586.

(2) (1878) L.R. 2 Ir., 371.

(3) [1929] 1 K.B., 619, 627.

(4) [1924] 1 K.B., 171, 205.

(5) [1929] 2 K.B., 397.

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the law is admirably summed up in it, in regard to the powers of superior Courts to issue prerogative writs.

I may also refer to the observations of BRETT L.J., in *The Queen v. Local Government Board*(1)—

"I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

These various statements, with great respect, I adopt. Subject to the exception with which I shall deal, the High Court possesses the same jurisdiction in *certiorari* as the Court in England.

I shall now deal with the second point. Sir C. P. Ramaswami Ayyar contends that we possess the same unlimited jurisdiction in this respect as the Court of King's Bench. He relies mainly, if not solely, on clause S of the Letters Patent establishing the Supreme Court at Madras (dated the 26th December 1800). It provides—

"And it is our further Will and Pleasure, that the said Chief Justice, and the said the Puisne Justices shall, severally and respectively be, and they are all and every of them hereby appointed to be, Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Fort St. George, and the Town of Madras, and the Limits thereof, and the Factories subordinate thereto, and all the Territories which now are, or hereafter may be, subject to, or dependent upon, the Government of Madras aforesaid; and to have such Jurisdiction and Authority as Our Justices of Our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain, called England, as far as Circumstances will admit."

(1) (1882) 10 Q.B.D., 309 at 321.

This clause consists of two parts and we are concerned with the second. By the first part, the Judges are appointed Conservators of the Peace and Coroners. The second part confers on them a distinct and independent jurisdiction. This is not merely ancillary to or explanatory of the first, but confers on the Judges a separate authority and jurisdiction. SUNDARA AYYAR J.'s construction in *In re Nataraja Iyer*(1) seems, with all respect, forced and far-fetched. My view receives support from the judgment of SADASIYA AYYAR J. in that case—

"The High Court has inherited the powers of the Supreme Court and if this clause stood alone, I should on the strength of it, hold without hesitation that we possess jurisdiction in *certiorari*, as extensive as that possessed by the Court of King's Bench."

This leads me to examine certain Statutes and Charters to which the learned Government Pleader has drawn our attention. They preceded the Letters Patent to which I have referred and serve to explain the scope and effect of clause 8 of that Patent. The first Act, which is material in this connexion, is the East India Company Act, 1772 (13 Geo. III, c. 63).

Section 13 enacted that it shall be lawful for His Majesty by Letters Patent to establish a Supreme Court of Judicature at Fort William, which Court shall have full power and authority to exercise all Civil, Criminal, Admiralty and Ecclesiastical Jurisdiction.

I may pass over section 14 and refer to sections 15 and 17, which alone impose certain restrictions in regard to the jurisdiction possessed by that Court.

Section 15 rendered the Governor-General and Members of his Council immune in respect of certain offences.

(1) (1912) I.L.R., 36 Mad., 72.

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Section 17 exempted them and certain other high officers from arrest or imprisonment upon any action or proceeding in that court.

These restrictions are not relevant to the matter in hand and the jurisdiction of the Supreme Court was not otherwise limited.

In pursuance of this Act, by a Letters Patent, dated the 25th of March 1774, a Supreme Court was established at Calcutta with plenary powers. Into the conflict that arose in consequence between the Judges of that court and the executive Government, it is needless to enter. It was then thought desirable, in the interests of good administration, to limit the powers of the court, and to secure that object the Act known as the East India Company Act, 1780 (21 Geo. III, c. 70) was next passed.

The preamble is instructive. After referring to the previous Act and the Letters Patent, it goes on to say that they led to dissensions between the Judges of the Supreme Court and the Governor-General and his Council. The result was disastrous. To use the very words—

“The minds of many inhabitants . . . have been disquieted with fears and apprehensions and further mischiefs may possibly ensue . . . if a reasonable and suitable remedy be not provided.”

It was therefore enacted—

“(1) That the governor general and council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as governor general and council.

(2) And . . . if any person or persons shall be impleaded in any action or process, civil or criminal, in the said Supreme Court for any act or acts done by the order of the said governor general and council in writing, he or they may

plead the general issue, and give the said order in evidence; which said order, with proof that the act or acts done has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the said Court:

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(8) Provided always, that with respect to such order or orders of the said governor general and council as do or shall extend to any British subject or subjects, the said court shall have and retain as full and competent jurisdiction as if this Act had never been made:

(4) Provided also, that nothing herein contained shall extend or be construed to extend to discharge or acquit the said governor general and council, jointly or severally, or any other person or persons acting by or under their order, from any complaint, suit or process before any competent court in this kingdom, or to give any other authority whatsoever to their acts than acts of the same nature and description had by the laws and statutes of this kingdom before this Act was made.”

It is the first section that is now material. In regard to the matters specified, it totally removes the Governor-General and his Council from the jurisdiction of the Supreme Court.

What I have so far said pertains to the Supreme Court at Fort William. We must now turn to the Government of India Act, 1800 (39 and 40 Geo. III, c. 79). After reciting and referring to certain matters, it provides for the establishment of a Supreme Court at Madras. But that court is to be, to quote the words of the Act—

“In the same form and with the same powers and authorities as that now subsisting . . . at Fort William in Bengal.”

The relevant part of what follows, I reproduce—

“(2) It shall be lawful for His Majesty . . . to establish a supreme court of judicature at Madras . . . with full power to exercise such jurisdictions . . . and to be invested with such power and authorities, privileges and

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immunities . . . and subject to the same limitations, restrictions and control within the said . . . Town of Madras and Territories dependent on the Government of Madras, . . . as the said supreme court of judicature at Fort William in Bengal . . . is invested with or subject to within the said Fort William or the Kingdoms or provinces of Bengal, Bihar and Orissa :

(8) Provided always that the Governor and Council at Madras and the Governor-General of Fort William aforesaid shall enjoy the same exemption and no other, from the authority of the said supreme court of judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the supreme court of judicature there already by law established."

Thus, in every respect, the two courts were placed on the same footing, that is, the court already existing and the court to be established. The words used are direct and pointed. No higher powers can be conferred on the Supreme Court to be established, than those possessed by the Court at Fort William. The Governor and his Council are exempted from its jurisdiction in the same way, and to the same extent, as the Governor-General and his Council from the jurisdiction of the Calcutta Court.

Then we come to the Letters Patent establishing the Supreme Court, at Madras, dated the 26th December 1800. Clause 23 provides *inter alia*—

"nor shall it be competent for the said Court to hear or determine, or to entertain or exercise jurisdiction in any suit or action against the Governor-General of Fort William, or the Governor or any of the Council of the said Settlement, for or on account of any act or order, or any other act, matter or thing whatsoever, committed, ordered or done by them in their public capacity, or acting as Governor-General, or Governor and Council."

The limitation here mentioned, it may be said, is not quite as extensive as that in the Act itself, for in this clause, only suits or actions are mentioned, whereas the Act totally excludes all jurisdiction and authority. This

is a detail which may be ignored, it being obvious that the powers of the Court as laid down in the Act cannot be enlarged by the Letters Patent issued under it.

