



65

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

1931

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1931

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of the Act did not apply to the case of a submission to more than two arbitrators, even the High Court, if the suit had been instituted therein, could not give the relief prayed for in the suit under those sections; and that, consequently, the City Civil Court also, assuming it had jurisdiction to entertain the suit, could not give such relief and the suit should have been dismissed. [Their Lordships did not decide the question whether the City Civil Court had jurisdiction to entertain this suit.]

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CITY MUNICIPAL ACT (MADRAS) (IV OF 1919), sec. 287—*Use of premises for purpose specified in Sch. VI—Licence under sec. 287—Charging fee for manufacturing, another equivalent fee for storing and another for packing—Propriety of.* For the use of premises for any purpose specified in schedule VI of the Madras City Municipal Act (IV of 1919) the owner must under section 287 of the Act apply for a licence. He cannot get a licence for manufacturing oil and then pack or store it without a licence. But it would obviously be inequitable to charge a person or a fee for manufacturing, and then another equivalent fee for storing, and another for packing.

Samrapuri Chetti v. Corporation of Madras ... (1931) I.L.R. 54 Mad. 1034

SEC. 287—Licence under—
Madras Electric Tramways Company's duty to obtain, for casting metal, etc., in their workshops—Sec. 288 of Act—Licence under—Madras Electric Supply Corporation's duty to obtain, for erecting steam-boiler in their generating station in Madras—Indian Electricity Act (IX of 1910) and licence obtained by Corporation under—Effect of—Indian Tramways Act (XI of 1886)—Construction and effect of. The Madras Electric Tramways Company are not entitled to cast metal or to break or hammer iron or to beat metal in their workshops without obtaining licences from the Commissioner of the Corporation under section 287 of the Madras City Municipal Act (IV of 1919). There is no inconsistency whatever between the provisions of the Indian Tramways Act and the provisions of the Madras City Municipal Act (IV of 1919) whereby the Commissioner is empowered to require any one to take out a licence before he casts metal, or hammers or breaks iron, or beats metal. The Madras Electric Supply Corporation are bound to obtain the permission of the Commissioner of the Corporation under section 288 of the Madras City Municipal Act (IV of 1919) for erecting a steam-boiler in their generating station in Madras. There is not in this respect any inconsistency between the provisions of section 288 of the Madras City Municipal Act and either the Electricity Act or the licence issued under it to the Madras Electric Supply Corporation. The Indian Electricity Act is not a complete code making the holders of licences issued thereunder free from the control of any other law or authority in respect of their operations, buildings, machinery and apparatus.

Corporation of Madras v. Madras Electric Tramways, Limited ... (1931) I.L.R. 54 Mad. 364

CITY TENANTS' PROTECTION ACT (MADRAS) (III OF 1922)—"Building"—*Shed erected on land belonging to another, used as firewood depot—Whether included in term—Applicability of Act—Restriction of scope of Act by preamble—Attitude of mind referred to in preamble—Whether duty of*

deciding imposed on Court—Whether such attitude, test of possession of legal rights.] A shed, erected on land belonging to another and used as a fire-wood depot before the coming into force of the Madras City Tenants' Protection Act (III of 1922) is included in the term "building" as defined in the Act and the owner of the shed is entitled to the protection of the Act. In order to restrict the scope of an Act by the terms of its preamble the Court must be satisfied that there was an intention on the part of the Legislature that its scope should be so restricted. The text of the Madras City Tenants' Protection Act (III of 1922) cannot be read subject to its preamble so as to impose on the Courts the difficult, if not impossible, duty of deciding the presence of such an attitude of mind as is referred to in the preamble. It would not be in any degree usual to make such an attitude of mind a test of the possession of legal rights.

Kannammal v. Kanakasabai ... (1931) I.L.R. 54 Mad. 845

CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 2—Decree—Order in substance a decree—Appeal—Maintainability—Order styled a "decretal order"—Effect of.] If in substance an order passed in an original suit is a "decree" as defined by section 2 of the Code of Civil Procedure and therefore appealable, the fact that the Court styles it an "order" or "decretal order", from which the Code allows no appeal, will not make it non-appealable.

Adinarayana Chetti v. Narasimha Chetti ... (1931) I.L.R. 54 Mad. 337

SEC. 2, SUB-CL. (12) AND O. XX, R. 12—*Decree of Court awarding mesne profits silent as to interest—Executing Court—If entitled to execute decree allowing interest.*] Held by the CHIEF JUSTICE, and RAMESAM, ANANTAKRISHNA AYYAR, and SUNDARAM CHETTI JJ., that when a decree of Court which awards mesne profits under rule 12 of Order XX of the Code of Civil Procedure (Act V of 1908) is silent as to interest, it is not open to the executing Court to fix the rate of interest, and to execute the decree allowing interest. *Per REILLY J.*—If a decree for mesne profits is not only silent in regard to interest, but properly interpreted does not award interest, the executing Court cannot allow interest. But if the decree, though "silent as to interest" in the sense that the word "interest" does not appear in it, nevertheless by the use of the expression "mesne profits" combined with a reference to a rate of income or in any other way indicates that interest is awarded, the executing Court must give interest, and, no rate of interest being mentioned, should give it at the Court rate of six per cent. But this result, when reached, must be reached solely by interpretation of the decree, not by the use of any supposed discretion in the executing Court. And, as the Court making the decree has the right to refuse interest, any indication that it has done so must be allowed full weight by the executing Court. *Rajah of Bobbili v. Ayyagari Sodemma*, (1927) 53 M.L.J. 619, overruled on this point.

Pankunni Menon v. Raman Menon ... (1931) I.L.R. 54 Mad. (F.B.) 955

SEC. 47, AND O. I, R. 10 (2)—*Dismissal of a suit on a mortgage against a defendant claiming paramount title—Whether he is a party to the suit within the meaning of sec. 47—Proper order in such case—Right of executing Court to ascertain reason for dismissal.*] In a suit to enforce a mortgage, one of the defendants who was in possession pleaded that he did not derive his title from the mortgagor but independently of him, and the Court held that he was not a necessary party and dismissed the suit as against him. The plaintiff who got a decree on the mortgage evicted that defendant in execution, and on application by the evicted defendant, the executing Court put him in possession. Plaintiff preferred an appeal to the District Court. Held, by the Full Bench—(1) that the proper order to pass in a case where a Court holds that a defendant had been wrongly impleaded as a party was, not to dismiss the suit as against him but to strike out his name from the record as provided by Order I, rule 10 (2), Code of Civil Procedure, (2) that such a defendant was not "a party to the suit" within the meaning of section 47, Code of Civil Procedure, and the appeal to the District Court was therefore incompetent, and (3) that an executing Court was not confined to the terms of the decree in the suit but was entitled to

look into the pleadings and the judgment in the case and find out the real cause of the dismissal of the suit as against that defendant. *Krishnappa v. Periaswami*, (1916) I.L.R. 40 Mad. 964, approved.

Abdul Sac v. Sundara Mudaliar ... (1931) I.L.R. 54 Mad. (F.B.) 81

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SEC. 80—*Suit by two plaintiffs, one of whom alone gave notice required by section—Maintainability of, against Secretary of State—Maintainability of, against other defendants—Partial rejection of plaint—Permissibility of, under O. VII, r. 11 of Code of Civil Procedure.*] Under section 80 of the Code of Civil Procedure there should be identity of the person who issued the notice with the person who brings the suit. Two plaintiffs instituted a suit against the Secretary of State and others seeking for reliefs on behalf of both of them, but only one of them had given the notice required by section 80. Held, that the suit was not maintainable against the Secretary of State as regards either plaintiff, that it could not be proceeded with against the other defendants also even though notice to them was not necessary under section 80 of the Code of Civil Procedure, and that either the suit was liable to dismissal or the plaint was liable to rejection. *Bhagchand Dagadasa v. Secretary of State for India*, (1927) I.L.R. 51 Bom. 725 (P.O.), followed. Under Order VII, rule 11 of the Code of Civil Procedure, there cannot be a partial rejection of a plaint in respect of a portion of the claim or as regards some of the parties. *Quaere* whether non-compliance with the requisites of section 80 is a ground covered by clause (d) of rule 11 of Order VII of the Code of Civil Procedure.

Appa Rao v. Secretary of State for India ... (1931) I.L.R. 54 Mad. 416

SEC. 89, CL. (1) AND SCH. II, PARAS. 17, 19, AND 20 :—*See ARBITRATION ACT (INDIAN) (IX OF 1899), ss. 2, 3, ETC.* ... 198

SEC. 92—*Scheme suit—Decree in—Election of trustees directed by—Confirmation by Court of—Provision in decrees as to, not ultra vires—Decree in scheme suit directing in substance and effect payment of money to trustees of temple—Execution of—Right of new trustees as to—Addition of such trustees as parties under O. I, r. 10, or O. XXII, r. 10, not necessary.*] A decree in a suit for scheme under section 92 of the Code of Civil Procedure provided for the appointment of new trustees by election and for their confirmation by the Court after election. Held that the provision for confirmation by the Court being only for the purpose of carrying out the scheme already settled by the Court was not ultra vires, as it did not violate section 92 of the Code; *Veeraraghavachariar v. Advocate-General, Madras*, (1927) I.L.R. 51 Mad. 31 (F.B.), followed. A decree in a suit under section 92 providing in substance for the recovery by trustees by way of execution of any amount that might be found due from the deposed trustees is in effect an executable decree, as soon as the amount is ascertained, in favour of the trust, and therefore in favour of any one who might become the trustee under the scheme, and he can directly execute the decree, as soon as he is confirmed, without the necessity of his being added as a party either under Order I, rule 10, or under Order XXII, rule 10 of the Code.

Varadiah Chetti v. Narasimhulu Chetti ... (1931) I.L.R. 54 Mad. 345

SEC. 92—*Decree in a scheme suit under—Provision for Court filling up future vacancies—Validity of—Appointment of new trustees—Appeal or Revision, maintainability of.*] A provision in a decree framing, under section 92, Code of Civil Procedure, a scheme for the future management of a charitable trust to the effect that the Court which passed the decree was to fill future (and not then existing) vacancies amongst the trustees is neither an alteration nor a modification of the scheme within the scope of *Veeraraghavachariar v. Advocate-General, Madras*, (1927) I.L.R. 51 Mad. 31 (F.B.), and is hence not ultra vires. An appointment made by the Court filling, under such a provision,

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a vacancy arising after the decree is not one made without jurisdiction and hence is not revisable by the High Court under section 115, Civil Procedure Code. Not being an order made in execution of any direction in the decree to fill any particular existing vacancy, such order of appointment is not one made in execution under section 47 of the Code of Civil Procedure and is not appealable. <i>Ponnambala Tambiran v. Sivagnana Desika Gnanasambandha Pandara Sannadhi</i> , (1894) I.L.R. 17 Mad. 343 (P.O.), distinguished.	
<i>Sivaram Dubai v. Rajagopala Misra</i> ... (1931) I.L.R. 54 Mad. 315	315
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SEC. 144:—Costs paid under decree afterwards reversed on appeal—Refund of, by way of restitution—Party entitled to—Interest on such costs—Right of party to.] Under section 144 of the Code of Civil Procedure, a party who is entitled by way of restitution to a refund of costs paid by him under a decree afterwards reversed on appeal is ordinarily entitled to interest on such costs.	
<i>Venkatarama Ayyar v. Govindarajulu Ayyar</i> ... (1931) I.L.R. 54 Mad. 887	887
O. I, R. 8—Persons to whom leave to prosecute or defend a suit is given—Death of one—Proper procedure on—Legal representatives of deceased—Right to prosecute or defend suit, if survives to.] Where sanction is given by the Court to a certain number of persons <i>ex nomine</i> to prosecute or defend a suit and one of them dies the right does not survive and his heirs are not competent to prosecute or defend the suit unless the order granting sanction can be so construed as to confer the right on the legal representatives also. In such a case, the proper procedure is for the remaining persons to apply to the Court for directions; and it is for the Court to decide whether it will permit the remaining persons to whom the original sanction was given to continue to prosecute or defend the suit, or whether it will insist upon the original number, in which case, it should give directions authorizing an additional person, who need not necessarily be the legal representative of the deceased person, to join the survivors. When the Court gives the necessary orders the suit will proceed.	
<i>Venkatakrishna Reddi v. Srinivasachariar</i> ... (1931) I.L.R. 54 Mad. 527	527
O. I, R. 8—Representative suit by sole plaintiff—Death of plaintiff pending—No abatement under O. XXII by reason of—Application by person on whose behalf also suit brought, to continue suit—Maintainability—Limitation for making such application—Art. 181, Limitation Act (IX of 1908)—Applicability—Dismissal of suit for default before expiry of three years prescribed by art. 181—Jurisdiction of Court as to.] A suit filed by a sole plaintiff on behalf of himself and others having the same interest, as members of a community, with the necessary permission of the Court under Order I, rule 8 of the Code of Civil Procedure is a representative suit. There can be no abatement of such a suit under Order XXII of the Code by reason of the death of the sole plaintiff therein. On his death, any person on whose behalf also the suit was filed can apply to the Court to be added as a plaintiff for continuing the suit within three years under article 181 of the Limitation Act of 1908. Before the expiration of that period, the Court has no jurisdiction to dismiss the suit for default.	
<i>Mahomed Kanni Rowther v. Naina Mahomed Rowther</i> ... (1931) I.L.R. 54 Mad. 770	770
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O. XXI, R. 2—Agreement after suit and before decree having effect of nullifying the decree but not embodied in it—Plea of, in bar of execution of decree—Not maintainable.] An agreement between parties to a suit after its commencement and before decree, which has the effect of rendering the decree inexecutable, wholly or in part, but which has not been embodied in the decree, attacks the decree itself and cannot be pleaded in bar of execution. <i>Chidambaram Chettiar v. Krishnu Vathiyar</i> , (1916) I.L.R. 40 Mad. 233 (F.B.), distinguished. Order XXI, rule 2 of the Code of Civil Procedure does not apply to agreements before decree.	
<i>Butchiah Chetti v. Tayar Rao Naidu</i> ... (1931) I.L.R. 51 Mad. 184	184
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SCH. II, PARAS. 17, 18, AND 19—Arbitration by named persons—Reference to—Agreement outside Court as to—Death of one of named persons pending arbitration proceedings and prior to matter being brought before Court—Suit ignoring agreement in case of—Maintainability—No provision in agreement for filling up vacancy.] In a case where parties privately agreed to refer their disputes to certain named arbitrators and to abide by their unanimous decision, but the agreement did not contain any provision as to what should be done in case any of the arbitrators died in the course of the arbitration proceedings, and one of them died in the course of such proceedings and prior to the matter being brought before the Court, Held, that the agreement became inoperative and came to an end on the death of the arbitrator and that it could not thereafter be filed in Court under paragraph 17 of Schedule II of the Code of Civil Procedure, for the Court could not thereafter make an order of reference "in accordance with" the agreement, within the meaning of clause 4 of paragraph 17, and "consistently" with it, within the meaning of paragraph 19 of that Schedule. Provisions contained in paragraphs 1 to 16 of Schedule II of the Code can be applied to cases falling under paragraph 17, only in so far as they are "consistent" with such agreement, and paragraph 5 (1) (b) (1) of that schedule cannot be invoked for filling up the place of the deceased arbitrator, for to do so would be inconsistent with the agreement which did not contain any provision for such a contingency. Hence, a suit instituted, after the death of one of the named arbitrators, by one of the parties to the agreement, in respect of any matter agreed to be so referred, cannot be stayed under paragraph 18 of Schedule II of the Code. Death of the arbitrator is "sufficient cause", within the meaning of paragraph 17 for not ordering the agreement to be filed.	
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CONSENT —Plan of—For being killed:—See PENAL CODE (INDIAN) (XLV OF 1860), SEC. 300, EXCEPT 5 AND SEC. 304 ... 504	504	<i>Official Receiver of Secunderabad v. Lakshminarayana</i> ... (1931) I.L.R. 54 Mad. 727	
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SEC. 65—Minor—Sale by, receiving price—Suit by minor on attaining majority to set aside the sale—Specific Relief Act (I of 1877), sec. 41—Fraudulent misrepresentation by minor as to his age—Innocent purchaser—Relief to minor, only on returning purchase money.] If A falsely represents to B that he is a major, when in fact he is a minor and thus induces B to buy his land, and B believing in the representation pays for the land, held, that, in a suit by A, after attaining majority, to set aside the sale and to recover possession of the land, on the ground of his minority at the time of the sale, under section 65 of the Contract Act and under section 41 of the Specific Relief Act, a decree should be given in his favour only on condition that he repays the purchase money. <i>Harnath Kunwar v. Indar Bahadur Singh</i> , (1922) I.L.R. 45 All. 179 (P.C.) followed; <i>Mohari Bibee v. Dharmodas Ghose</i> , (1903) I.L.R. 30 Cal. 539 (P.C.) discussed. <i>Per REILLY J.</i> —The same result is reached by applying the general principle that no plaintiff can be allowed to make the Court an instrument of fraud. <i>Appaswami Ayyangar v. Narayanaswami Ayyar</i> ... (1931) I.L.R. 54 Mad. 112			
CONTRACT IN WRITING —Construction—Stipulation not expressed in contract—When may be implied—Construction not dependent on nature of consideration.] A Court, in construing a written contract, should not imply a stipulation not expressed therein, merely because it thinks it would be reasonable to imply it; such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made. Whether a stipulation should or should not be implied is a question relating to the construction of the agreement and does not depend on the nature of the			

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 7, CL. (1)—

Object of—Relation between sessions division and district—"District"—Meaning of—Notifications constituting Sessions Division of West Tanjore and Sessions Division of East Tanjore—Whether intra vires.] Held by the Full Bench (JACKSON J. dissenting):—The object of section 7, clause (1) of the Code of Criminal Procedure (Act V of 1898) is not to enable the Local Government to constitute sessions divisions out of districts but to lay down a rule governing the relation between sessions divisions and districts; that is, a sessions division shall not consist of half a district or even one and-a-half districts, but shall consist of one district or a plurality of whole districts. The word "district" as used in section 7 and in other sections of the Code is a district for the purposes of criminal administration. Hence the Notifications Nos. 175 and 177 of the Local Government, dated 22nd June 1921, constituting a Sessions Division of West Tanjore and a Sessions Division of East Tanjore, are *intra vires*. *Per JACKSON J.*—The word "district" in the section must be understood in its generally accepted sense, as the revenue division in charge (in this Presidency) of a Collector. Under section 7 a sessions division shall either be a district, as for instance in Madura, where the jurisdiction of the Sessions Judge and of the District Magistrate is coextensive, or shall consist of districts as in Coimbatore and the Nilgiris, where there is one Sessions Judge with two District Magistrates. But (except in Malabar, which was validated by sub-clause (3) of section 7) there may not be a sessions division consisting of part of a district as in Tanjore. Hence, the notifications aforesaid of the Local Government are *ultra vires*.

Arumuga Solagan, In re ... (1931) I.L.R. 54 Mad. (F.B.) 943

ss. 107, 112 AND 548

—Order on a person under sec. 112 to keep peace under sec. 107—Right of such person to grant of copy of Police information—Whether information part of the record within meaning of sec. 548.] A person against whom a Magistrate has drawn up an order under section 112 of the Code of Criminal Procedure, calling on him to show cause why he should not be bound over to keep the peace under section 107 of the Code, is not entitled to the grant of a copy of the written information given by the police and on which the order is based, as such information is not part of the record within the meaning of section 548 of the Code.

Anantapadmanabhaiah, In re ... (1931) I.L.R. 54 Mad. 422

ss. 110 (f) AND

117—*Proceedings against several persons under sec. 110 (f)—Joint enquiry under sec. 117—Legality of.]* Where proceedings are taken against several persons under section 110 (f) of the Code of Criminal Procedure, a joint enquiry under section 117 of the Code is legal, provided the evidence of reputation admitted is not against each accused separately but against them all together. *In re Kutti Goundan*, (1924) 47 M.L.J. 689; *Hari Telang v. Queen-Empress*, (1900) I.L.R. 27 Cal. 781; and *Emperor v. Angnu Singh*, (1922) I.L.R. 45 All. 109, referred to.

Appasaamy Mudali, In re ... (1931) I.L.R. 54 Mad. 334

ss. 156 AND 202—

Police receiving information in complaint forwarded for enquiry under sec. 202—Whether can investigate under sec. 156.] The police on receiving information in a complaint forwarded for enquiry under section 202 of the Code of Criminal Procedure (V of 1898) can investigate under section 156 of the Code.

Gopal Naick v. Alajirisami Naick ... (1931) I.L.R. 54 Mad. 598

SEC. 195 (1) (b)—

Person gave information to police alleging commission of offence—After investigation police reported to Sub-Magistrate case false—Same complaint pressed before Sub-Magistrate—Accused discharged under sec. 253 (2) of the Code—Police filed complaint before Subdivisional Magistrate for giving false information to police—Conviction under sec. 182, Indian Penal Code (XLV of 1860)—Legality of—Offence committed whether not one under sec. 211,

Indian Penal Code—Complaint in writing under sec. 195 (1) (b) of the Code of Criminal Procedure—Necessity for.] A person gave information to the police that certain persons had broken the seal and lock of a temple and entered it. After some investigation the police reported to the Stationary Sub-Magistrate that the case was false. Thereupon the said person pressed the same complaint before the Stationary Sub-Magistrate requesting the Court to make a judicial investigation of the charge. Subsequently the Magistrate discharged the accused persons in that case, under section 252 (2) of the Code of Criminal Procedure (Act V of 1898), finding the charge against them to be groundless. The police filed a complaint against the said person for giving false information to the police before the Subdivisional Magistrate who convicted him under section 182 of the Indian Penal Code (Act XLV of 1860). Held, in revision, by the High Court, that, as the complaint disclosed clearly an offence under section 211 of the Indian Penal Code alleged to have been committed in or in relation to a proceeding in Court, the Subdivisional Magistrate could not take cognizance of the case without a complaint in writing by the Sub-Magistrate as required by section 195 (1) (b) of the Code of Criminal Procedure and that the conviction was illegal and should be set aside.

Dholiah v. King-Emperor ... (1931) I.L.R. 54 Mad. 1018

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), SEC. 259—Private

complaint—Whether abates on death of complainant—Death of complainant after framing of charge—Application under sec. 259 to acquit accused—Order by Magistrate that case should proceed—Validity of.] There is no principle of general application that a private complaint abates on the death of the complainant. Where a complaint under section 166, Indian Penal Code (Act XLV of 1860), was filed by a private person against certain persons, and a charge under that section was framed by the Magistrate, and the complainant died, and the Magistrate was moved to acquit the accused under section 259 of the Code of Criminal Procedure (Act V of 1898), and the Magistrate ordered the case to proceed, held that, after the charge was framed, the Magistrate had no discretion in the matter, and that his order was right.

Narayana Naick, In re ... (1931) I.L.R. 54 Mad. 768

SEC. 265 (2)—Judg-

ment of a Bench of Magistrates—Necessity for signature—Compliance with mandatory provision of section—One member initialling judgment, others signing—Whether an irregularity cured by sec. 537 of Code—Practice of Bench granting copies of judgments with signature of presiding Magistrate alone.] A judgment of a Bench of Magistrates has to be signed as required by section 265 (2) of the Code of Criminal Procedure, and the requirements of public policy necessitate the writing of the full name of the Magistrate signing the judgment, and the mere putting in of the initials is not a sufficient compliance with the mandatory provision of section 265 of the Code. The initialling of a judgment by one of the members constituting the Bench, the other members signing it, is not an irregularity which under the amended Code (XVIII of 1923) can be cured by section 537 of the Code. It affects the validity of the proceeding and vitiates the conviction and sentence. The practice of Courts of Benches of Magistrates granting copies of their judgments with the signature of the presiding Magistrate alone copied deprecated.

Valivalli Brahmaiah, In re ... (1931) I.L.R. 54 Mad. 252

SEC. 332 :—See

EVIDENCE ACT (INDIAN) (I OF 1872), SEC. 30 ... 788

SEC. 346 (1) AND

(2)—*Case submitted to Magistrate under sec. 346 (1)—Magistrate of opinion that evidence disclosed offence properly triable by Magistrate submitting case—Jurisdiction of Magistrate under sec. 346 (2) to refer case back to Magistrate submitting.]* If a Magistrate to whom a case is submitted under section 346 (1) of the Code of Criminal Procedure is of opinion that the evidence

disclosed an offence properly triable by the Magistrate who submitted the case, he has jurisdiction under section 848 (2) of the Code to refer the case back to the Magistrate who originally submitted the case. *In re Kottur Hampanna*, (1922) I.L.R. 45 Mad. 846, considered.

Polur Reddi v. Muniswami Reddi ... (1931) I.L.R. 54 Mad. (F.B.) 16

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), sec. 350—*Magistrate who recorded evidence in inquiry ceases to exercise jurisdiction—Succeeded by another with jurisdiction—Latter acting on evidence recorded by predecessor—Validity of.* Where a Magistrate who has recorded the evidence in an inquiry ceases to exercise jurisdiction and is succeeded by another Magistrate who has jurisdiction, the latter may under section 350 of the Code of Criminal Procedure act on the evidence recorded by his predecessor, and may, after perusing the record, frame a charge without re-examining the witnesses already examined, irrespective of whether there has been a change of Magistrates in the course of inquiry or whether an order of discharge by one Magistrate is set aside by the Sessions Court and the inquiry is reopened when another Magistrate has succeeded.

Lakshmi Reddy v. Muni Reddy ... (1931) I.L.R. 54 Mad. 512

SEC. 428—*Powers of an appellate Court under—Certain persons convicted under ss. 347 and 384, Indian Penal Code—Finding of appellate Court that evidence did not support conviction but charge under sec. 423 could be framed—Trial Court directed to take additional evidence—On receipt of it appellate Court framed charge and convicted under sec. 423—Procedure adopted whether proper.* Certain persons were convicted under sections 347 and 384 of the Indian Penal Code by a Joint Magistrate, and on appeal, the Sessions Court decided that the evidence did not support the conviction of the accused of either offence, but that a charge under section 423 of the Code could be framed against some of the accused, and for that purpose, directed the Joint Magistrate to take additional evidence, and on receipt of such evidence framed a charge under section 423 against such accused—acquitting the other accused who remained before him—and convicted them under section 423. *Held*, in revision, by the High Court, that, though section 428 of the Code of Criminal Procedure enabled an appellate Court, if it thought it necessary, to call for additional evidence which would explain or supplement within limitations, the evidence for the prosecution in support of a charge which had resulted in a conviction and which conviction was the subject of an appeal, it did not entitle an appellate Court to substitute an offence in respect of which there had been no conviction, and to direct additional evidence to be taken which may support such an offence, and that, therefore, the procedure adopted by the Sessions Court was not proper, and that the conviction should be set aside.

Konda Reddi v. Babanna ... (1931) I.L.R. 54 Mad. 63

SEC. 435(4)—*“Made”*—*Meaning of—Not only “made” but “entertained and decided”—Revision petition to District Magistrate against order of Sub-Magistrate discharging one of several accused, rest having been committed to the Sessions—Endorsement by District Magistrate that application to Sessions Judge convenient—Petition withdrawn and another presented to Sessions Judge—Latter whether competent.* Where a petition was presented before a District Magistrate to revise the order of a Stationary Sub-Magistrate who had discharged one amongst several accused persons, the rest having been committed to the Sessions by him and the District Magistrate made the endorsement “As I am informed that the records are in the Sessions Court and the time is too short to get them to enable me to consider this case, I think it would be convenient if this application were presented to the Sessions Judge” on the petition, and the petition was thereupon withdrawn, and another petition was presented to the Sessions Judge, *held*, that the petition to the Sessions Judge was competent, as the word “made” in section 435 (4) of the Code of Criminal Procedure (Act V of 1898) should be construed to mean not only “made” but “entertained and decided.”

Appachi Goundan, In re ... (1931) I.L.R. 54 Mad. 842

CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898), sec. 476-B—*Court suo motu making complaint—Appeal against.* An appeal under section 476-B of the Code of Criminal Procedure (as amended by Act XVIII of 1923) lies where the Court *suo motu* makes the complaint, as under section 476 of the amended Act it is for the Court itself in all cases, whether of its own accord or on application made to it, to make a complaint.