Now let us go back to clause 8 of this Charter on which, as I have said, Sir C. P. Ramaswami Ayyar so strongly relies. It confers on the Judges of the Supreme Court at Madras the same jurisdiction as that possessed by the Judges of the Court of King's Bench. Perfectly true; but this clause is subject to the sections of the Act which controls the Charter. The position may be thus summed up. The Charter of the Calcutta Supreme Court gave that Court, as it were, unrestricted jurisdiction. It contained a provision, clause 4, in terms identical with clause 8 of the later Charter of the Madras Supreme Court. It said, in terms, that the Judges of the Supreme Court at Fort William shall have jurisdiction and authority as extensive as the Judges of the King's Bench Court in England. This led, as I have pointed out, to dissensions between the Judges of the Supreme Court at Fort William and the Executive Government. Thereupon, an Act was specially passed to curtail the powers of that Court. This history was not allowed to be repeated in the case of the Madras Supreme Court. An Act was first passed which defined the limits of the Court to be established. It was specially enacted that that Court was not to have any higher powers than those the Calcutta Court possessed after its powers had been curtailed. What is the result? Clause 4 of the Charter of the Calcutta Court was qualified by an Act passed subsequent to it, namely, the Act of 1780; whereas, clause 8 of the Charter of the Madras Court becomes restricted in its operation, by an Act which had been passed previous to it, namely, the Act of 1800.

I now pass on to the next stage. The Indian High Courts Act, 1861 (24 and 25 Vict. c. 104) was passed and

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gave to the Crown authority to establish High Courts in the Presidency Towns. It abolished the Supreme Courts and the Sudder Courts and provided for the jurisdiction and powers of the High Courts. Section 9 runs thus—

“Each of the High Courts to be established under this Act shall have and exercise all such civil, criminal, admiralty and vice-admiralty, testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established, as Her Majesty may by such Letters Patent as aforesaid grant and direct, subject, however, to such directions and limitations as to the exercise of original civil and criminal jurisdiction beyond the limits of the presidency towns as may be prescribed thereby;

and save as by such Letters Patent may be otherwise directed and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of India in Council, the High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts.”

It is the second clause that is material for the present purpose. Each High Court, it says, shall have the jurisdiction and power vested in the abolished Courts at the time of their abolition. It is this provision that Sir C. P. Ramaswami Ayyar invokes in his favour. By virtue of it the High Court inherits the jurisdiction of the Supreme Court, but if the power contended for was not possessed by the Supreme Court itself, this clause cannot avail the applicant.

Having regard to the opening words of the clause referred to, the question arises: Have the Letters Patent “otherwise directed”? Far from it; they contain, in fact, no provision corresponding to clause 8 of the Charter of 1800. The High Court, therefore, derives its power to issue prerogative writs, not from any

express clause in the Charter, but from section 9 of the Act, which preserves intact the powers of the abolished courts. It follows, therefore, that the Letters Patent have not enlarged the jurisdiction of the High Court in *certiorari*. I may refer to the dictum of KERNAN J. that the provision relating to the exemption of the Governor and Members of Council is not affected by the High Courts Act of 1861, or the Letters Patent of 1865, *Collector of Sea Customs v. P. Chithambaram*(1).

Finally, the various High Courts Acts were repealed in their turn by the Government of India Act. Section 106 (1) enacts—

“The several high courts are courts of record and have such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority over or in relation to the administration of justice, including power to appoint clerks and other ministerial officers of the court, and power to make rules for regulating the practice of the court, as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdictions, powers and authority as are vested in those courts respectively at the commencement of this Act.”

This does not carry the matter further. The question ultimately resolves itself into: Did the Supreme Court possess the power in question? If yes, the High Court (having inherited its jurisdiction) has it. If not, it does not possess it.

It is said, by way of answer, that the Government of India Act has repealed the East India Company Act, 1780 (21 Geo. III, c. 70) and the Indian High Courts Act, 1861 (24 and 25 Vict., c. 104). But this is utterly irrelevant, for, what matters for the present purpose whether they have been repealed or not? The repealed Acts serve merely to show what the powers of the

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(1) (1875) I.L.R., 1 Mad., 89 (F.B.).

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abolished Courts were. We are not directly concerned with the Acts themselves.

It is next suggested that the exemption of the Governor-General and Council is subject to the proviso relating to British subjects (see the sections of 21 Geo. III, c. 70, quoted above). The argument is thus put: Since the passing of the Government of India Act, 1858, natives of British India are British subjects (see Halsbury's Laws of England, Vol. X, page 588) and the order complained against affects the rights of such subjects and therefore the immunity claimed does not extend to it. The short answer is, that the proviso has no bearing on the section which relates to the exemption in question. That proviso (unlike the succeeding one) refers to matters dealt with in section 2 and not in section 1.

Then comes the question, does the exception by statute in favour of "the Governor and Council" enure to the benefit of "the Governor acting with Ministers"? The Act says, "The Governor and Council shall enjoy the same exemption as is enjoyed by the Governor-General and Council" (section 3 of 39 and 40 Geo. III, c. 79 already quoted). And what is the exemption that the latter enjoy? The Statute of 1780 provides that they are exempted jointly and severally. The Governor is thus individually not amenable for acts done in his official capacity. As granting the writ against "the Governor acting with Ministers" involves the exercise of jurisdiction against the Governor himself, it follows, that we must even as against that body, refuse to issue *certiorari*. To this subject I shall return when dealing with an allied argument in connexion with section 110 of the Government of India Act.

The learned Government Pleader relies upon section 31 of the General Clauses Act (X of 1897) for construing

the expression "The Governor and Council" as including "the Governor acting with Ministers." It provides (omitting words not material) —

"In any enactment made by any authority in British India before the date on which section 3 of the Government of India Act, 1919, comes into operation . . . any reference by whatever form of words to an authority, authorized by law, . . . to administer executive Government . . . shall where a corresponding new authority has been constituted by the Government of India Act, 1919, be construed . . . as a reference to such new authority."

This was added to the General Clauses Act by Act XXXI of 1920. Are the requirements of this section fulfilled? First, the enactment in question (the Government of India Act, 1800) was made before the date specified in the section. Secondly, was it made by an authority in British India? Is this to be confined as contended for by the applicant, to an authority *situated* in British India? I see no reason to limit it in that way. The word "authority" according to Webster's Dictionary may mean a body exercising power. Substituting those words, the section reads thus—

"In any enactment made by anybody exercising power in British India".

The British Parliament being such a body, the enactment in question answers this description. Is the Indian Legislature then competent to provide for the interpretation of words occurring in an Act of Parliament? Having regard to the fact that the Act in which the expression occurs is a repealed one and having advertence to the rule embodied in section 65 of the Government of India Act, I am disposed to think that we can call in aid section 31, in construing the words in the Act of 1800. In that case, what is the new Executive Authority which corresponds to the "Governor and Council" of 1800? Section 46 of the Government of

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India Act (already quoted) says that each Presidency shall be governed in relation to reserved subjects, by a Governor in Council and, in relation to transferred subjects, by the Governor acting with Ministers. The authority with which we are now concerned is the Governor acting with Ministers and, therefore, the exemption extends to that body. But this was the conclusion at which I arrived also on another (and in my opinion safer) ground.