Numberumal Ohetti v. Nainiappa Mudali ... (1931) I.L.R. 54 Mad. 831

CRIMINAL TRIAL—Practice—Accused persons anticipating defence—Petitions to trial Court and written orders thereon—Revision. The practice of accused persons before they are charged and put upon their defence anticipating their defence by petitions on which the trial Court passes written orders is misconceived. They must wait till they are charged before they defend themselves; and if they are convicted their first remedy in most cases will be by way of appeal.

Ramireddi, In re ... (1931) I.L.R. 54 Mad. 251

DECREE—Two possible constructions of—Rule to be applied:—See HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), CHS. IV, V AND VI ... 532

DEFENDANT—Wrongly added—Proper order to be passed by Court:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), SEC. 47, AND O. I, R. 10 (2). 81

DISTRICT MUNICIPALITIES ACT (MADRAS) (IV OF 1884), sec. 63 (1) (a)—*Construction of—Madras District Municipalities Act (V of 1920), sec. 83 (a)—Construction of—Public purpose—Meaning of.* A building used as a school for all the public is one used for a public purpose within the meaning of section 63 (1) (a) of the Madras District Municipalities Act (IV of 1884), which exempted from property-tax “light houses . . . and other buildings or lands to the extent to which they are used for public, charitable or religious . . . purposes” though its proprietor is entitled to appropriate for himself all the surplus income from the school. A building used for a school is within the exemption stated in section 83, clause (a) of the Madras District Municipalities Act (V of 1920) which exempted “places set apart for public worship and either actually used or used for no other purpose, choultries, buildings used for educational purposes, and libraries and playgrounds which are open to the public and from which no income is derived” even if the proprietor of the school made a profit out of it for his own use. The words “from which no income is derived” refer only to libraries and playgrounds and not to buildings used for educational purposes.

Municipal Council, Trichinopoly v. Venkatarama Ayyar ... (1931) I.L.R. 54 Mad. 495

SEC. 83 (a)
—*Public purposes—Building used for—Meaning of:—See DISTRICT MUNICIPALITIES ACT (MADRAS) (V OF 1920), SEC. 63 (1) (a)* ... 495

DIVORCE—Judicial separation—Permanent alimony—Power of Court to increase alimony—Indian Divorce Act (IV of 1869), sec. 37. Upon the true construction of section 37 of the Indian Divorce Act, 1869, a Court, which has made an order on a husband to pay to his wife, who has obtained a decree for judicial separation, monthly or weekly sums for her maintenance and support, has power to make subsequent orders on the husband for payment of increased amounts.

Iswarayya v. Swarnam Iswarayya ... (1931) I.L.R. 54 Mad. (P.C.) 774

DIVORCE ACT (INDIAN) (IV OF 1869), SEC. 37:—See DIVORCE ... 774

EASEMENTS ACT (INDIAN) (V OF 1882), ss. 59 AND 62—*Licence in respect of a property—Whether annexed to it or transferable or heritable—Determination of—Continuance of licence or representative after transfer.* A licence enjoyed in respect of a property is not annexed to it and is not a transferable or a heritable right. The licence is determined on the transfer

of the property affected by it. *Obiter*.—If the licensee or his representative continues after the transfer to exercise the privilege, he would be a mere trespasser.

Chinnan v. Rangithammal ... (1931) I.L.R. 54 Mad. 554

EJECTMENT SUIT—Effective possession of the property—Neither party proving, within 12 years of suit—Effective enjoyment of same—Not the customary mode of exercising the right of possession—Possession—Presumption of, in favour of the person holding title.] As a general rule, in a suit in ejectment, when the plaintiff seeks, on the strength of title and dispossession, to oust the defendants in possession, he must prove possession within twelve years of suit. But the possession to be proved is such possession as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any acts of effective possession, and the normal method of possession is not referable to any such act, and effective enjoyment of the property is not the customary method of exercising the right of possession, possession must be presumed to be with the person holding title to the extent to which that title is found valid.

Ramanathan Chettiar v. Lakshmanan Chettiar ... (1931) I.L.R. 54 Mad. 622

ELECTRICITY ACT (INDIAN) (IX OF 1910)—Duty to obtain licence for erecting steam-boilers:—See CITY MUNICIPAL ACT (MADRAS) (IV OF 1919), SEC. 287 ... 364

ESTATES LAND ACT (MADRAS) (I OF 1908), SEC. 3 (15), (11) AND (1)—Agriculture—Land held for purpose of—Meaning of—Casuarina trees—(Growing of—Land held for purpose of, not held for purpose of agriculture—Person holding land for that purpose not a ryot.) Growing casuarina trees, that is trees for fuel, is not an agricultural purpose so as to make the person who holds the land for that purpose a ryot within the meaning of the Madras Estates Land Act. Per REILLY J.—“Agriculture” cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on.

Chandrasekhara Bharathi Swamikal v. Duraisami Naidu ... (1931) I.L.R. 54 Mad. 900

SS. 135, 137, 142; AND ART. 21 OF PART B OF SCHEDULE TO ACT—District Collector's order under sec. 137 directing landholder to carry out repairs—Appeal by landholder from—Competency to entertain—Board of Revenue and not District Court has—Article 21 of Part B of schedule to Act—Application contemplated by and appeal allowed by.] Where, on an application filed by ryots under section 135 of the Madras Estates Land Act, an order is made by the District Collector under section 137 of the Act directing the landholder to carry out certain repairs to the irrigation work in question, an appeal by the landholder against the District Collector's order to the District Court is incompetent. The appeal lies under section 142 of the Act to the Board of Revenue. Article 21 of Part B of the schedule to the Act contemplates an application made by the landholder under section 137 of the Act and the appeal allowed by that article is against the order made on such application.

Rajah of Vizianagaram v. Padala Appalaswami ... (1931) I.L.R. 54 Mad. 924

SEC. 191—Agency Rules (1924), r. 56.—Period of limitation for an appeal to the Agent to the Governor from the decision of an Assistant Agent in a suit for rent under sec. 77 of the Act—Thirty days under sec. 191 or six weeks under r. 56—Scheduled Districts Act (XIV of 1874), sec. 6—Rule 56, whether ultra vires.] Rules 56 of the Agency Rules of 1924, and not section 191 of the Madras Estates Land Act, applies to appeals preferred to the Agent to the Governor from the decisions of the Assistant Agent, in suits for rent filed before the latter under section 77 of the Madras Estates Land Act; consequently, the period of limitation for such appeals is six weeks as prescribed by rule 56. The expression “Civil Justice” in the heading of rule 2 onwards to the end of the Agency Rules of 1924 includes the administration of justice in Revenue

Courts as well as in ordinary Civil Courts in the Agency tracts; hence rule 56 applies to appeals from decisions of Assistant Agents in rent suits. A special Act is not generally repealed or affected by the passing of a later general Act; see *Seward v. “Yera Cruz,”* (1884) 10 App. Cas. 59; the Agency Rules of 1860 applied to Agency tracts, when the Madras Estates Land Act was passed in 1908; the said rules were in the nature of a special Act, while the latter Act was a general Act. Hence the rule of limitation under rule 18 of the rules of 1860 governed appeals in rent suits from 1908 to 1924; section 191 of the Act did not supersede rule 18; and the Agency Rules of 1924, which simply continued the former rules of 1860, were not in conflict with section 191 and applied in the place of rule 18 of the former Agency Rules; See *Unnoda Persaud Mookerjee v. Kristo Coomarr Moitro*, (1872) 15 Beng. L.R. 60 (P.C.) note. Rule 56 of the Agency Rules of 1924 is not ultra vires of the local Government which made it, by reason of the provisions of section 6 of the Scheduled Districts Act (XIV of 1874).

Thammayya v. Viswanada Mallapuraj ... (1931) I.L.R. 54 Mad. 92

EVIDENCE ACT (INDIAN) (I OF 1872), ss. 8, 32 (1)—Statement by deceased constituting motive to commit crime—Admissibility—Under what circumstances.] Where a statement by a deceased person is said to constitute a motive for another to commit a crime, it cannot be proved by one who heard the deceased make the statement. Such a statement will be admissible under section 32 (1) of the Indian Evidence Act (I of 1872), if it be a statement as to the cause of death or as to any of the circumstances of the transaction which resulted in death or under Explanation 1 to section 8 of the Act if it is shown to have accompanied or explained any act of the deceased. There is nothing in section 8 to indicate that a relevant fact can be proved by hearsay evidence.

Venkatasubba Reddi, In re ... (1931) I.L.R. 54 Mad. 931

SEC. 30—Construction favour of accused—“Proved”—Interpretation of—Two accused jointly tried—Prosecution case closed—Questions under sec. 332 of Code of Criminal Procedure (Act V of 1898)—Confession by one of the accused admitting his guilt and stating other accused also guilty—Admissibility under sec. 30.] Section 30 of the Indian Evidence Act (I of 1872) creates a very marked exception to the fundamental principles of Criminal Law and as such must be strictly construed in favour of an accused person. The word “proved” in the section must be interpreted to mean proved before the case for the prosecution comes to an end, i.e., proved either in the course of the prosecution case or proved in some proceeding previous to the trial. Hence, a confession made by one of two accused jointly tried in a case, admitting his own guilt and stating that the other accused was also guilty, after the close of the prosecution case, when questions under section 332 of the Code of Criminal Procedure (Act V of 1898), were put to him, is not admissible under the section; *Emperor v. Mahadeo Prasad*, (1926) I.L.R. 45 All. 323, followed.

Marudamuthu Fadayachi, In re ... (1931) I.L.R. 54 Mad. 788

SEC. 30—Confession—Meaning of.] “Confession” in section 30 of the Indian Evidence Act means confession of the very offence for which the accused persons are being tried—“offence” always including under the explanation to the section attempts of and attempts to commit the offence. *Shirabai v. Emperor*, (1926) I.L.R. 50 Bom. 663, dissented from.

Periyaswami Moopan, In re ... (1931) I.L.R. 54 Mad. 76

SS. 32 AND 159—Statement by deceased person—Of circumstances leading to death—Recorded by a witness—But no tread over to or signed by deceased—Admissibility of.] A statement by a deceased person of the circumstances leading to his death recorded by a

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witness but not read over to or signed by such deceased person is admissible in evidence as a record of what the deceased said at the time from which the witness could refresh his memory.	
<i>Krishnama Naicken, In re</i> ... (1931) I.L.R. 54 Mad. 678	
EVIDENCE ACT (INDIAN) (I OF 1872), SEC. 32, CLS. 3 AND 7:—See HINDU LAW ... 576	
SEC. 33—Court having no jurisdiction	
—Proceeding before—If “judicial proceeding”—Deposition given in such proceeding—Admissibility of.] A proceeding before a Court which has no jurisdiction to entertain it is not a “judicial proceeding” within the meaning of section 33 of the Indian Evidence Act, and a deposition given in such a proceeding is inadmissible in evidence under the section.	
<i>Sankappa Rai v. Koraya Pujary</i> ... (1931) I.L.R. 54 Mad. 561	
SEC. 41—Judgment in rem—Judgment of an Insolvency Court admitting proof of an alleged debt, if a “legal character”—Meaning of—Indian Bar Councils Act (XXXVIII of 1926), sec. 12—Proceedings under—Genuineness of such debt, matter in issue—Court and the Tribunal of the Bar Council—If precluded from investigating same.] The judgment of a Court exercising Insolvency Jurisdiction, admitting proof of an alleged debt of a creditor and declaring him to be a creditor in the insolvency, is not a judgment in rem since it neither confers upon nor takes away from him any “legal character,” nor declares him “to be entitled to any specific thing, not as against any specified person but absolutely”, within the meaning of section 41 of the Indian Evidence Act. In proceedings under section 12 of the Indian Bar Councils Act, on a complaint against an Advocate for certain alleged acts of professional misconduct, when the genuineness or otherwise of such a debt was a matter in issue, held, that neither the Tribunal of the Bar Council nor the Court was precluded from investigating the same.	
<i>An Advocate, In re</i> ... (1931) I.L.R. 54 Mad. (F.B.) 601	
SEC. 92—Promise of grace—Proof of	
—Past and future breaches of contract—Waiver of—Distinction between—Indian Contract Act (IX of 1872), sec. 63—Remission of payment resulting in partial discharge of contract—Validity of.] Section 92 of the Indian Evidence Act (I of 1872) is not a bar to the reception in evidence of an alleged oral arrangement, even though it is in variance with the terms of a written agreement, when it is put forward not as imposing any legal obligation on a party to accept a lower amount than the one specified in the written agreement but as a promise of grace to support other independent evidence that a less amount was accepted in satisfaction of a larger amount due. There is nothing in law to prevent proof of actual waiver of past breaches whether or not this is in pursuance of a promise to waive. A promise of grace to waive future breaches may be proved but is of no value unless performance has been actually waived. A binding agreement to waive future performance cannot be proved. Section 63 of the Indian Contract Act (IX of 1872) is not restricted to cases where by remission of payment the whole contract is discharged and extinguished but also applies to any and every occasion in which any sum becomes due and payable under the contract.	
<i>Vaidyanatha Rao v. Kandappa Chetti</i> ... (1931) I.L.R. 54 Mad. 889	
SEC. 92, PROviso (1)—Principles governing the application of.] Section 92, proviso (1) of the Indian Evidence Act (I of 1872) does not empower a plaintiff suing on an unperfected and unambiguous deed to lead evidence to shew that by a mistake a term has been omitted from the deed, unless the mistake is of such a nature as would found a claim for rectification or cancellation of the deed, and in such a case the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification or cancellation. One test which equity applies in a suit for rectification is “Is the proof of error clear and conclusive?” One defence equity	