I now proceed to deal with the next contention of the Government Pleader, that section 110 of the Government of India Act also excludes our jurisdiction. This is pleaded in the alternative as the second ground. The relevant part of that section runs thus—

“The Governor-General, each Governor, Lieutenant-Governor and Chief Commissioner and each of the members of the executive council of the Governor-General or of a Governor or Lieutenant-Governor, and a minister appointed under this Act shall not—

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only; nor

(b) liable to be arrested or imprisoned in any suit or proceeding in any High Court acting in the exercise of its original jurisdiction;”

In the first place, the question arises, if exemption otherwise exists (as I have held it does), why was section 110 enacted at all? Mr. Rajamannar's argument seems plausible; he says by section 9 of the High Courts Act of 1861 (already quoted), the Court was invested with two distinct jurisdictions; first, jurisdiction of the abolished Court (second clause) and secondly, jurisdiction freshly conferred (first clause). The old jurisdiction was excluded in the manner already stated. How was exemption to be obtained from the jurisdiction newly conferred? This was secured by the enacting of section 110. Then another difficulty

presents itself, why was this exclusion restricted to the original jurisdiction? I do not think it necessary to refer to the answer attempted. The fact remains, that Governors and Ministers are declared not amenable to the original jurisdiction of the High Court in respect of their official acts. Then is the jurisdiction in *certiorari* original? I think the question must be answered in the affirmative. By section 34 of the Judicature Act of 1873 (corresponding to section 55 of the present Act of 1925) to the Queen's Bench Division of the High Court were assigned—

“All causes and matters . . . which would have been within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction.”

This is explained thus in the “Supreme Court Practice”—

“Matters within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction at the commencement of this Act included the supervision of decisions of inferior tribunals generally by *certiorari*.”

(See the Supreme Court Practice, 1928, page 1610.)

I must guard myself against being understood that the term “Original Jurisdiction” in this context connotes that the writ cannot be issued outside the limits of the City. This is not the sense in which that expression is used. The jurisdiction in the exercise of which the writ is granted is original, as contrasted with appellate. This jurisdiction termed “original” is not to be confused with “original civil jurisdiction” mentioned in section 12 of the Letters Patent. The last mentioned jurisdiction can be exercised by its very nature, within certain local limits. But the jurisdiction possessed by the High Court in the matter of *certiorari* is supervisory or corrective and, on the

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English analogy, extends over all inferior tribunals amenable to its authority.

Again, under this section, a difficulty arises similar to the one I have already noticed. A Governor is exempted, so is a Minister, but there is no exemption in favour of "the Governor acting with Ministers". I may point to a similar lacuna in the section even in the case of "the Governor in Council", for, while it mentions both the Governor and the Members, it does not in terms refer to "the Governor in Council". Reading the section strictly, the Governor is exempted, so are the Members and the Ministers. But this exemption does not extend to "the Governor in Council" or "the Governor acting with Ministers". We must construe the section reasonably. If each of these individuals enjoy immunity in respect of his public acts, it stands to reason that they should likewise be exempt when acting jointly.

I am, therefore, constrained to hold that our jurisdiction is excluded. The restrictive provisions, which drive us to this conclusion, are mere relics of the past, dating back to the discord of the Supreme Court and the Governor-General's Council—see Supplement to the Government of India by Ilbert (1916), page 154. In the words of KERNAN J., in respect of an allied matter in *Collector of Sea Customs v. P. Chithambaram* (1) already quoted, the continuance of these exceptions is both unnecessary and useless. These remarks apply with greater force at the present day, having regard to the new constitution. In England, as shown by the numerous cases cited at the Bar, prerogative writs lie to the Government in its various departments. I see no reason for retaining the restrictive

provisions, in regard to the High Courts in India. It is, however, our duty to give effect to the law as we find it. I must, therefore, refuse to make the rule *nisi absolute*. The application is dismissed with costs (two sets). We must fix a special fee, but we cannot penalise the petitioner by ordering him to pay a sum adequate to the importance of the case and the time it has taken. Accordingly, we fix the fee of the Government at Rs. 350 and the other respondent's costs at Rs. 75.

The petitioners will pay Rs. 350 to the third respondent and Rs. 75 to the fourth respondent for their respective costs in this petition.

MADHAVAN NAIR J.—In this application directed against (1) the Secretary of State for India in Council, (2) the Honourable the Minister of Public Health, the Government of Madras, (3) the Secretary for Public Health, Government of Madras, and (4) Vezzu Venkata Narasimham of Nuzvid, the petitioners request this Court to issue a writ of *certiorari* to the Honourable the Minister, Public Health, calling for the records in the matter of G.O. No. Mis. 673, P.H., dated 11th March 1929, cancelling G.O. No. Mis. 1214, P.H., dated 9th June 1928, to quash the said proceedings and to pass such order or orders as this Court may deem fit.

Local Self-Government Department, G.O. No. Mis. 1214, P.H., dated 9th June 1928, was passed in the following circumstances. By its resolution No. 71, dated 20th January 1928, the Nuzvid Union Board granted permission to the fourth respondent to establish a rice mill against the advice of the District Health Officer, Kistna, who considered it most undesirable as the site was in the midst of dwelling houses and on a busy thoroughfare and in the heart of the town. The Collector, in his proceedings, dated 10th February 1928, suspended the

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Union Board's resolution as, in his opinion, the establishment of a mill in the locality was likely to be detrimental to the public health. The Union Board was given an opportunity to show cause why the Collector's order should not be made to continue in force permanently. The Government were not impressed with the arguments of the Union Board; and they concurred with the Collector that the establishment of a mill in the heart of the town should not, in the interests of public health, be agreed to. Narrating these circumstances, the order ended as follows—

"In exercise of the powers conferred on them by sub-section (2) of section 38 and section 196 of the Madras Local Boards Act, 1920, they accordingly direct that the Collector's order contained in his proceedings, dated 10th February 1928, shall continue in force permanently and the permission is cancelled."

(By order of the Government, Ministry of Public Health.)

(Signed) C. W. E. COTTON,
Secretary to Government."

The above order was subsequently rescinded by the Government by Local Self-Government (Public Health) Department G.O. No. Mis. 673, P.H., dated 11th March 1929, which this Court is now called upon to quash by the issue of a writ of *certiorari*. After mentioning in the first paragraph that the Government in G.O. No. Mis. 1214, P.H., dated 9th June 1928, the G.O. already quoted, directed that the Collector's order suspending the resolution of the Nuzvid Union Board, No. 71, dated 20th January 1928, should continue in force permanently, the Government Order proceeds as follows—

"Affidavits have now been filed by the residents of Nuzvid in respect of the working of the mill in question and the Government have after a careful consideration thereof come to the conclusion that the existence of the mill at its present site

is not likely to cause danger to life, health or safety of the residents of the locality. In supersession of the orders contained in G.O. No. 1214, P.H., dated 9th June 1928, they accordingly rescind the proceedings of the Collector No. R.O.C. B-3, 362-28, dated the 10th February 1928, suspending the resolution of the Union Board referred to above.

(By order of the Government, Ministry of Public Health.)

(Signed) S. RANGANATHAN,
Dy. Secretary to Government."

A rule *nisi* was issued by this Court calling upon the Honourable the Minister of Public Health for the records in the matter of these Government Orders for quashing the said proceedings.

At the time of the final hearing of the rule, the petitioners' learned Counsel filed an amended application for the issue of the writ in which "The Government of Madras, Ministry of Public Health" is substituted for "The Honourable the Minister of Public Health."

On behalf of the Government, the learned Government Pleader takes a preliminary objection that an application will not lie under the Government of India Act against the Honourable the Minister of Public Health, Government of Madras, and that the amendment asked for directing the fresh application against the Government of Madras, Ministry of Public Health, should not be allowed at this late stage. He next argues that this Court has no jurisdiction to issue a writ of *certiorari* against the Minister or the Government of Madras, Ministry of Public Health, and that in any event, having regard to the circumstances of this case, the writ of *certiorari* asked for should not be issued. All these points are disputed by the learned Counsel for the petitioners. The three main questions arising for consideration are: (1) Should the preliminary objection

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be upheld? (2) has this Court jurisdiction to issue a writ of *certiorari* against the Minister or the Government of Madras, Ministry of Public Health? and (3) if it has such jurisdiction should a writ be granted to the petitioners in the present case? I shall deal with these questions one after the other.