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allows is laches. Equity will not relieve him who tarries on the way. One bias equity always shows in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say the burden of proof lies heavily on the person seeking rectification.	
<i>Sayamma v. Venkata Reddi</i> ... (1931) I.L.R. 54 Mad. 973	
EXECUTOR BY IMPLICATION:—See WILL ... 266	
FRAUD ON REGISTRATION LAW:—See REGISTRATION ACT (INDIAN) (XVI OF 1908), SEC. 28 ... 352	
GRANT—Lost grant:—See PRESCRIPTION ... 427	
GUARDIANS AND WARDS ACT (VIII OF 1890), SEC. 7—Guardian of minor's person—Person resident outside British India if can be appointed.] Under the Guardians and Wards Act a person residing outside British India cannot be appointed guardian of a minor's person, as over such a guardian the Court cannot exercise its proper control.	
<i>Subbarathnammal v. Seshachalam Naidu</i> ... (1931) I.L.R. 54 Mad. 758	
HABEAS CORPUS—Writ of—Infant—Court acting under Guardians and Wards Act (VIII of 1890) declares a person fit and proper to be guardian of—Habeas corpus—Whether available for going behind such order and deprive guardian of custody—Intervention of Court by Habeas corpus—Illegal or improper detention necessary.] Where a Court of competent jurisdiction has under the Guardians and Wards Act (VIII of 1890) declared a person to be a fit and proper person to exercise guardianship over an infant, the procedure by way of habeas corpus cannot be utilized for the purpose of going behind such an order and depriving the guardian so appointed of his custody. It is only in cases where it can be shown that a minor child is illegally or improperly detained that Courts will interfere by way of habeas corpus.	
<i>Subbarathnammal v. Seshachalam Naidu</i> ... (1931) I.L.R. 54 Mad. 759	
HINDU LAW—Adoption—Son disqualified for inheritance and incompetent to perform ceremonies—Existence of, not a bar to an adoption by his father—Indian Evidence Act (I of 1872), sec. 32, cls. 3 and 7—Leprosy of son at time of adoption by his father—Evidence—Adoption deed executed by father and attested by son—Recital in, as to son's leprosy at the time—Admissibility.] The existence of a son, who is not only disqualified for inheritance but also incompetent to perform obsequial and other ceremonies, is no bar to an adoption by his father; <i>Bharmappa Ujjangauda</i>, (1921) I.L.R. 46 Bom. 455, not followed. On an issue as to whether an adoption made by A, who had two sons at the time, was valid because those sons were at the time suffering from a virulent and incurable form of leprosy, held that a recital in the registered deed of adoption, executed by A at the time of the adoption and attested by the sons, that they were then suffering from such form of leprosy was admissible in evidence under clause 3 or clause 7 of section 32 of the Indian Evidence Act.	
<i>Nagammal v. Sankarappa Naidu</i> ... (1931) I.L.R. 54 Mad. 576	
Illatom adoption:—See REGISTRATION ACT (INDIAN) (XVI OF 1908), ss. 17 AND 49 ... 27	
Partition—Fixing of shares of members with reference to a partition at a future date—Binding nature, effect and validity of.] Where, in consideration (a) of composing existing and possible future family disputes and (b) of one member of the family who was issueless consenting to relinquish his right to a share in case the other members postponed the division of the joint family properties till after his death, all the adult members of all the branches of a joint Hindu family not only agree to postpone the division accordingly but also fix and consent to take their shares in proportions slightly different from what each might, but for such considerations, be entitled to, under the law, on the date of the agreement, such agreement will be valid and binding on each of the parties thereto and his descendants. Such an agreement does not in law effect a division in	

status between them as from its date. Hence a clause therein to the effect that until division "all the members will treat themselves as members of an undivided family subject to the law of survivorship" is valid. The share of one of the members bound by such an agreement dying issueless in the interval goes by survivorship to the other members of his branch only and not also to the members of other branches.

Ramabhadra Odayar v. Gopalaswami Odayar ... (1931) I.L.R. 54 Mad. 269

HINDU LAW—Will or adoption deed—Construction of deed—Registration of deed in book not appropriate for will—Effect of:—See HINDU WILL ... 440

HINDU RELIGIOUS ENDOWMENTS ACT (MADRAS) (II OF 1927), ss. 9 (7) AND 81 (2)—*Math—Finding by the Religious Endowments Board that a particular building is a—Suit for a declaration that it is not a—If maintainable.* The Hindu Religious Endowments Board, after giving notice to B and holding an inquiry, passed an order that a particular building was a math within the Madras Hindu Religious Endowments Act. B filed a suit for a declaration that it was not an institution under the said Act. Held, that when, by an Act of the Legislature, powers are given to any person for a public purpose from which an individual may receive injury and when the mode of redressing the injury is also pointed out by the statute, as has been done in this case by section 84 (2) of the Act, viz., by an application to the District Court, the suit for the said purpose is not maintainable.

Iswarananda Bharathi Swami v. Commissioners, H.R.E. Board ... (1931) I.L.R. 54 Mad. 928

(II OF 1927, I OF

1928), SEC. 78—*Suit to establish right of hereditary trusteeship of a certain temple—Bar of—Code of Civil Procedure (Act V of 1908), sec. 92.* Section 78 of the Madras Hindu Religious Endowments Act (II of 1927 as amended by Act I of 1928) is no bar to the institution of a suit to establish a right of hereditary trusteeship of a temple and for certain consequential reliefs. The words "except as provided by this Act" in section 78 of the said Act mean "contrary to the provisions of this Act".

Vythilinga Pandara Sannadhi v. Temple Committee, Tinnevely Circle. (1931) I.L.R. 54 Mad. 1011

(II OF 1927), CHS.

IV, V AND VI—*Excepted temples—Policy in respect of—Decree—Two possible constructions of—Rule to be applied.* The policy of the Madras Hindu Religious Endowments Act, as seen from a comparison of Chapters IV, V and VI thereof, is to place maths and excepted temples, in normal conditions under much less direct and detailed interference from the Religious Endowments Board in matters of internal management than ordinary temples. This does not mean that, in cases of proved mismanagement or incapacity or in the imperative interests of future good government, such interference may not have to be provided for in a scheme. Consequently, in a case where there is no proof of mismanagement, it is appropriate, in a scheme in respect of an "excepted temple," that the appointment of a manager should be with the trustees who are the persons really responsible. Of two possible constructions of a decree, the Court will not accept the one which leads to plain injustice and makes its own decree an instrument of depriving parties, whose case had not been heard and decided, of valuable and cherished rights which no one had any intention to destroy.

Zamorin of Calicut v. Krishna Nambudripad ... (1931) I.L.R. 54 Mad. 582

HINDU WILL—Document executed in mufassal—Construction of document—Testamentary effect—Registration—Registration in book not appropriate for will.] A Brahman, four months before his death and when he was ill, executed a document in favour of the son of his wife's sister as follows: "As I have had no issue I have brought you up while you were young and have adopted you and celebrated your upanayanam, etc., and have chosen you as a son; so I have communicated this fact to the Revenue authorities and got your name registered for the office of the karnam held by me. Further, you shall be my son and you shall be entitled to my entire property as a son."

The deceased presented the document for registration and it was registered in Book IV (Miscellaneous Register). The execution being in the mufassal the Hindu Wills Act did not apply and formalities were not necessary for its validity as a will. No valid adoption had taken place. Held, that the document had testamentary effect; the fact that the document had not been registered in Book III, that appropriate in the case of a will, was insufficient to outweigh its terms and the circumstances in which it was executed.

Krishna Rao v. Sundra Siva Rao ... (1931) I.L.R. 54 Mad. (P.C.) 440

ILLATOM RELATIONSHIP—Proof, incidents, and extent of:—See REGISTRATION ACT (INDIAN) (XVI OF 1908), ss. 17 AND 49 ... 27

INCOME-TAX—*Railway outside British India—Working agreement with railway in British India—Receipt of profits—Agent—"Business"—Deduction—Expenditure—Payment as Concessionaires—Indian Income-tax Act (XI of 1922), sec. 2 (4), sec. 4 sub-sec. (1), sec. 6 (iv), sec. 10 sub-sec. (2) (ix).* The appellant Company was incorporated in the United Kingdom in 1869 with a registered office in London, and under a convention with the French Colonial Government constructed a railway in the French Colony of Pondicherry making junction at the frontier of British India with the South Indian Railway Company. By the convention, the appellant Company was to pay to the French Colonial Government half its net profits calculated as therein provided. In 1879 the appellant Company entered into a working agreement with the South Indian Railway Company, whereby that Company was to work the Pondicherry Railway as an integral part of its own line, and out of the receipts make certain payments to the appellant Company in India in rupees. For each of the financial years 1925-26 and 1926-27 the South Indian Company paid sums due under the agreement to their agent at Trichinopoly, who was also agent for the appellant Company, admittedly, for certain purposes. Under instructions from the appellant Company he calculated and paid to the French Colonial Government the sums due under the convention, and remitted the balance to the appellant Company in London by a bank draft payable there. Held that the sums paid by the South Indian Railway Company had been "received" in British India (namely, at Trichinopoly) by the appellant Company within section 4, sub-section (1) of the Indian Income-Tax Act, 1922, and constituted the profits and gains of a "business" carried on by them within section 2 (4) and section 6 (iv) of the Act, so as to render them chargeable to tax in respect thereof; further that the appellant Company was not entitled to deduct the payments made under the convention as being expenditure "incurred solely for the purpose of earning such profits or gains" within section 10, sub-section 2 (ix) of the Act. [It was unnecessary to decide whether the profits accrued or arose in British India, or were to be deemed to do so, or whether the business was carried on in British India.] *South Behar Ry. Co. v. Inland Revenue Commissioners*, [1925] A.C. 476 and *Gresham Life Assurance Society v. Styles*, [1902] A.C. 309, 315, applied.

Pondicherry Railway Company v. Commissioner of Income-tax, Madras. (1931) I.L.R. 54 Mad. (P.C.) 691

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Forest produce, sale of—Amount received by owner of unassessed land by sale of timber trees thereon, whether liable to Income-tax. Amounts received by the owner of unassessed forest lands by the sale of timber trees thereon, are income liable as such to income-tax.

Commissioner of Income-tax, Madras v. Manavedan Tirumalpad. (1931) I.L.R. 54 Mad. (S.B.) 21

INTEREST—Winding up proceedings:—See COMPANY ... 324

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KARNAVAN OF A MARUMAKKATAYAM TARWAD—Alienation by, amounting to merely a lease—Suit by junior member to set it aside—Circumstances :—See MARUMAKKATAYAM TARWAD ... 239

LAND ACQUISITION ACT (I OF 1894), ss. 3 (d) AND 54—*Land Acquisition Court*—Chief Judge of Small Cause Court appointed as "its special judicial officer"—If, a principal Civil Court of Original Jurisdiction—Decrees of the said Court—If appealable—Code of Civil Procedure (Act V of 1908), sec. 96—"Awards" and "Decrees"—Distinction between.] A Land Acquisition Court, constituted by the appointment of the Chief Judge of the Court of Small Causes in Madras as its "special judicial officer," is not a "principal Civil Court of Original Jurisdiction" within the meaning of section 3 (d) of the Land Acquisition Act (I of 1894), but it is a special Court having its own statutory status which does not follow the status of the Court ordinarily presided over by the person who happens to be appointed as its Judge. Neither section 54 of the Land Acquisition Act nor section 96 of the Code of Civil Procedure confers on the High Court a power to act as a Court of appeal from the decisions which are not "awards" but "decrees" of the said Court. Distinction between "awards" and "decrees" of the Land Acquisition Court pointed out.

Bayavathi Doss Bavaji v. Sarangaraja Iyengar ... (1931) I.L.R. 54 Mad. 722

LEGAL PRACTITIONERS' ACT (XVIII OF 1879), SEC. 7 AND E. 13 OF RULES FRAMED UNDER ACT—Renewed certificate—Receipt from High Court of—Forbidding of practitioner to practise pending—District Judge's power as to.] A District Judge has no power to forbid a legal practitioner to practise pending the receipt from the High Court of his renewed certificate. Any orders in regard to non-renewal or suspension pending refusal to renew must proceed direct from the High Court.

Gopala Menon, In re ... (1931) I.L.R. 54 Mad. 574

SEC. 13 (b) AND (f)—*Legal practitioner—Duty of, to Court and his client—False representation to Court for the purpose of impeding the course of justice—Misconduct.*] A legal practitioner has not only got a duty to his client but he has got a duty towards the Court and it is his duty to see that the case is fairly and honestly conducted. If a legal practitioner, deliberately for the purpose of impeding the course of justice, makes a statement to a Court which he knows or believes to be untrue and thereby gains an advantage for his client, he is guilty of grossly improper conduct and, as such, renders himself liable to be dealt with by the High Court.

First-grade Pleader, In re ... (1931) I.L.R. 54 Mad. (F.B.) 520

LEGAL REPRESENTATIVE—Suit against wrong—Instituted and conducted bona fide—Judgment and decree for plaintiff without fraud or collusion with defendant—Binding nature of decree on proper legal representative.] A debtor died leaving a will by which he bequeathed his estate to his nephew subject to certain dispositions. The widow of the debtor disputed the will. In ignorance of the will and bona fide believing the widow to be the proper legal representative, the creditor brought a suit against her alone, and obtained an *ex parte* decree for the debt to be paid out of her husband's assets in her hands. The widow was in possession of a few items of the estate. In a suit by the nephew to set aside the decree and the sale in execution thereof, held that, as the creditor bona fide believed the widow to be the proper legal representative and as she was then interested in defending the estate and sufficiently represented the estate and as he got his decree without any fraud or collusion with her, it was binding on the plaintiff, the residuary legatee, under the will.

Chathurbujadoss Kushaldoss and Sons v. Rajamanicka Mudali ... (1931) I.L.R. 54 Mad. 212

LETTERS PATENT (MADRAS), CL. 12:—See BAR COUNCILS ACT (INDIAN) (XXXVIII OF 1920), SEC. 12 (3) ... 857

LETTERS PATENT (MADRAS), CL. 15—Code of Civil Procedure (Act V of 1908), O. 1, r. 10 (2)—Order under, adding party to a suit—Whether "judgment" within meaning of cl. 15 of Letters Patent (Madras)—Appealability of.] An order under Order I, rule 10 (2) of the Code of Civil Procedure (Act V of 1908) adding a party to a suit is not a "judgment" within the meaning of clause 15 of the Letters Patent (Madras), and therefore no appeal lies against such an order. *Tuljaram Row v. Alagappa Chettiar*, (1910) I.L.R. 35 Mad. 1 (F.B.), followed.

Ramaswami Chettiar v. Kannappa Mudaliar ... (1931) I.L.R., 54 Mad. 491

CL. 15, AS AMENDED—Second appeal—Leave to appeal in—Grant of—Reason for decision should be recorded in case of :—See PROVINCIAL INSOLVENCY ACT (V OF 1920), SS. 4, 53 AND 75 ... 989

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LIMITATION ACT (INDIAN) (IX OF 1908), SEC. 3, ARTS. 181, 182—Step in aid of execution—Application for extension of time to pay money due under decree, whether a step in aid—Sec. 48, Code of Civil Procedure (Act V of 1908).] A decree directed possession of land to be given to the plaintiff on payment of the amount due to the defendant for improvements, to be ascertained by the Court later. On an application for execution by the plaintiff for possession and for ascertainment of the amount due for improvements, the Court ascertained the amount on a certain date and fixed a date for payment. Unable to pay on the date fixed, the plaintiff unsuccessfully applied for extension of time for payment. On a further application for execution, held, (1) that, assuming that article 182 of the Limitation Act applied, the application for extension of time to make the payment was not a step in aid of execution within the meaning of the article, (2) that, as no time was originally fixed in the decree for payment, article 182 did not apply, but article 181 applied, under which the right to apply for execution, which was not a continuing right, accrued on the date of the ascertainment of the amount and not on the date of the dismissal of the petition for extension, (3) that section 48 of the Code of Civil Procedure did not give a period of 12 years for execution, but only provides for dismissal of the execution petition which is filed after the period of 12 years, and (4) that article 181, like the other articles of Schedule I of the Limitation Act, must be read with section 3 of the Act and refers to applications for which no period of limitation for the purpose of dismissal is provided elsewhere in the schedule or by section 48 of the Code of Civil Procedure.

Annamalai Desikar v. Raju Pillai ... (1931) I.L.R. 54 Mad. 306

SEC. 10—Directors of companies—Whether trustees for purposes of section—Indian Companies Act (VII of 1913), sec. 235—Application under, against directors for compensation for misfeasance—Commencement of limitation, whether from date of misfeasance or date of order for winding up.] Directors of companies under the Indian Companies Act (VII of 1913) are not trustees for the purposes of section 10 of the Indian Limitation Act (IX of 1908). In respect of an application by a liquidator under section 235 of the Indian Companies Act against the directors of the company seeking to recover certain moneys by way of compensation for their acts of misfeasance, limitation begins to run from the date of the commission of the alleged acts of misfeasance and not from the date of the order directing the winding up of the company.

Narasimha Ayyangar v. Official Assignee of Madras ... (1931) I.L.R. 54 Mad. 153

SS. 19 AND 31 AND ART. 182—"Period prescribed" in sec. 19—meaning of.] The right to sue on a mortgage expired by the end of March 1909, but an acknowledgment of liability was made in May 1909. On a suit on the mortgage filed in February 1921,

held (1) that the words "period prescribed" in section 19 of the Indian Limitation Act (IX of 1908) meant not only the period prescribed in the first schedule of the Act but included also the "two years" provided by section 31 of the Act, which came into force in August 1908, and that the suit was, therefore, not barred under article 132 of the Act. Courts in dealing with questions of limitation should, as far as possible, place upon the Limitation Act a construction favourable to plaintiffs.

Seshayya v. Subbadu ... (1931) I.L.R. 54 Mad. 445

LIMITATION ACT (INDIAN) (IX OF 1908), ART. 44:—See REGISTRATION

ACT (INDIAN) (XVI OF 1908), SEC. 28 ... 352

ARTS. 89 AND 116—*Account—Suit for, or for compensation for breach of registered contract—Art. 89 applicable in former case—Nature of suit for an account.*] A suit for an account is governed by article 89 of the Limitation Act. In a suit for an account, if the result of taking an account shows a balance in favour of the defendant, he can get a decree for the amount of that balance. Two brothers, A and B, agreed to partition their property by means of a registered deed, by which some property was not actually divided but was to be managed by each in turn, and each agreed to account to the other for the other's share of the income at the end of his management. When A sued B for an account of B's management, B prayed for an account of A's management and claimed to set off what would be due to him from A on taking an account. *Held* that, as both A and B claimed only an account and not compensation for breach of the registered contract, each claim was governed only by article 89 and not by article 116 of Limitation Act.

Annu v. Somasundara ... (1931) I.L.R. 54 Mad. 654

ART. 96—*Mistake—Suit to set aside partition on the ground of—Applicability of article to.*] Article 96 of the Indian Limitation Act applies to a case where a Hindu sues to set aside a partition and to get the disparity between his and the other co-parcener's share redressed by a fresh adjustment of the ancestral property on the ground of mistake or misapprehension of the correct position of affairs at the time of partition.

Ramakotayya v. Sundararamayya ... (1931) I.L.R. 54 Mad. 883

ART. 156—*Ex parte decree—Appeal from—Limitation—Starting point—Ex parte decree set aside by trial Court within appealable period, but subsequently restored by High Court in revision.*] When an *ex parte* decree has been set aside by the Court which passed it within the appealable period and therefore no appeal against it is thereafter competent to the defendant, but the order setting aside the *ex parte* decree is subsequently set aside in revision and the original *ex parte* decree restored, the period of 90 days allowed by article 156 of the Indian Limitation Act of 1908 for an appeal from the original *ex parte* decree runs, not from the date of the said decree, but from the date when it is restored in revision.

Peer Ammal v. Nalluswami Pillai ... (1931) I.L.R. 54 Mad. 455

ART. 181:—*See CIVIL PROCEDURE,*

CODE OF (ACT V OF 1908), O. I, R. 8 ... 770

ART. 182 (5)—*Step in aid of execution—Application in accordance with law to take—Limitation if saves—Actual execution prayed for in application not in accordance with law.*] An application in accordance with law to take a step in aid will save limitation, although the actual execution prayed for in that application may not be in accordance with law.

Ohinna Vel Naick v. Venkatarama Naick ... (1931) I.L.R. 54 Mad. 852

LOCAL BOARDS ACT (MADRAS) (XIV OF 1920), ss. 42 (b) AND 159—Removal of encroachment by owner of premises—Discretionary nature of duty of President of Union Board under sec. 159—President electing to allow encroachment to continue—Whether enables President, District Board, to act under sec. 42 (b).] Under section 159 of the Madras Local Boards Act (XIV of

1920) the only duty imposed on the President of a Union Board is to exercise his discretion as to whether the owner of any premises should or should not be required to remove an encroachment; and, if he elect to allow an encroachment to continue it cannot be said he has made default in performing his duty so as to enable the President of the District Board to act under section 42 (b) of the Act, and assume the function of the Union Board.

Sendiappa Nadar v. President, District Board, Madura. (1931) I.L.R. 54 Mad. 595

LOCAL BOARDS ACT (MADRAS) (XIV OF 1920)—Election petition filed during currency of—Jurisdiction of Court to decide the petition after the passing of the amending Act (XI of 1930)—Sec. 54 (2) and proviso, and transitional provisions and rr. 5 (3) and 6 of Act XI of 1930, effect of—Statute—Retrospective operation of.] Generally, except in matters regulating procedure, no statute can be construed to be retrospective in its operation so as to take away substantive rights of parties, unless such a result arises by express declaration or by necessary implication. While the Madras Local Boards Act (XIV of 1920) was in force, A, a Public Prosecutor and Government Pleader, successfully stood for election as President of a district board. Even while the above Act was in force, an election petition was filed to set aside his election on the ground of his ineligibility to stand for election on account of his holding the above offices. *Held* that the Court which then had jurisdiction to decide the petition was not deprived of its jurisdiction to do so after the coming into force of the amending Act (XI of 1930) by any provision contained either in its sections or in its transitional provisions. *Held* further that neither the amending Act (XI of 1930) nor section 54 (2), nor the proviso (2) to section 54 (2) thereof was merely declaratory of the existing law and therefore retrospective in operation, as section 54 (2) and its proviso contained amendments and additions to the corresponding repealed provisions of Act XIV of 1920. *Held* further that rule 5 (3) of the transitional provisions of the amending Act (XI of 1930) did not relate to the method of disposal of election petitions, either past or future but related to other matters. *Held* also that rule 6 of the transitional provisions of the amending Act (XI of 1930) applied only to persons validly holding office when that came into force.

Pannirselvam v. Veeriah Vandayar ... (1931) I.L.R. 54 Mad. 627

MAINTENANCE—Suit by Hindu widow for—Decree giving charge on immovable property, operates from date of plaint:—See TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 52 ... 132

MARUMAKKATAYAM TARWAD—Karnavan of—Lease by—Suit by a junior member to set aside—Maintainability of—Code of Civil Procedure (Act V of 1908), O. XXVI, r. 10 (3)—Successive commissions on a particular subject, issue of—Practice relating to—Legality of.] Where an alienation by the karnavan of a Marumakkatayam tarwad, which is attacked as fraudulent, improper or detrimental to the tarwad, does not amount to more than a lease, a suit to set it aside by a junior member of the tarwad can only be brought in exceptional circumstances. A Court, which has issued a commission to deal with a particular subject, should not issue a second commission unless it thinks that the report of the first commissioner is not satisfactory, in which case the earlier commission should be wiped out altogether, and attention should be paid only to what is reported by the second commissioner. It is not at liberty to treat both reports as evidence. The practice prevalent in Malabar of issuing separate commissions in succession on the same subject without setting aside the previous ones is improper and contrary to what is contemplated by Order XXVI, rule 10 (3) of the Code of Civil Procedure, 1908, and should no longer be continued. *Ambi v. Kunhikavamma.* (1929) 118 I.C. 296, referred to.

Kunhi Kutti Ali v. Muhammad Haji ... (1931) I.L.R. 54 Mad. 239

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ORIGINAL SIDE RULES, HIGH COURT, MADRAS, O. XXXIV, R. 57 (FORM NO. 124) AND R. 62—Application for calling in of Letters of Administration granted on footing of intestacy—Citation—Issue of—Appropriate rule.] On an application for the calling in of a grant of letters of administration which has been made upon the footing of an intestacy, citation ought to be issued only under Order XXXIV, rule 57 (Form No. 124) of the Madras High Court Original Side Rules, and not under rule 62 of the said order. <i>Ammani Ammal v. Narayanaswami Naidu</i> (1931) I.L.R. 54 Mad. 462	
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... ss. 182, 211:—See CRIMINAL PROCEDURE, CODE OF (ACT V OF 1898) 1018	
... ss. 201 to 203—Person guilty of main offence—Applicability to—Practice—Accused charged in the alternative with the main offence and under ss. 201 and 203—Misjoinder—Person charged with murder—Finding by trial Court that accused did not inflict the fatal injuries but knew who had inflicted and gave false story to screen real offender—Conviction of accused under ss. 201 and 203—Legality of—Calculating of punishment under.] Sections 201 to 203 of the Indian Penal Code are applicable to a person who is guilty of the main offence, though in practice a Court will not convict an accused both of the main offence and under these sections. There is no misjoinder in charging an accused in the alternative with the main offence and under sections 201 and 203 of the Indian Penal Code. For the purpose of calculating the punishment to be awarded under section 201, it is necessary for the Court to decide not so much what offence—the evidence of which has been concealed—has been committed, as what offence the accused knew or had reason to believe had been committed. Where a person was charged with murder, and the trial Court held that the evidence did not prove that the accused had inflicted the injuries that proved fatal, but that he knew who had inflicted such injuries and gave out a false story intending to screen the real offender, and convicted the accused under sections 201 and 203 of the Indian Penal Code, held, by the High Court, on appeal, that the conviction was legal. <i>Chinna Gangappa, In re</i> (1931) I.L.R. 54 Mad. 68	
... SEC. 300, EXCP. 5 AND SEC. 304—Person kills another more than eighteen years of age—Pleads consent of deceased—Not impossible deceased asked to be killed—No motive proved for deliberately killing—Benefit of exception 5 to sec. 300—Conviction under earlier part of sec. 304.] Where a person kills another who is more than eighteen years of age, and pleads it was done with the consent of the deceased, in circumstances in which the Court can hold that it is not impossible that the deceased feeling desperate and depressed asked to be killed, and no motive is proved against the accused for deliberately killing the deceased of his own free will, he is entitled to the benefit of exception 5 to section 300 of the Indian Penal Code, and must be convicted only of culpable homicide not amounting to murder under the earlier part of section 304 of the same Code. <i>Kanaga Kosavan, In re</i> (1931) I.L.R. 54 Mad. 504	
... SEC. 395—Robbery—Trial by jury—Proper direction—Violence used in course of committing theft or for the purpose of committing theft—Omission of—Whether would make charge bad and amount to misdirection—Charge of dacoity—Jury return verdict of "guilty" against less than five—Duty of Court.] In explaining to a jury the constituent elements of the offence of robbery, it is essential that the jury should be directed that theft only becomes robbery, when it is shown that, in the course of committing theft and for the purpose of committing theft, violence is used, and the omission to point out that very important essential would make the charge bad on that point and would amount to a misdirection. Where, at a Sessions trial, the jury have before them a charge of dacoity against named persons, and they return a verdict of "guilty" against some of them and a verdict of "not guilty" against the others, and the number of those found "guilty" falls below five, the jury should be told that they must have due regard to the fact that	

they have acquitted a certain number of persons reducing the number to below five and that before convicting any number short of five they must be satisfied that the accused found "guilty" were acting conjointly with persons not charged in the case and in number sufficient to make at least five including the accused found "guilty".

Raman Koravan, In re ... (1931) I.L.R. 54 Mad. 568

PENAL CODE (INDIAN) (XIV OF 1860), SEC. 447—Criminal trespass—Person in possession of property absent—Whether offence committed—Ploughing leased lands in absence of lessee, lessor coming to spot to prevent—Conviction under sec. 447—Validity of.] The offence of criminal trespass under sec. 447 of the Indian Penal Code may be committed even when the person in possession of the property is absent provided the entering into or upon the property is done with intent to do any of the acts mentioned in the section. Where a person entered upon a field, that had been leased during the absence of the lessee and ploughed it, and only the lessor came to the spot on hearing of it to prevent the commission of such acts; held that that was not enough to exonerate that person from intention to annoy the lessee and that such a person could properly be convicted under section 447.