(1) The Preliminary Objection—

In these proceedings action has been taken by the Local Government under section 38, clause 2 of the Madras Local Boards Act, 1920. It empowers the District Collector to suspend the resolution of any Local Board under certain circumstances,

“and report to the Local Government, who may thereupon rescind the collector's order or after giving the local board and, if the order affected any act of the president, the president also, a reasonable opportunity of explanation, direct that it continue in force with or without modification permanently or for such period as they think fit.”

Under section 134, clause (4) of the Government of India Act—

“local government” means in the case of a governor's province, the governor in council or the governor acting with ministers (as the case may require)

This definition epitomizes the substance of section 46 of the Act which is as follows—

“The Presidencies of Fort William in Bengal, Fort St. George, and Bombay . . . shall each be governed, in relation to reserved subjects, by a governor in council, and in relation to transferred subjects (save as otherwise provided by this Act) by the governor acting with ministers appointed under this Act.”

The two limbs of the Local Government are the Governor in Council in relation to reserved subjects and the Governor acting with Ministers in relation to transferred subjects. The subject-matter of the Government orders in the present proceedings admittedly falls within the category of transferred subjects, and as such,

the Local Government's order under section 38, clause 2 of the Local Boards Act will be made by the Governor acting with the Minister in charge of this particular subject.

Having regard to these provisions it is clear that the application for the writ should not have been directed against the Honourable the Minister of Public Health, Government of Madras. This is conceded by the petitioners. In strict propriety the application should have been directed against the Governor of Madras acting with the Minister in charge of this particular subject. Section 49, clause 1 enacts that—

“All orders . . . of the government of a governor's Province (such as Madras, Bombay, etc.,) shall be expressed to be made by the government of the province, and shall be authenticated as the governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

“Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the government of the province.”

Clause 2 enacts—

“The governor may make rules and orders for the more convenient transaction of business . . . with his ministers, and every order made or act done in accordance with those rules and orders shall be treated as being the order or the act of the government of the province.”

Obviously, it must have been according to the rules made under this section that the order in this case has been issued in the following form—

“By order of the Government, Ministry of Public Health.”

The expression “Ministry of Public Health” does not find a place in the Government of India Act; but rules must have been made under section 49 which authorize the Governor acting with the Minister of

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Public Health being described as the "Ministry of Public Health". This, I think, is the explanation for the expression "The Ministry of Public Health" being found in the order of the Government. So, if the application for the issue of a writ was directed against the Government of Madras, Ministry of Public Health, the application according to the provisions of the Statute would have certainly been in proper form.

The learned Government Pleader argues that the application to be in proper form should be directed against the Governor. His argument is mainly based on section 52, clauses 1 and 3 of the Government of India Act. Under clause 1 the Governor may appoint ministers and any ministers so appointed shall hold office during his pleasure. Clause 3 enacts that—

"In relation to transferred subjects, the governor shall be guided by the advice of his ministers, unless he sees sufficient cause to dissent from their opinion, in which case he may require action to be taken otherwise than in accordance with that advice.

"Provided that rules may be made under this Act for the temporary administration of a transferred subject where in cases of emergency, owing to a vacancy, there is no minister in charge of the subject, by such authority and in such manner as may be prescribed by the rules."

It is argued that, since the Ministers offer only advice which may be discarded by the Governor and since he can administer the departments himself without Ministers in cases of emergency, the orders passed by the Government in relation to transferred subjects are really orders of the Governor and, as such, if they are sought to be questioned by writs of *certiorari*, the writs should be directed against the Governor. The point is sought to be further emphasized by reference to section 47 (1) of the Act which deals with Members of the Governor's Executive Councils and section 50 (1)

which deals with the procedure in case of difference of opinion in Executive Council. The argument cannot be accepted. Under section 46, clause 1, the Presidency of Madras is governed in relation to transferred subjects by the Governor acting with Ministers. Whether their advice is followed or not, the orders passed in relation to transferred subjects are orders of the Governor acting with Ministers and when the orders passed by this statutory body are sought to be challenged by writs of *certiorari*, it is clear that the application for the writs should be directed against that body and against none else. I have shown that, having regard to the rule-making power contained in section 49 (1), the application would be in proper form if directed against the Government of Madras, Ministry of Public Health. As this has not been done in the present case, is the application to be dismissed? I think not; and this, apart from the question of amendment asked for at this hearing. The recipient of the notice knew exactly the scope of the application against which he was asked to show cause. He knew, by the receipt of the petition and the affidavit annexed to it, that the Court was being moved to issue a writ of *certiorari* calling for the records in the matter of G.O. Mis. No. 673, P.H., dated 11th March 1929, cancelling G.O. No. 1214, P.H., dated 9th June 1928, and for quashing the said proceedings. On his attention being drawn to the matter of these Government orders, it must have become clear to him that the proceedings were directed against the orders passed by the Local Government, i.e., the Governor acting with the Minister of Public Health, i.e., the Government of Madras, Ministry of Public Health. In this view, the application may be considered to have been directed against the proper department of the Government of Madras. Therefore

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the objection that the petition should be dismissed as it was directed against the Hon'ble the Minister of Public Health, Government of Madras, has no substance in it and is overruled. This dispenses with the necessity to consider the question whether the amendment asked for may be allowed at this stage.

(2) Has the High Court jurisdiction to issue the writ?

The next question for consideration is whether the High Court has jurisdiction to issue a writ of *certiorari* against the Government acting with the Minister of Public Health or the Ministry of Public Health as the department is now called. The learned Government Pleader argues that it has no such jurisdiction relying on sections 106 (1) and 110 of the Government of India Act under each of which, he states, that the Government can claim exemption. Generally stated, his argument is that, while the High Court has jurisdiction to issue writs of *certiorari* against Courts or persons entrusted with judicial functions [*In re Nataraja Ayyar*(1), *In re Mrs. Besant*(2) and *Besant v. Advocate-General of Madras*(3),] "the Governor acting with Ministers" is exempt from its jurisdiction "by reason of anything counselled, ordered or done" by that body in its "public capacity."

I shall first deal with section 106 (1) of the Government of India Act, the relevant provisions of which are as follows—

"The several high courts . . . have such jurisdiction . . . and all such powers and authority . . . as are vested in them by letters patent, and, subject to the provisions of any such letters patent, all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act."

(1) (1912) I.L.R., 36 Mad., 72. (2) (1916) I.L.R., 39 Mad., 1164.

(3) (1919) I.L.R., 43 Mad., 146.

In finding out the present jurisdiction of the High Court we have therefore to inquire into the jurisdiction, power and authority vested in it at the commencement of the Act." This requires examination of the various Letters Patents relating to the High Court and of the powers of the Supreme Court.

This High Court was established by 24 and 25 Vict., c. 104, known as the High Courts' Charter Act. Section 9 of that Act provided that—

"The High Court to be established in each Presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned courts."

By section 8 of that Act, the old "Supreme Court" and the Courts of Sudder Dewany Adawlat and Foujdary Adawlat were abolished. The High Court thus inherited the jurisdiction and all the powers of the old Supreme Court. These powers were continued in the Court under 28 and 29, Vict., c. 15. The Letters Patent issued with reference to this statute re-enacted the powers already given and stated that the powers hitherto exercised "before the publication of these presents" shall vest in the High Court (see section 17). Then came the Government of India Act which dealt with the jurisdiction of the High Court in section 106, clause 1 already referred to. It is thus apparent that the High Court at the present day, in exercising all the powers it has under the statutes we have referred to, exercises, amongst all such powers, all the powers of the old Supreme Court; and when we examine what powers the Supreme Court had, it will be discovered that it had no jurisdiction over the Governor and Council jointly or severally for acts done or orders issued by them in their public capacity.