Venkatesu v. Kesamma ... (1931) I.L.R. 54 Mad. 515

PLEADINGS—Person claiming to be principal sues another as agent for accounts—Other denies relationship of principal and agent—Trial judge disbelieves both parties and holds relationship was one of partnership and orders accounts—Legality of judgment—Prayer in partnership suit for account without asking for dissolution—Granting of.] Where a person claiming to be a principal sued another as his agent for accounts, and that other denied the relationship of principal and agent and added that the plaintiff was given *ex gratia* a half-share in the business which was solely that of the defendant and the trial judge disbelieving both the parties held that the relationship between them was one of partnership and directed an account to be taken, *Held*, that in the circumstances a decree on a partnership basis should not have been given, and certainly not without a prior amendment of the plaint; *Ma Shwe Mya v. Maung Mo Hwang*, (1921) I.L.R. 48 Cal. 832 (P.C.), and *Ananda Chandra Chuckerbutty v. Braja Lal Singh*, (1922) I.L.R. 50 Cal. 292, followed. *Held* further, that, if a partner asks for an account without asking for a dissolution, the Court must be satisfied that there are special grounds for granting the prayer, which grounds must be alleged by the plaintiff, and the defendant must have an opportunity of showing cause against. *Kassa Mal v. Gopi*, (1886) I.L.R. 9 All. 120, followed; *Karri Venkata Reddi v. Kollu Narasayya*, (1908) I.L.R. 32 Mad. 76, and *Damodara Shanabhaga v. Subraya Pai*, (1917) 33 M.L.J. 509, referred to.

Krishnaswami Naidu v. Jayalakshmi Ammal ... (1931) I.L.R. 54 Mad. 671

POLICE ACT (V OF 1861), SEC. 30 (2)—Promulgation of order under, stating licence should be obtained before collecting assemblies, etc.—Whether execution of the law under sec. 30—Person directing procession after promulgation and with knowledge of it—Liability to conviction under sec. 143, Indian Penal Code (Act XIV of 1860)—Resistance to execution of the law different from refusal to comply with order to disperse—Refusal to comply with order to disperse—Whether necessary for conviction under sec. 143.] The promulgation of an order by the Police, under section 30 (2) of the Police Act (V of 1861), that persons collecting assemblies or directing or promoting processions for certain purposes within their contemplation are to apply to the police authorities for a licence before so doing is the execution of the law as laid down in section 30 of the Act; and any person who after the promulgation of the order and with knowledge of it directs such a procession will be guilty of resisting the execution of the law and therefore liable to conviction under section 143 of the Indian Penal Code. Resistance to execution of the law is different from refusal to comply with an order to disperse. A conviction under section 143 of the Penal Code does not require a refusal to comply with an order to disperse. *King-Emperor v. Abdul Hamid*, (1922) I.L.R. 2 Pat. 184, referred to.

Public Prosecutor v. Satyanarayana ... (1931) I.L.R. 54 Mad. 1025

POSSESSION—Presumption of, in favour of person holding title—where :—See EJECTMENT SUIT ... 622

PREAMBLE TO AN ACT—Scope of :—See CITY TENANTS' PROTECTION ACT (MADRAS), (III of 1922) ... 845

PRESCRIPTION—Irrigation rights—Long user—Implied grant—Construction of chapakattus in channel—Whether right claimed sufficiently definite.] The appellants were inamdars of cultivated lands abutting on an irrigation channel which served a village of the respondent's zamindari. About 1864, the zamindar had made in the irrigation system an alteration which could have been made only with the inamdars' consent, and thereupon they had constructed a smaller channel communicating with the zamindar's channel at a point at some distance from their land. The water flowed naturally through the inamdars' channel so as to water their first crop. For a long period, probably ever since the above alterations, the inamdars during the drier season constructed a *chapakattu* (or temporary dam) in the zamindar's channel so as to raise the level of the water therein and cause it to flow down their channel; by this means they raised a second crop. In 1917, the zamindar, while admitting that the inamdars were entitled to use the natural flow of the water for their first crops, claimed a declaration that they were not entitled to use the water for their second crops by the means above stated. The appellants claimed the right to do so either by an agreement made when their channel was constructed, or by long user; whether there had been any agreement had not been investigated in the suit. *Held*, that the long continued user must be ascribed to a lawful origin either by a grant actually made when the alterations took place or to be implied from the circumstances and relations then existing. The appellants consequently had a right to take from the zamindar's channel such water as was reasonably required for a second crop of the character customary on their land, and for that purpose to construct, whenever necessary, a *chapakattu* of the required length. The right was sufficiently definite to be acquired by prescription. Even if the Indian Easements Act would have applied otherwise, its application was excluded by section 2 (c) thereof. *Beeston v. Weate*, (1856) 5 El. & Bl. 986; 119 E.R. 748 and *Pollbach Colliery Co. v. Woodman* [1915] A.C. 634, 646, applied.

Pakala Venkanna v. Raja of Bobbili ... (1931) I.L.R. 54 Mad. (P.C.) 427

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), SEC. 7—Insolvent father—Suit by sons for partition of joint family properties—Pending—Application by Official Assignee for declaration that debts of insolvent father binding on sons to extent of their shares in joint family property—Jurisdiction of Insolvency Court acting under sec. 7—Power to direct sale—General rule of limitation for enforcement of sons' liability.] A Court acting under section 7 of the Presidency Towns Insolvency Act (III of 1909) has jurisdiction on the application of the Official Assignee to grant a declaration that the debts of an insolvent father are binding upon the sons to the extent of their shares in the joint family property, even though a suit filed by the sons for partition of the property is pending in a civil Court at the time such an application is made. *Obiter*: After such a declaration is made, the Court has the consequential power to direct a sale of the sons' shares in the property. Generally speaking, and excluding such an exceptional case as the post-partition renewal of a debt by the father, the liability of the sons' share is enforceable in proceedings in insolvency, so long as the father himself may be proceeded against, irrespective of the circumstance that the debt would be time-barred in an ordinary Court. *Morley v. White. In re White*, (1872) 8 Ch. App. 214, followed. *Balusami Ayyar, In re*, (1928) I.L.R. 51 Mad. 417 (F.B.); *Sat Narain v. Behari Lal*, (1924) I.L.R. 6 Lah. 1 (P.O.); *Official Assignee, Madras v. Narasimha Mudaliar*, (1929) I.L.R. 52 Mad. 717 (F.B.); and *Seetharama Chettiar v. Official Receiver, Tanjore*, (1926) I.L.R. 49 Mad. 849 (F.B.); referred to.

Ramachandra Ayyar v. Official Assignee of Madras ... (1931) I.L.R. 54 Mad. 789

SEC. 58 (2)—Property—Title of insolvent to, disputed—Insolvency Court—Power of, to authorize Official Assignee to take charge of same pending dispute.] In a

case where the title of the insolvent to certain property is disputed, the Insolvency Court can, under section 58 (2) of the Presidency Towns Insolvency Act (III of 1909), authorize the Official Assignee to take charge of that property pending settlement of the dispute. The question of jurisdiction must no doubt be investigated, but the Court is not bound to stay its hand upon the mere assertion of a paramount title.

Ramaswami Chettiar v. Official Assignees of Madras ... (1931) I.L.R. 54

Mad. 1008

PRESUMPTION OF POSSESSION IN FAVOUR OF PERSON HOLDING TITLE—When:—See EJECTMENT SUIT 622

PROVINCIAL INSOLVENCY ACT (V OF 1920), ss. 4, 53, 75—*District Munsif's order annulling sale under section 53—Second appeal against—Maintainability of—Second appeal—Decision in—Leave to appeal against—Grant of—Reasons for decision—Record of, necessary.* No second appeal lies against an order made by a District Munsif annulling a sale under section 53 of the Provincial Insolvency Act. The words "whether of title or priority or of any nature whatsoever" and especially the words "of any nature whatsoever" in section 4 of the Act are plainly and in themselves incompatible with the *ejusdem generis* rule of interpretation. The words "subject to the provisions of this Act" in section 4 of the Act mean "excluding questions otherwise provided for by the provisions of this Act." *Per REILLY J.*—When leave to appeal against a second appellate decision is granted, the reasons which led to the decision should always be recorded.

Alagirisubba Naik v. Official Receiver of Tinnevely ... (1931) I.L.R. 54

Mad. 989

SEC. 28—*After-acquired property of insolvent—Emeralds entrusted to insolvent for sale in the ordinary course of his business—Agreement with defendant to sell for profit—Suit by undischarged insolvent for recovery of price and share of profits—Claim for profits negatived—Suit for emeralds or their value, if maintainable by undischarged insolvent—Property, reputed ownership of.* Where the plaintiff, an undischarged insolvent, who had obtained some emeralds for sale from their owner in the ordinary course of his business and had given them to the defendant for sale, sued the latter for the price of the emeralds and a half share of the profits said to be realized by an alleged sale of the same by the defendant, or, if there was no sale, for the recovery of the emeralds or their value, the defendant pleaded, *inter alia*, that the suit was not maintainable by the plaintiff, as he was an undischarged insolvent, and the lower Courts had negatived the claim for profits as no sale had been made. *Held*, that, in respect of the emeralds, the plaintiff was a bailee for sale, and the property in them did not vest in the Official Receiver in insolvency under section 28 of the Provincial Insolvency Act (V of 1920); nor were they the reputed property of the insolvent under the section; and that, consequently, the plaintiff, though he was an undischarged insolvent, was competent to sue for the recovery of the emeralds or their value from the defendant. The question as to the competency of an undischarged insolvent to sue to recover his after-acquired property, raised in the reference to the Full Bench, was not answered by their Lordships, as it did not arise for decision in this case.

Moonrumugamkondan Asari v. Chockalingam Asari ... (1931) I.L.R.

54 Mad. (F.B.) 5

SEC. 38—*Composition scheme—Court's approval of—Matters to be considered—Assent of requisite majority of creditors—Opposing creditor's failure to accept offer made to him—Accounts—Insolvent's failure to maintain proper—Effect.* A composition scheme under which one of the creditors was to take over the whole of the insolvent's property on condition of his paying 6 annas in the rupee to all the creditors was approved by the District Judge on three grounds:—(1) that the requisite majority of the creditors had approved of the scheme; (2) that it was represented for those creditors that the Official Receiver's

administration of the estate of the insolvent under the Act would lead to considerable delay and expense; and (3) that the opposing creditor did not accept an offer of the same terms made to him in the course of the proceedings. It appeared, however, that, in approving of the scheme, the District Judge (1) had overlooked the fact that the Official Receiver had reported against the scheme and had represented that it was not beneficial to the creditors, (2) had not himself considered whether the scheme was a fair scheme, (3) had not commented upon the fact that the insolvent's conduct in connection with the insolvency had been bad, (4) had not paid due attention to the fact that the creditor who agreed to take over the insolvent's assets on the terms proposed was a very near relation of the insolvent, (5) had ignored the probability that the scheme was a device to enable the insolvent to buy back his own assets at a profitable figure and to make a profit out of his insolvency, and (6) had not himself considered the question of what profit the proposed scheme would be to the creditors. *Held*, that the scheme was not one which should have been approved. Under section 38 of the Provincial Insolvency Act the assent of the requisite majority of the creditors is not by itself a sufficient reason for approving a scheme. Even if there is that assent, the Court must exercise its judicial discretion before approving the scheme—that is a discretion founded on sufficient reasons after considering all aspects of the case and ascertaining the facts as far as possible. The opposing creditor's failure to accept the order made to him is not by itself a ground for approving of the scheme. On a question as to whether a scheme should be approved, the insolvent's failure to maintain proper accounts is one of the most serious matters to be taken into consideration.

Servagan Chettiar v. Murugappa Chettiar ... (1931) I.L.R. 54 Mad. 823

PROVINCIAL INSOLVENCY ACT (V OF 1920), sec. 53—*Amending Act (X of 1930), sec. 6—Effect of—Application to set aside transfer by insolvent—Transfer more than two years from date of adjudication but within two years of date of petition for adjudication—Amending Act (X of 1930), if retrospective.* A transfer of property of the description given in section 53 of the Provincial Insolvency Act (V of 1920), made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication, can be annulled by the Court under section 53 of the Act at the instance of the Official Receiver. By reason of the amendment of section 53 by Act X of 1930, by the insertion of the words "on a petition presented" after the words "adjudged insolvent" in that section, the doubt as to the construction of the section on this matter has been set at rest by the legislature. The amendment made by Act X of 1930 has a retrospective effect and will apply to a pending proceeding. *Veerappa Chettiar v. Subramania Ayyar*, (1929) I.L.R. 52 Mad. 123 (F.B.), applied.

Pichamma v. Official Receiver, Cuddapah ... (1931) I.L.R. 54 Mad. (F.B.) 12

RECEIVER—*At instance of person with equitable mortgage by deposit of title deeds—Security proving insufficient—Right of mortgagee to moneys realized by receiver—Preferential right as against ordinary creditors of mortgagor.* Where a receiver is appointed by Court in respect of certain properties at the instance of a person in whose favour an equitable mortgage of those properties had been created by deposit of title-deeds, the equitable mortgagee, in the event of the security proving insufficient, will have, in regard to any moneys realized by the receiver from the properties, a preferential right as against the ordinary creditors of the mortgagor, and will be entitled to the payment of such moneys or so much thereof as is sufficient to discharge the mortgage.