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The Government of India Act of 1800 (39 and 40 Geo. III, c. 79), by virtue of which the Supreme Court at Madras was established, by clauses 2 and 8 enacted that a Supreme Court may be established at Madras with the same powers and authorities as the Supreme Court at Calcutta and that the Governor and Council shall enjoy the same exemption, and no other, from the authority of the Supreme Court, as is enjoyed by the Governor-General and Council from the jurisdiction of the Supreme Court at Calcutta. The 4th and 5th paragraphs of section 2 and section 8, where the exemption of the Governor and Council is specifically referred to, are as follows—

Section 2, paragraph 4—

"And whereas it may be expedient for the better administration of justice in the said settlement of Madras that a supreme court of judicature should be established at Madras, in the same form and with the same powers and authorities as that now subsisting by virtue of the several Acts before mentioned at Fort William in Bengal."

Section 2, paragraph 5—

"Be it therefore enacted, that it shall and may be lawful for His Majesty, . . . to erect and establish a supreme court of judicature at Madras aforesaid, . . . with full power to exercise such civil, criminal, admiralty and ecclesiastical jurisdictions, . . . and to be invested with such power and authorities, privileges and immunities, . . . and subject to the same limitations, restrictions and control within the said Fort Saint George, . . . as the said supreme court of judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed, or by this present Act, doth consist of, is invested with or subject to, within the said Fort William or the kingdoms or provinces of Bengal, Behar and Orissa."

Section 3—

"Provided always that the governor and council at Madras and the governor general at Fort William aforesaid shall enjoy the same exemption and no other, from the authority of the said supreme court of judicature to be there erected, as

is enjoyed by the said governor general and council at Fort William aforesaid from the jurisdiction of the supreme court of judicature there already by law established."

As, this Act specifically grants to the Governor and Council at Madras "the same exemption and no other" from the jurisdiction of the Supreme Court to be established as is enjoyed by the Governor-General and Council at Fort William, it becomes necessary to refer to the powers and authorities vested in the Supreme Court at Calcutta to find out the exact nature of the exemption that is granted to the Governor and Council. To anticipate a little, this will show the interesting fact that, unlike the Supreme Court at Calcutta about the jurisdiction of which over the Governor-General and Council there were "many doubts and difficulties," the Supreme Court at Madras from its very origin had clearly no jurisdiction over the Governor and Council.

The East India Company Act, 1772, commonly known as the *Regulating Act* (13 Geo. III, c. 63), authorized His Majesty by charter and letters patent to erect and establish a Supreme Court at Calcutta (see section 18). This Act was followed by the grant of the Charter, dated the 26th of September 1774, establishing the Supreme Court which, briefly stated, invested that Court within Bengal, Behar and Orissa with such jurisdiction and authority as the Court of the King's Bench exercised in England (see clause 4). Then came the historic struggle between the Governor-General and Council and the Supreme Court, which led to the passing of 21 Geo. III, c. 70 (*East India Company Act of 1780*). By section 1 it is enacted—

"that the governor general and council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only, and acting as governor general and council."

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Section 2 enacts that—

" . . . for any act or acts done by the order of the said governor general and council in writing, . . . which said order, with proof that the act or acts done has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted and discharged from all and every suit, action and process whatsoever, civil or criminal, in the said court."

These provisions show that the Supreme Court at Calcutta had, in the year 1800, when the Supreme Court at Madras was established, no jurisdiction over the Governor-General and Council of Bengal jointly or severally "for or by reason of any act or order or any other matter or thing whatsoever counselled, ordered or done by them in their public capacity only and acting as governor general and council" as mentioned in section 1; and also over persons for any act or acts done by them under the authority of the Governor-General and Council. In this connection reference may usefully be made to *In the matter of Ameer Khan*(1), by way of illustration to show what effect was given to section 2 by the Calcutta High Court which inherited the limited jurisdiction of the Supreme Court by 24 and 25 Vict., c. 104. In that case, a Muhammadan subject of the Crown was arrested in Calcutta and taken to the mufassal and detained in jail under a warrant of the Governor-General and Council in the form prescribed by Regulation III of 1818 and an application was made to the High Court to issue a writ of *habeas corpus* to the superintendent (a European British subject) of the jail. It was held that the Supreme Court had power to issue writs of *habeas corpus* to persons in the mufassal and that the same power was continued to the High Court. It was also held that, as

the person against whom a writ was applied for acted under the written order of the Governor-General and Council, the Court would not direct the writ to issue. The latter part of this decision illustrates the limitation of the jurisdiction of the High Court over the Governor General and Council. Referring to sections 9 and 2 of 21 Geo. III, c. 70 which emphasise the limitation of the powers of the Supreme Court, NORMAN J. states thus—

"Therefore as the superintendent of the jail at Alipore holds the prisoner under the warrant in writing of the Governor-General in Council, it is clear that such order must prevail as against the command of any writ which this Court has power to issue. It appears to me, therefore, that I ought not to issue a writ which it would be the duty of the superintendent of the jail to disobey."

From this it follows that the jurisdiction of the Supreme Court at Madras over the Governor and Council (see 39 and 40 Geo. III, c. 79 already referred to) was limited in the same way as was the jurisdiction of the Supreme Court over the Governor-General and Council of Bengal by 21 Geo. III, c. 70. In other words, the Supreme Court at Madras, when it was established in 1800, had no jurisdiction over the Governor and Council for acts counselled, ordered or done by them in their public capacity as enacted in 21 Geo. III, c. 70 with reference to the Calcutta Supreme Court. Having regard to the fact that Governor-General and Council enjoyed the exemption referred to, *jointly and severally*, it must be held that in Madras also the exemption from the jurisdiction of the Supreme Court affected the Governor and Council jointly and severally. The letters patent of the Supreme Court were issued, on the 26th of December 1801 in pursuance of the Statute, 39 and 40 Geo. III, c. 79. Clause 8 of that Charter enacted that the Supreme Court shall have

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" . . . such jurisdiction and authority as our Justices of our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit."

In exercising these various powers of the Court of King's Bench, the Supreme Court had no jurisdiction, as we have seen, over the Governor and Council of Fort St. George. It follows, therefore, that the Madras High Court, which has inherited the powers of the Supreme Court by Letters Patent, in exercising its "Jurisdiction, powers and authority" under section 106 (1) of the Government of India Act, has no jurisdiction over the Governor and Council jointly or severally.

The above conclusion is controverted by the learned Counsel for the petitioners by referring to section 130 of the Government of India Act, which repeals the Acts specified in the fourth schedule to the Act to the extent mentioned in the third column of that schedule. It is pointed out that 13 Geo. III, c. 63, 21 Geo. III, c. 70, 39 and 40 Geo. III, c. 79 and 24 and 25 Vict., c. 104 are all repealed either in part or in whole, and that, having regard to the following paragraph of section 130, the exemption claimed by the Governor and Council no longer exists and that the only exemption which they can claim is under section 110 of the Government of India Act which, it is argued, according to its terms cannot be availed of by them.

" . . . Any reference in any enactment, whether an Act of Parliament or made by any authority in British India, or in any rules, regulations or orders made under any such enactment, or in any letters patent or other document, to any enactment repealed by this Act, shall for all purposes be construed as references to this Act, or to the corresponding provision thereof."

(See section 130.)

This argument cannot be accepted, as the powers of the Supreme Court limited in its operation are, as shown

above, still retained by the High Court under section 106 (1), and the High Court in exercising these various powers under that section can only exercise them subject to the restriction which I have pointed out. In this connexion it is also argued that, having regard to the "powers and authorities" vested in the High Court without any restriction by section 9 and the language of section 11 of the High Courts Act, it must be held that the old restriction has not been carried out in the Act, but this argument is also untenable as the High Court has inherited the powers of the abolished Courts, the jurisdiction of which was restricted in the manner already pointed out.

The argument as regards section 110 will be dealt with later on.

Having thus established that, under section 106 (1) of the Government of India Act, the High Court has no jurisdiction over the Governor and Council jointly or severally for acts done or counselled by them in their public capacity, the respondent argues that the same exemption can be claimed by the "Governor acting with Ministers" in relation to a transferred subject. It is objected that unless by statute "Governor acting with Ministers" within the meaning of the Government of India Act is assimilated to the "Governor and Council" referred to in the enactments, the exemption from the jurisdiction of the High Court granted to the Governor and Council cannot be extended in favour of the "Governor acting with Ministers." The petitioners are prepared to concede for this argument that the "Governor in Council" under the Act may claim the exemption in question. This leads to the anomaly that one limb of the Government that supplanted the Governor and Council of old is not subject to writs of *certiorari*, while the other is. The learned Government

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Pleader argues (1) that the acts done, counselled, etc., in the administration of the transferred subjects are acts done by the Governor; if this argument is not acceptable, he states (2) that under section 31 of the General Clauses Act the Governor and Council may be identified with the "Governor in Council" and the "Governor acting with the Ministers" under the Government of India Act.

Section 31 of the General Clauses Act is as follows—

"In any enactment made by any authority in British India before the date on which section 3 of the Government of India Act, 1919, comes into operation, and in any rule, order, notification, scheme, by-law or other document made under or with reference to, any such enactment, any reference by whatever form of words to an authority authorized by law, at the time the enactment was made, to administer executive Government in any part of British India, shall, where a corresponding new authority has been constituted by the Government of India Act, 1919, be construed for all purposes, after the abovementioned date, as a reference to such new authority."

I have already overruled the argument that the orders of the Local Government in relation to transferred subjects are "Orders of the Governor". Section 31 of the General Clauses Act is of no use in solving the difficulty, as it obviously applies only to laws made by "any authority in British India" and not to Acts of Parliament. It seems to me, however, that if the Governor can claim the exemption in question from the jurisdiction of the High Court under section 106 (1), as I have held he can, then clearly it is not illogical to infer from this circumstance that no writ of *certiorari* can be issued by the High Court also against the Governor acting with Ministers. How can, in actual practice, exemption be given to the Governor, which he is entitled to claim as a matter of statutory right, if it is held that proceedings

can be directed against the Governor acting with the Ministers? The inconsistency is obvious. I must, therefore, hold that if the High Court has no jurisdiction to issue the writ of *certiorari* against the Governor under section 106 (1) of the Government of India Act, it has equally no jurisdiction to issue the writ against "the Governor acting with the Ministers."

The next branch of the argument relates to the exemption claimed under section 110 of the Government of India Act which is as follows—

"The Governor-General, each Governor, Lieutenant-Governor and Chief Commissioner and each of the members of the executive council of the Governor-General or of a Governor or Lieutenant-Governor, and a minister appointed under this Act shall not—

(a) be subject to the original jurisdiction of any High Court by reason of anything counselled, ordered or done by any of them in his public capacity only ;"

The exemption from the original jurisdiction of the High Court granted by this section to the persons named therein relates only to "anything counselled, ordered or done by any of them in his public capacity". There can be no question that the order complained against in these proceedings was passed by the authority concerned in its public capacity. If with respect to such an order both the Governor and the Ministers are severally exempt from the jurisdiction of the High Court, provided that the jurisdiction invoked against them is its original jurisdiction, then it follows as a matter of inference that the Governor acting with the Ministers must also be exempt from the Court's jurisdiction. The question, then, for consideration is whether "the writ of *certiorari*" is issued by the High Court in the exercise of its original jurisdiction. Having regard to the authorities, this question must be answered in the affirmative—

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"*Certiorari* is an original writ issuing out of the Chancery or Court of King's Bench directed in the King's name to the Judges or officers of inferior Courts commanding them to return the records of a cause or matter depending before them, to the end the party may have the more sure and speedy justice before the King or such Justices as he shall assign to determine the cause."

(See note 1 at page 14 of the Practice of the Crown Office by Short and Mellor.)

The High Courts Act, section 9 in investing the High Court with the powers of the King's Bench invested it with the power to issue writs of *certiorari*. Under the Judicature Act, 36 and 37 Vict., c. 66, section 34 (2), the original jurisdiction to issue writs exercised by the Court of King's Bench was assigned to the Queen's Bench Division of the High Court. The following note under section 34 of the Judicature Act of 1873 in the Yearly Practice of the Supreme Court (1924) clearly shows that writs in England were issued by the Court of Queen's Bench in the exercise of its original jurisdiction—

"Matters within the exclusive cognizance of the Court of Queen's Bench in the exercise of its original jurisdiction at the commencement of this Act included the supervision of the decisions of inferior tribunals generally by *certiorari*." [*R. v. Chantrell*, (1875) L.R., 10 Q.B., 587; and (1878) 4 A.C., 800.]

The original jurisdiction of the Queen's Bench to issue a writ of *certiorari* was assigned to the King's Bench Division by section 56 (2) of the Supreme Court of Judicature Act, 1925, and the same note which I have quoted above appears under this section in the "Yearly Practice" for 1928. To the same effect, is the following note which appears in the Annual Practice, 1929, under section 56 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925—

"The exclusive jurisdiction extended to the supervision of inferior Courts by prohibition, *certiorari*, case stated at common law, etc."

(See page 2171.) These authorities show that in England a writ of *certiorari* is issued by the King's Bench in the exercise of its original jurisdiction and, as I have already stated, it is this jurisdiction which was vested in the High Court by the High Courts Act. It may be pointed out that, in England, under section 45 of the Judicature Act, an appeal lies to the Divisional Court against an order in matters of *certiorari*. In this connexion the observations of WALLIS C.J. in *Chief Commissioner of Income-tax v. North Anantapur Gold Mines, Ltd.* (1), regarding the jurisdiction under which the writ of mandamus (a prerogative writ like the writ of *certiorari*) is issued by the High Court, may usefully be referred to. The learned Judge observes—

"Now, the issuing of the writ of mandamus to secure the performance of a public duty where no adequate remedy existed by action or otherwise was, it seems to me, clearly an exercise of original jurisdiction. It was a proceeding originating in the Court issuing it, and might be directed in a proper case to any class of public officer, executive or judicial. It must also be regarded as having been within the original jurisdiction of the Supreme Court because that Court had no appellate jurisdiction."

Having regard to these authorities it must be held that in India this Court's power to issue the writs of *certiorari* falls within its original jurisdiction as distinguished from its appellate or other jurisdictions and it is in this sense that the expression "original jurisdiction" is used in section 110 of the Government of India Act.

Sir C. P. Ramaswami Ayyar attempted to show with reference to the nature of the writ that the High Court in issuing it exercises its appellate or revisional or supervisory jurisdiction. No doubt the writ of *certiorari* is described as—

(1) (1921) I.L.R., 44 Mad., 718 at 725.