Maharajah of Pittapuram v. Gokuldoss Goverdhandoss ... (1931) I.L.R. 54 Mad. 565

RECEIVERS—Foreign and domestic:—See COURTS 727

REGISTRATION—*Mortgage by deposit of documents of title—Memorandum signed by mortgagor—Admissibility in evidence—Indian Registration Act (XVI of 1908), ss. 17, 49.* A memorandum signed by the mortgagor in relation to a mortgage by deposit of documents of title may be a document which the Indian Registration Act, 1908, section 17, requires to be registered, even

though it does not embody all the particulars of the transaction, but registration is not so required unless the memorandum on its face embodies such terms, and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties. The plaintiff verbally agreed at Madras to make a further advance to the defendants, making Rs. 60,000 in all, upon the deposit of certain documents of title. The defendants' agent signed and handed to the plaintiff a memorandum stating "As agreed upon in person I have delivered to you the undermentioned documents as security," a list of the documents following, also a promissory note for Rs. 60,000. After examination of the documents the agreed amount was handed over. *Held*, that the memorandum was not a document which required registration, even if the no written agreement, the memorandum as well as oral evidence was admissible in evidence to prove the intent to create a security by deposit of the documents named. *Subrahmonian v. Lutchman*, (1922) I.L.R. 1 Bang. 66; (1922) I.L.R. 50 Calc. 338; L.R. 50 I.A. 77, distinguished. Decree of the High Court affirmed.

Sundarachariar v. Narayana Ayyar ... (1931) I.L.R. 54 Mad. (P.C.) 257

REGISTRATION—Deed—Registration of, in a book not appropriate to the Deed—Effect:—See HINDU WILL ... 440

REGISTRATION ACT (INDIAN) (XVI OF 1908), ss. 17 AND 49—*Unregistered partition list evidencing partition—Admissibility of, to prove division of particular properties or to prove division in status—Admissibility of conduct to prove division in status—Hindu Law—Custom—Ilatom relationship, incidents of—Necessity for strict proof—Extent of legal rights flowing from ilatom relationship, not matter of law, but matter of proof of custom.* A document between two persons containing lists of properties that fell to the share of each on a partition, written in duplicate, signed by each and attested and intended to be the evidence of the partition, must be regarded as the formal and operative deed of partition between them; and, unless registered as required by section 17 of Indian Registration Act, it will be inadmissible in evidence under section 49 of the Act, to prove what properties were taken by each on partition; but it is admissible to prove a division in status. It is not the less a partition deed because its contents were previously discussed and decided upon and then alone put into writing. A division in status may also be proved by other evidence, e.g., the conduct of parties. The legal incidents of an *ilatom* relation; they have to be proved in each case by evidence. *Held*, that an *ilatom* relationship to a father-in-law's brother was very unusual and that on the evidence in the case the relationship was not established.

Subba Rao v. Mahalakshamma ... (1931) I.L.R. 54 Mad. 27

possession of lands—Sale of lands belonging to a Hindu minor son by his father and guardian—Sale deed including a small item of father's property with a view to register it in a particular office—If fraud on registration law—Sale, if void or voidable—Suit for possession by son, more than three years after majority but within twelve years of sale, whether barred—Indian Limitation Act (IX of 1908), art. 44. To establish fraud on the registration law, there must be a collusion between the parties to the document to practise a fraud upon the registering officer; and as a test of whether the parties had an intention to practise such a fraud, it has primarily to be considered whether there was a property that could be conveyed by the executant, or as to which a genuine belief existed that he could convey it. Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee, though it does not follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention. The facts that the property is small or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud. Where,

therefore, the father and guardian of a Hindu minor son conveyed certain immovable properties belonging solely to the minor, and included in the sale deed a small item of property belonging to himself with a view to register the document in the registration office within whose registration limits such latter property was situate, and registered it in such office, and a suit was instituted by the son to recover the property, more than years after his attaining majority but within twelve years of the sale, and it was found that there was an intention to convey to the vendee the title to the small item under the sale deed; *Held*, that there was no fraud on the registration law under section 28 of the Registration Act, and the registration of the sale deed was not invalid; that the sale was not void but only voidable and should be set aside before possession could be recovered; and that the suit was barred by limitation under article 44 of the Limitation Act.

Appa Rao v. Venkatarama Rao ... (1931) I.L.R. 54 Mad. 852

REJECTION OF PLAINT—Partial:—See CIVIL PROCEDURE, CODE OF (ACT V OF 1908), O. VII, R. 11 ... 416

RESTITUTION OF CONJUGAL RIGHTS—Suit for—Order under sec. 488 of the Code of Criminal Procedure (V of 1898) by consent for payment of maintenance to wife—Whether bar to suit. An order under section 488 of the Code of Criminal Procedure (V of 1898) directing the payment of a sum of money to the wife by way of maintenance, even though made by consent of parties, is not a bar to a suit which the husband may subsequently file for restitution of conjugal rights.

Guruvappa Chetty v. Thayarammal ... (1931) I.L.R. 54 Mad. 558

RYOTWARI VILLAGE—Government river—Customary supply of water for irrigating lands in such a village by channels drawn from—Interference of the right by ryots of another ryotwari village—If actionable by ryots of former village without proof of actual damage—Rights of ryots of a ryotwari village against Government for the customary supply of water for irrigating their lands—Sub-surface water of a Government river—Rights of ryots in—Distinction between English and Indian Law as regards underground streams. Where the ryots of wet lands in two Government ryotwari villages, situated on opposite sides of a Government river, were drawing their customary supply of water for irrigation from channels which were taken off at particular points in the river-bed, and the ryots of the village, the head of whose channel was the lower one of the two, moved the head nearer to the head of the other channel, so as to interfere with the natural flow of water to that channel, and the ryots of the other village sued the interfering ryots for a declaration of their rights and for an injunction restraining them from such action, *held*, (1) that a ryot in a ryotwari village acquires a legal right to the water when it reaches his customary channel for the irrigation of his lands, and not merely when the water has reached his fields; (2) that, in the circumstances of the case, the channel of the plaintiffs, taking off sub-surface water from a definite point in the river-bed and leaving the bed at a point lower down the river, was not so undefined as not to give rise to a cause of action on interference by another ryot; (3) that the principles of the English Law regarding underground streams (defined or undefined), do not apply to irrigation channels taking sub-surface water in India, as the conditions in England are different from those in India; consequently, even though a river-channel, which is the customary source of irrigation for a ryot's wet land recognised by the Government, has its supply of water from the sub-surface water of a river-bed, still it is water in which, under the law of this Presidency, there can be a legal right in favour of the ryot; and (4) that, in the case of an interference with such a channel supplied with sub-surface water, the ryot whose rights to such supply are interfered by another ryot, has a cause of action against the latter, apart from proof of actual damage, and a right to an injunction, if he establishes probable prospective damage by such interference. Where the sub-surface water of a river-bed is the Government source of supply for irrigation channels of certain ryotwari wet lands, the Government cannot shelve its duty of seeing to the equitable

distribution of this supply between the ryotwari tenants under each channel source; and, in the case of interference by one ryot with the sub-surface supply to the customary channel of another ryot, the Government is bound to see that the channel of the latter is not interfered with by the former, unless and until the Government supply some other equally efficient source of irrigation for the latter.

Basavana Gowd v. Narayana Reddi ... (1931) I.L.R. 54 Mad. 793

SCHEDULED DISTRICTS ACT (XIV OF 1874), SEC. 6:—See ESTATES LAND ACT (MADRAS), SEC. 191 ... 92

SPECIFIC RELIEF ACT (I OF 1877), SEC. 41:—See CONTRACT ACT (INDIAN) (IX OF 1872), SEC. 65 ... 112

STATUTE—Retrospective operation of:—See LOCAL BOARDS ACT (MADRAS) (XIV OF 1920) ... 627

Retrospective operation of:—*See* **PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 53** ... 12

Interpretation of—*Ejusdem generis* rule—Applicability of:—*See* **PROVINCIAL INSOLVENCY ACT (V OF 1920), ss. 4, 53, 75** ... 989

Preamble to—Scope of:—*See* **CITY TENANTS' PROTECTION ACT (MADRAS), (III OF 1922)** ... 845

SUCCESSION ACT (INDIAN) (XXXIX OF 1925), ss. 234, 244—Grant of Letters of Administration to the legal guardian of a sole minor executor:—*See* WILL ... 266

TRAMWAYS ACT (INDIAN) (XI OF 1886)—Duty to obtain licence for casting metal, etc.:—*See* CITY MUNICIPAL ACT (MADRAS) (IV OF 1910), SEC. 287 ... 364

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 52—*Lis pendens*—Suit by a Hindu widow for maintenance—Plaint, praying for a decree charging maintenance on specific immovable property mentioned therein—Decree creating the charge on property specified—Sale of such property in execution of decree for a debt binding on the joint Hindu family pending the suit for maintenance—*Lis pendens*, if applicable to sales in Court auction—Date from which *lis pendens* operates, date of plaint or date of decree in suit for maintenance—Code of Civil Procedure (Act V of 1908), O. XXI., r. 27 (1) (b) and 27 (2).] Section 52 of the Transfer of Property Act, 1882, applies to suits for maintenance in which a charge was claimed on certain immovable properties specified in the plaint, and a decree was passed creating a charge on such property. The principle of the doctrine of *lis pendens* applies to sales in Court auction. A maintenance decree, creating a charge on specific immovable properties mentioned in the plaint, operates to give a charge to the plaintiff from the date of the plaint and not merely from the date of the decree. An auction-purchaser of certain items of joint family property in execution of a money decree for a debt binding on a joint Hindu family, during the pendency of a suit for maintenance claiming a charge on such items, has no preferential right to the items purchased by him, over a subsequent auction-purchaser of the same items in execution of the maintenance decree in which a charge was given over such property. *Per OGGERA J.* at the original hearing:—Where an appellate Court, acting under Order XXI, rule 27 (1) (b) of the Civil Procedure Code, 1908, does not require a document to be produced before it, it must be satisfied that there is some other substantial ground to allow such document to be produced; and where it has not recorded reasons for its admission under rule 27 (2) of the same order, the admission is illegal. *Kaki Mutyalu v. Siva Raghavaya* (1915) 3 L.W. 163, followed.

Seetharamanujacharyulu v. Venkatasubdamma ... (1931) I.L.R. 54 Mad. 132

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 54—Sale of lands partly for money consideration and partly for forbearance to take proceedings, whether a sale—Transfer of Property (Amendment) Act (XXVII of 1926)—Sec. 2—Attestation, meaning of—Mortgage by minor's guardian, not properly attested, rights on—Charge, whether allowable—No plea of invalidity of mortgage or of the personal covenant given by guardian—Benefit retained by minor—Form of decree.] A sale of lands, partly for a sum of money and partly for some other consideration, such as, forbearance to take proceedings, is not a "sale" for a "price" within the meaning of section 54 of the Transfer of Property Act and hence there can be no vendor's lien in such a case. If (a) the attestors to a mortgage did not see the executant sign the deed, or the executant did not acknowledge to them that she had signed it and (b) the attestors did not sign the deed in the presence of the executant, the deed is not "attested" within the meaning of section 2 of the Transfer of Property (Amendment) Act (XXVII of 1926). If a guardian of a minor executes in favour of another, for a consideration which is eventually retained by the minor, a deed purporting to be a mortgage containing a covenant to pay out of the other assets of the minor any balance that might remain unrealized from the sale of the property thus mortgaged, and the deed turns out to be unenforceable as a mortgage for want of proper attestation, a decree can be given for the amount due to the other against the personal assets of the minor, even though there was no prayer to that effect in the plaint on the principle that the minor cannot approbate and reprobate the transaction and thus be allowed to retain the consideration and at the same time deny his liability to be bound by the covenant, especially in the absence of a defence repudiating the binding nature of the covenant.

Zamindar of Polavaram v. Maharaja of Pittapuram ... (1931) I.L.R. 54 Mad. 163

SEC. 81—*Marshalling*—Contribution—Purchaser in execution of money decree against mortgagor of plot not mortgaged to *puisne* mortgagees—Payment by him of the decree amount of first mortgagee—Purchaser of plot mortgaged to both mortgagees in execution of decree on the second mortgage—Rights of former purchaser to contribution from the latter—Right of latter to *marshall* as against the former.] Where two plots of land (A and B) were mortgaged to one person, and plot A alone was subsequently mortgaged to another, a purchaser of plot B in execution of a money-decree against the mortgagor, who paid off the full amount of the decree obtained by the first mortgagee on his mortgage, is entitled to contribution rateably from plot A in the hands of the *puisne* mortgagee who had also purchased it in execution of his decree on his mortgage; and the latter is not entitled to enforce his right of *marshalling* on plot B as against the former, under section 81 of the Transfer of the Property Act.

Unnamalai Ammal v. Gopalaswami Chetti ... (1931) I.L.R. 54 Mad. 59

TRANSFER OF PROPERTY AMENDMENT ACT (XXVII OF 1926), SEC. 2—Attestation—Meaning of:—*See* TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 54 ... 163

UNDISCHARGED INSOLVENT—Suit by—Maintainability of:—*See* PROVINCIAL INSOLVENCY ACT (V OF 1920), SEC. 28 ...

VENDOR AND PURCHASER—Earnest money—Charge on property contracted to be sold in respect of—Purchaser's right to—Refusal by him to complete purchase—Taking possession of property by him from mortgagee thereof instead of from vendor—Effect—Subrogation—Mortgage on property contracted to be sold—Discharge of, by purchaser not completing purchase—Subrogation to rights of mortgagee—Purchaser not entitled to—Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 8—Preliminary decree in redemption suit—Payment made out of Court after, if can be recognized in passing of final decree.] A purchaser paying earnest money and then refusing to complete the purchase does not obtain a charge on the property for the earnest money. *Semle*: the taking of possession by the purchaser of the property contracted to be sold from the mortgagee thereof instead of from the vendors is a breach of the original contract to sell which would by itself be sufficient to

destroy any charge on the property which the purchaser might get by payment of the earnest money. A purchaser of property subject to a mortgage who does not complete the purchase and acquire title as owner of the property does not, by reason of his having paid off the mortgage, become entitled to be subrogated to his rights. A payment of the mortgage money out of Court made after the passing of the preliminary decree in a suit brought on foot of the mortgage cannot be pleaded against the passing of the final decree in the suit.

Adari Sanyasi v. Nookalamma ... (1931) I.L.R. 54 Mad. 708

WILL—*Caveat*—Nature of interest entitling a person to lodge—Person setting up title adverse to testator—Whether can be said to have an interest in the estate of deceased.] The interest which entitles a person to lodge a caveat in an application for the probate of a will must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate. A person, who alleges that jewels, which the testator has disposed of by his will are her own jewels, and thus sets up a title adverse to that of the testator, cannot be said to have an interest in the estate of the deceased.