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"The process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdiction, requires the Judges or officers of such jurisdiction to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below."

[See Short and Mellor, Crown Practice (Second edition, page 14).]

This describes the nature of the writ but no inference can be made from it as regards the special jurisdiction of the High Court under which it is issued. The petitioners' learned Counsel relied on the following observation of NORMAN J. in *In the matter of Ameer Khan*(1), in support of his argument:—

"I may observe, moreover, that the issuing of the High prerogative writ of *habeas corpus ad subjiciendum* is not a matter of ordinary original civil jurisdiction. In England, it issues on the Crown Side of the Court of Queen's Bench, and in the late Supreme Court the motion for such *habeas corpus* was made in the Supreme Court, and not on any side, such as the Plea Side or Equity Side of the Court. See Fulton's Reports, page 372, note."

In understanding these observations reference must be had to the context in which they were made. The learned Judge was considering the question whether a writ of *habeas corpus* can be issued into the mufassal, that is, beyond the ordinary territorial jurisdiction of the original side of the High Court. The sentences which succeed the extract quoted above, to my mind, make the position clear—

"The limits within which such writs can be issued are, in my opinion, not affected by the 11th clause of the Charter of 1865. The answer to the question as to the local limits within which such *habeas corpus* may be issued appears to me to depend on the jurisdiction which the late Supreme Court possessed under the Charter of 1774;".

(1) (1870) 6 Beng. L.R., 302 at 438.

In the passage quoted, the expression "original jurisdiction" is used in contrast with the jurisdiction over the mufassal which the High Court has, and not in contrast with the appellate and other jurisdictions of the High Court. The passage in *Besant v. Advocate-General of Madras*(1), namely—

"Their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of *certiorari*, can be said to have been taken away,"

also, in my opinion, does not support the petitioners. The expression "ordinary jurisdiction" in this passage is used as opposed to "extraordinary jurisdiction" and the other jurisdictions of the High Courts and not in the technical sense in which I think the expression "original jurisdiction" is used in section 110 of the Government of India Act. Attention may be drawn to the following observations of the Judicial Committee in *In the matter of Candas Narrondas Navivahu v. C. A. Turner*(2), to elucidate the meaning of the expression "ordinary jurisdiction" appearing in the above passage.

"Mr. Rigby argued that the passages of the Charter which have just been epitomized divide the jurisdiction into four classes, ordinary original, extraordinary original, appellate and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression 'ordinary jurisdiction' embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and that it is opposed to extraordinary jurisdiction, which the Court may assume at its discretion upon special occasions and by special orders."

If the expression "ordinary jurisdiction" is understood as explained by their Lordships in the Bombay Case, then it is clear that the passage in *Besant v. Advocate-General of Madras*(1), does not really help the

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(1) (1919) I.L.R., 48 Mad., 146, 159. (2) (1880) I.L.R., 13 Bom., 520 at 533.

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petitioners. It must therefore be held that the jurisdiction to issue a writ of *certiorari* falling under the original jurisdiction of the High Court, this Court has no jurisdiction to issue such a writ against the Governor acting with the Minister for Public Health.

It will thus be seen that the Governor acting with Ministers is entitled to claim exemption from the jurisdiction of the High Court for acts counselled or ordered by them in their public capacity both under section 106 (1) and section 110 (a) of the Government of India Act. It is needless to speculate as to why the Legislature has provided this double safeguard for the Local Government. We have seen how it originated and how it was passed on from statute to statute. It was argued that since provision for the exemption of the Government from the High Court's jurisdiction is found explicitly in section 110 of the Act, it must be assumed that no such provision can be extracted from section 106 (1). This assumption, even if correct, does not help the petitioners; but I have shown that section 106 (1) also exempts the Government from the High Court's jurisdiction. The learned Government Pleader, basing his arguments on the extensive powers given to the High Court under the first paragraph of section 9 of 24 and 25 Vict., c. 104 as distinguished from the powers of the "abolished Courts" given to it under the second paragraph, has attempted to offer some explanation for including in the same Act two sections dealing with the same subject; but I do not think it is necessary to embark on this inquiry, however interesting it is; we are familiar with legislation "by way of abundant caution"; probably, section 110 was enacted to make sure that the wholesale repeals and amendments effected by the Government of India Act did not interfere with this safeguard which is a relic of antiquity.

We now come to the last question—

(3) Should the writ be granted in the present case?

As I have held that this Court has no jurisdiction to issue a writ of *certiorari* against the Local Government, this question does not arise for consideration.

In the result, the Civil Miscellaneous Petition is dismissed with costs.

K.R.

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APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Jackson.

IN RE MUTHU REDDI AND ANOTHER (PETITIONERS),
PETITIONERS.*

1930,
March 14.

Indian Extradition Act (XV of 1903)—East Indian Dependencies of France—Whether "Foreign States" within meaning of the Act—Article IX of Treaty of 7th March 1815—Right of British Indian Government to deliver up a British Indian subject to Pondicherry Government on statement by latter of commission of theft by such subject, and on its demand, without satisfying itself of existence of prima facie case—Unilateral act of one of the Parties—Whether can impose procedure more elaborate than that contemplated in treaty.

The East Indian Dependencies of France, having been expressly excluded from the Extradition Treaty of 1876, and not being States or parts of a State to which the Extradition Acts of 1870 and 1873 apply, are not "Foreign States" within the meaning of the Indian Extradition Act of 1903.

Extradition in the East Indian Possessions of Great Britain and France are governed by Article IX of the Treaty of the 7th March 1815; and that article contemplating summary delivery at the request of any authority of either High Contracting Party and not providing any special procedure for the

* Criminal Revision Case No. 78 of 1930 and Criminal Miscellaneous Petition No. 133 of 1930.

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purpose of extradition, the British Indian Government may, on the statement of the Government of Pondicherry that a British Indian subject has committed the offence of theft within its territory and on its demand, deliver him up to the Government of Pondicherry, without holding an enquiry to satisfy itself that there is a *prima facie* case against the person whose extradition is sought.

Where the treaty practically provides for surrender on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the parties.

Rahamat Ali v. Emperor, (1919) I.L.R., 47 Calc., 37 and *In re Cullington*, (1920) I.L.R., 48 Calc., 328, referred to.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, and under section 491 of the same Code praying the High Court to revise the orders of the Court of the District Magistrate, South Arcot.

K. S. Jayarama Ayyar and *K. R. R. Sastri* for petitioners.

Advocate-General (*A. Krishnaswami Ayyar*) and *K. Venkataraghavachari* for Public Prosecutor (*L. H. Bewes*) for the Crown.

JUDGMENT.

WALLACE J. —The point raised in this criminal revision petition is of considerable importance, namely, what is the procedure to be observed in extradition proceedings between the British Government in India and the French Settlements in India.

The District Magistrate of South Arcot has, on a demand from the Governor of the French Settlement of Pondicherry and on information from him that judicial proceedings are pending in Pondicherry against two British subjects, arrested these two men and proposes to hand them over without further inquiry to the

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French authorities. The two arrested men have put in this petition alleging that the action of the District Magistrate is illegal, inasmuch as he has under the Extradition Act of 1903 no authority to deliver them up in this summary fashion, but must first hold an inquiry and satisfy himself that there is a *prima facie* case against them, as provided for in Chapter II of that Act. The learned Advocate-General on behalf of the Government contends that Chapter II of the Act has no bearing on the case, and that the case is governed by the provisions of, and the procedure indicated in, Article IX of the Treaty of 1815, the necessary legislative sanction for which has been provided by section 18 of the Extradition Act. The petitioners rejoin that section 18 has no application to cases where no procedure has been prescribed by the Legislature, and that, in any case, its application is restricted to cases coming under Chapter III of the Act. They further urge that the extradition provision in the Treaty of 1815 had been abrogated by the Treaty of 1876 and by the English Extradition Acts of 1870 and 1873. They argue further that any part or dependency of a Foreign State is for the purpose of the Indian Extradition Act a Foreign State to which Chapter II and not Chapter III will apply.

To take the last point first, a Foreign State is, by definition in the Act, a State to which the Extradition Acts of 1870 and 1873 apply. Whether or not a part or dependency of a Foreign State is itself a Foreign State need not be decided here, since I am of opinion that in any case the East Indian Dependencies of France were expressly excluded from the Extradition Treaty of 1876, and therefore they are not States or parts of a State to which the Extradition Acts of 1870 and 1873 apply. This is the view taken by a Bench

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of the Calcutta High Court in *Rahamat Ali Emperor*(1). In a subsequent case in Calcutta, *In re Cullington*(2), a single Judge, BUCKLAND J., differed, holding that Article XVI of the Treaty of 1876 does not exclude the East Indian Dependencies of France, but was intended to preserve the provision of the Treaty of 1815, and that the effect of the Order in Council of 16th May 1878 was to put into operation as regards these Dependencies section 25 of the English Extradition Act, 1870. The learned Judge admitted that he had not then before him the exact terms of the Order in Council. That is a matter of regret, since, if he had had these terms before him, I doubt, speaking with respect, if he would have differed from *Rahamat Ali v Emperor*(1). The concluding terms of the Order in Council are that the Extradition Acts of 1870 and 1873 shall after 31st May 1878 "apply in the case of the said Treaty", that is, the Treaty of 1876, "with the President of the French Republic". So that it is only in respect of that Treaty and not in respect of all Treaties then in force that these Extradition Acts apply; and unless that Treaty abrogated the Treaty of 1815 in respect of French Dependencies in East India, the Extradition Acts of 1870 and 1873 do not apply to them, and they would therefore not be Foreign States within the meaning of the Indian Extradition Act of 1903.

Article XVI of the Treaty of 1876 sets out "the manner of proceeding", "in the Colonies and Foreign Possessions of the two High Contracting Parties", and ends up, "The foregoing stipulations shall not in any way affect the arrangements established in the East Indian Possessions of the two countries by the IXth Article of the Treaty of the 7th March, 1815." Now, as

(1) (1919) I.L.R., 47 Cal., 37.

(2) (1920) I.L.R., 48 Cal., 323.

petitioners themselves argue, this Article IX contains no procedure, strictly so called. Therefore what the saving clause at the end preserves, and intended to preserve, is the extradition "arrangements" provided by that Article. In other words, that Article is in no way affected by Article XVI of the Treaty of 1876, and extradition in the East Indian Possessions of the two countries remains governed by the Treaty of 1815. This is the view which has been taken of this clause both in *Rahamat Ali v. Emperor*(1) and *In re Cullington*(2).

The petitioners urge that, as Article IX of the Treaty of 1815 provides no procedure, it is in effect unenforceable. This argument I do not follow. If that Treaty provided no procedure such as was provided by the prior Treaty of 1802 or by the subsequent Treaty of 1876, that is a clear indication that the High Contracting Parties did not agree upon or intend that there should be any formal procedure for extradition. I do not follow the argument that the Treaty cannot be brought into operation until the Legislature has provided and sanctioned a procedure. That would obviously be exceeding its province. The Legislature can only sanction a procedure if the Treaty provides for one. The procedure must be found or provided for in the Treaty itself before any Legislature of either party can legislate about it. The Legislature cannot alter either by addition or subtraction the essentials of a Treaty, which is the contract between the High Contracting Parties, or impose upon one party conditions which do not form part of that contract. That would be tantamount to the subjects of one High Contracting Party forcing on its own Government a breach of the Treaty, or making it impossible for its own Government to keep its pledged word with the other party. See *The Queen v. Wilson*(3).

(1) (1919) I.L.R., 47 Cal., 37.

(2) (1920) I.L.R., 48 Cal., 323.

(3) (1877) 3 Q.B.D., 43.

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Section 18 of the Indian Extradition Act lays down that "nothing in this chapter", that is Chapter III, "shall derogate from the provisions of any treaty". That is, it incorporates in effect the provisions of such treaty in the Municipal Law of India. When, therefore, the Treaty says that offenders shall be extradited on demand, it is not open to a Municipal Court to say that they shall not be delivered up until some form of procedure initiated, prescribed and sanctioned by itself alone and not agreed upon by the High Contracting Parties is satisfied. There is, on this finding, no point here in emphasizing that section 18 of the Extradition Act refers to Chapter III alone, since, as already pointed out, the French possessions in India are not a Foreign State, and therefore Chapter III is the only one which would apply to the present case.

Article IX of the Treaty of 1815 which is therefore, in my view, the provision to be followed contemplates summary delivery at the request of any authority of either High Contracting Party. That is the view which the Local Government itself has taken of its obligations as set out in the Extradition Manual, Chapter III, section 2 (a), and I think we may assume that that is the view authorized by the High Contracting Party from whom this Government derives this authority. The procedure in the Manual, however, seems to be regarded as applicable to the case of "grave" offences, and neither side has been able to point us to any orders of Government under which the general provision of Article IX of the Treaty of 1815 has been so restricted. This question, however, does not arise here as theft is a "grave" offence. I find therefore that there is no substance in this petition and it is dismissed.

The collateral petition (Crl.M. P. No. 133 of 1930) put in under section 491 of the Criminal Procedure

Code must also fail since the detention of the petitioners is not illegal or improper; and it is also dismissed.

JACKSON J.—I agree. Under the Indian Act (XV of 1903), a Foreign State means a state to which the English Extradition Acts of 1870 and 1873 apply. The main Act is that of 1870. (Vol. 1, page 443, Coll. Stat.) As provided in section 2 of that Act, the application of that Act to any Foreign State shall be by Order in Council. If the Order in Council has not applied the Act to French possessions in India, the Act does not apply and these possessions are not a Foreign State as defined in the Indian Act (XV of 1903).

The Order in Council applied the Act not generally to France, but in a restricted sense "in the case of the Treaty with the President of the French Republic". This is the Treaty of 1876 which in terms does not affect the arrangements in the East Indian possessions of the two countries (Article XVI). Therefore the Extradition Act of 1870 has not been applied to that part of France which is Pondicherry and Pondicherry is not a Foreign State.

Therefore, Chapter III of the Indian Act (XV of 1903), "Surrender . . . in case of States other than Foreign States", applies to Pondicherry. Section 18, falling within Chapter III, expressly preserves the provisions of any treaty for the extradition of offenders and its procedure. This makes the provision of the Treaty of 1815 applicable to the present case, and gives statutory sanction to its procedure. There is therefore no room for an argument that the treaty cannot affect individual rights in the absence of statutory sanction.

BUCKLAND J. in *In re Cullington*(1) says, "By an Order in Council, dated 16th May 1878, the Extradition

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(1) (1920) I.L.R., 48 Cal., 328 at 335.

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JACKSON J. Acts were made applicable to France." It is here that with all respect I differ from him. I should have agreed, if the Order in Council stated "in the case of France" instead of "in the case of the said Treaty."

I agree that as the Treaty of 1815 practically provides for surrender on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the parties.

B.O.S.