Komalangi Ammal v. Sowbhagiammal ... (1931) I.L.R. 54 Mad. 24

—*Executor by implication*—Appointment of—Letters of Administration—Minor-executor—Guardian of—Grant to—Conditions—Indian Succession Act (XXXIX of 1925), ss. 234 and 244—Applicability of.] A provision in a will appointing A to discharge the testator's debts makes A an executor by implication. Section 234 of the Indian Succession Act (XXXIX of 1925) does not apply to a case where there is an executor (whether express or implied) who has not refused to act. Section 244 of the Act is the only section enabling the Court to grant letters of administration to the legal guardian of a minor who is the sole executor, but, before such letters can be granted, the legal guardian must apply to the Court to be appointed the minor's guardian for the purpose of getting the letters of administration; otherwise no letters can be granted.

Viramma v. Seshamma ... (1931) I.L.R. 54 Mad. 266.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Sundaram Chetti and Mr. Justice Pakenham Walsh.

IN RE PARAMESWARA PATTAR (PLAINTIFF) APPELLANT.*

1930,
August 4.

Court-fees Act (VII of 1870), sec. 17—Distinct subjects, meaning of—Suit for possession of lands and past mesne profits—Court-fee payable thereon—Court-fee, whether payable on the aggregate value of both reliefs or on each relief separately.

In a suit for possession of immovable property and past mesne profits, court-fee is payable on the aggregate value of both the reliefs.

The claims for possession of land and for mesne profits are not "distinct subjects" under section 17 of the Court-fees Act.

Kishori Lal Roy v. Sharut Chunder Mozumdar, (1882) I.L.R. 8 Cal. 593 (F.B.), followed.

Reference by the Master (Taxing Officer) of the High Court under section 5 of the Court-fees Act as to the proper amount of court-fee payable on the memorandum of appeal in the appeal sought to be preferred in the High Court against the decree of the Court of the Subordinate Judge of South Malabar in Original Suit No. 33 of 1925.

K. Kutti Krishna Menon (with him *V. K. Mudhavan Nayar*) for appellant.—The question is whether Court-fee payable for a plaint or a memorandum of appeal in a suit for possession of immovable property and mesne profits is on the aggregate value of

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both the claims, or on the value of each of the claims separately. Though the two claims may form different causes of action, yet they are not different subjects within the meaning of section 17 of the Court-fees Act. The High Courts of Calcutta, Patna and Allahabad hold that the court-fee payable in such a case is on the aggregate value of both the claims. See *Kishori Lal Roy v. Sharut Chunder Mozumdar* (1), *Nauratan Lal v. Wilford Joseph Stephenson* (2) and *Reference under the Court-fees Act, 1870, s. 5.* (3)

In this High Court also, the course of practice has been to pay court-fee on the aggregate value of both the claims. In a suit for specific performance and possession of lands, court-fee is paid only on the aggregate value of the claims, though they are different causes of action. See *Neelakandhan v. Ananthakrishna Ayyar* (4). The Court-fees Act being a Taxing Act, it should be construed, in a case of ambiguity, in favour of the subject.

Though the cause of action for possession may be different from that for mesne profits, yet possession and mesne profits are so connected as to form one subject of claim.

The OPINION of the Court was delivered by

SUNDARAM
CHETTI J.

SUNDARAM CHETTI J.—In this reference, the point arising for determination is whether, in a suit for possession of immovable property and mesne profits, court-fee should be paid on the aggregate value of both the reliefs, or on the value of each of the reliefs separately. The question turns upon the applicability of section 17 of the Court-fees Act to this case. That section says that, where a suit embraces two or more *distinct subjects*, court-fee has to be paid separately on the value of each subject, and not on the aggregate value of all the reliefs.

The word "subjects" in this section is somewhat obscure in its meaning, and has been held in some decisions to be not capable of precise definition. Ordinarily, the right or title to the land is the basis for the

(1) (1882) I.L.R. 8 Calo. 593.
(3) (1894) I.L.R. 16 All. 401.

(2) (1918) 4 Pat. L.J. 195.
(4) (1906) I.L.R. 30 Mad. 61.

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claim for possession of the land, as also for mesne profits, and it cannot therefore be deemed that the two claims are so disconnected, without any inter-relation, as to form *distinct subjects*, under section 17 of the aforesaid Act.

The Full Bench decision of the Calcutta High Court in *Kishori Lal Roy v. Sharut Chunder Mozumdar* (1) is a clear authority for holding that the claim for possession and the claim for mesne profits should be taken as one entire claim for the computation of the court-fee and not as distinct subjects. The question has been viewed by GARTH C.J. in several aspects, and due importance has been attached to the uniform practice prevalent in the whole country in respect of this matter, which a Court of Justice ought to be slow in changing to the prejudice of the suitor, unless it sees clear and weighty reasons for so doing. With this view, we are in agreement. This decision has been followed by the Allahabad High Court in *Reference under the Court-fees Act, 1870, s. 5.* (2)

There seems to be no decision of this High Court, directly bearing on the present question. In *Ponnammal v. Ramamirda Aiyar* (3), the Full Bench has held that the claim for possession and the claim for mesne profits are separate causes of action, though they may arise out of one act of dispossession. But that decision is for the purpose of Order II, rules 2 and 4 of the Code of Civil Procedure. The question remains whether separate causes of action would invariably be the criterion for treating the claims based on them as distinct subjects, under section 17 of the Court-fees Act. In the Full Bench Case, *Kishori Lal Roy v. Sharut Chunder Mozumdar* (1), this does not appear to have been taken as the deciding test. In a case dealt with by the Patna High Court, it

(1) (1882) I.L.R. 8 Calo. 593.

(2) (1894) I.L.R. 16 All. 401.

(3) (1914) I.L.R. 38 Mad. 829.

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is stated that two views are possible as to the meaning of the word "subjects" in this section. One is that the word "subject" relates back to section 7 where the various subjects of suits are put under different heads. The other view is that the word "subject" means cause of action; see *Nauratan Lal v. Wilford Joseph Stephenson*(1). But, however, it was held, on the strength of the Full Bench decision in *Kishori Lal Roy v. Sharut Chundar Mozumdar*(2) that the long-continued practice should not be disturbed, and that court-fee may be paid on the aggregate value of the reliefs, viz., claim for possession and claim for mesne profits. The preponderance of authority is in favour of not treating these two claims as distinct subjects under section 17 of the Court-fees Act.

There being no definition of the word "subject" in the Act, we think, we need not attempt to define it in the present case, and should only be guided by the long course of practice.

We think that any doubt or obscurity as to the precise meaning of the "subject" in this section should be cleared by the Legislature in due course.

We answer this reference by stating that, in a suit for possession of immovable property and past mesne profits, court-fee is payable on the aggregate value of both the reliefs.

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(1) (1918) 4 Pat. L.J. 195.

(2) (1882) I.L.R. 8 Calc. 593.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice,
Mr. Justice Sundaram Chetti and Mr. Justice Pakenham Walsh.

MOONRUMUGAMKONDAN ASARI (DEPENDANT),
APPELLANT,

1930,
July 30.

v.

CHOCKALINGAM ASARI (PLAINTIFF), RESPONDENT. *

Provincial Insolvency Act (V of 1920), sec. 28—After-acquired property of insolvent—Emeralds entrusted to insolvent for sale in the ordinary course of his business—Agreement with defendant to sell for profit—Suit by undischarged insolvent for recovery of price and share of profits—Claim for profits negatived—Suit for emeralds or their value, if maintainable by undischarged insolvent—Property, reputed ownership of.

Where the plaintiff, an undischarged insolvent, who had obtained some emeralds for sale from their owner in the ordinary course of his business and had given them to the defendant for sale, sued the latter for the price of the emeralds and a half share of the profits said to be realized by an alleged sale of the same by the defendant, or, if there was no sale, for the recovery of the emeralds or their value, the defendant pleaded, *inter alia*, that the suit was not maintainable by the plaintiff, as he was an undischarged insolvent, and the lower Courts had negatived the claim for profits as no sale had been made.

Held, that, in respect of the emeralds, the plaintiff was a bailee for sale, and the property in them did not vest in the Official Receiver in insolvency under section 28 of the Provincial Insolvency Act (V of 1920); nor were they the reputed property of the insolvent under the section;

and that, consequently, the plaintiff, though he was an undischarged insolvent, was competent to sue for the recovery of the emeralds or their value from the defendant.

The question as to the competency of an undischarged insolvent to sue to recover his after-acquired property, raised in

* Second Appeal No. 1481 of 1927.

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the Reference to the Full Bench, was not answered by their Lordships, as it did not arise for decision in this case.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Appeal Suit No. 171 of 1926 preferred against the decree of the Court of the District Munsif of Tinnevely in Original Suit No. 390 of 1924.

The material facts appear from the judgment. The second appeal first came on for hearing before ANANTAKRISHNA AYYAR J. who directed the case to be placed before the Chief Justice for orders under rule 6 of the Appellate Side Rules. An order was thereupon made directing that the case be heard by a Full Bench.

G. T. Ramanujachari for appellant.—The plaintiff being an undischarged insolvent, the present suit is not maintainable by him: see *Kala Chand Banerjee v. Jagannath Marwari* (1). Section 28 (4) of the Provincial Insolvency Act, 1920, vests the property (including after-acquired property) in the Official Receiver. The receiver alone can sue to realize the assets. The decision in *Ramanatha Iyer v. Nagendra Iyer* (2) is erroneous, as it is opposed to the decision of the Privy Council in the above case. Under the Indian Act after-acquired property vests in the Official Receiver without his intervention; hence, the insolvent cannot sue in respect of such property: see *Ma Phaw and others v. Maung Ba Thaw* (3). The rule of intervention by the trustee in insolvency has been taken away under the Indian Act, unlike the rule under the English Bankruptcy Law, see the English Bankruptcy Act (1914), section 53. In this case, the plaintiff asks for the price of the emeralds as well as a half share of the profits of the sale thereof. The amount recovered is liable to be distributed among the insolvent's creditors. Hence only the Official Receiver can sue to realize the assets.

R. Krishnaswami Ayyangar (with *K. Venkateswaran*) for respondent.—The question of vesting of property is different from the question of the right of suit. The plaintiff in this case is to recover certain emeralds (or their value) which were entrusted

to the insolvent for sale. The jewels belonged to one Sita Lakshmi Ammal who entrusted it to the insolvent who was only a bailee for sale; the property was not vested in the insolvent. The plaintiff prayed for the recovery of the jewels or their value and a half share of the profits of the sale, if there was a sale by the defendant. Both the lower Courts negatived the claim for profits. The defendant appealed in the lower Appellate Court and in the High Court against the decree for the value of the jewels. This claim for the recovery of the jewels or its value is not a claim for after-acquired property. There was no sale and no profits to be realized. Hence there were no assets to be realized on behalf of the insolvent's creditors by the Official Receiver. The question under reference does not arise. Reference was made to Williams on Bankruptcy (13th edition), pages 229 and 230.

G. T. Ramanujachari in reply.—The suit includes a half share of profits, which is certainly after-acquired property. The insolvent had a special property in the emeralds, even as a bailee, which vested in the Official Receiver under section 28 of the Provincial Insolvency Act, 1920. Even if it is a bailment to the insolvent, the Official Receiver is a competent party to sue, as there must be consideration for the bailment and so the insolvent had an interest in the property which vested in the Official Receiver. Further, this property was the reputed property of the insolvent under section 28 of the Act, and vests in the Official Receiver under that section.

The OPINION of the Court was delivered by

BEASLEY C.J.—The question referred to us for decision is, "Is it open to an undischarged insolvent to maintain a suit regarding his after-acquired properties subject to the right of the Official Receiver to intervene in such proceedings?" In our view, upon the facts of this case this question does not arise and we are not disposed to enter into any further discussion of this question which is purely one of academic interest.

The facts of the case may be quite shortly stated. The insolvent was the plaintiff in the District Munsif's Court. He was also an undischarged insolvent. His

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(1) (1927) I.L.R. 54 Cal. 595.

(2) (1923) 45 M.L.J. 827.

(3) (1926) I.L.R. 4 Rang. 125.

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case as set out in the plaint was that he got emeralds from one Sita Lakshmi Ammal for sale and that he gave them to the defendant in the suit for sale. The value of the emeralds was fixed, so he alleges, at Rs. 1,000 and it was agreed that the excess realized by the defendant by the sale should be shared equally between the plaintiff and the defendant. He sued to recover the emeralds or Rs. 1,000, the price of the emeralds, and for Rs. 250 being his share, as he alleged, of the profits made by the defendant on the allegation that the defendant sold the emeralds for Rs. 1,500, and he asked for the return of the emeralds in case they were not sold by the defendant. Amongst other contentions the defendant raised the plea that the plaintiff was an undischarged insolvent and was consequently not entitled to sue. An issue was taken upon that contention and the District Munsif found that the plaintiff was an undischarged insolvent but that he could maintain the suit for recovery of the articles bailed. I wish to draw particular attention to the fact that the articles were described by the District Munsif as articles bailed. Then there was an appeal and the first Appellate Court fixed the value of the emeralds at Rs. 800 and gave the plaintiff a decree for that amount only. The case came up on second appeal to this Court and the question of the maintainability of a suit by an insolvent with reference to after-acquired property was raised and in view of the fact that a Letters Patent Appeal raising this very point was then pending decision by a Full Bench, our learned brother ANANTAKRISHNA AYYAR J. adjourned the case until the Opinion of the Full Bench was delivered. The Letters Patent Appeal, however, abated and the matter again came before our learned brother who, in view of what appears to be a

difference of view in a case decided by KRISHNAN and ODGERS JJ in *Ramanatha Iyer v. Nagendra Iyer*(1) and a later decision of the Privy Council in *Kala Chand Banerjee v. Jagannath Marwari*(2), referred the case to us.

Upon the facts of this case, the plaintiff's suit was divided into two parts, (1) relating to his commission of Rs. 250—that claim has been held against—and (2) for the return of, or the value of, the emeralds which he handed over to the defendant for sale. In our view, the first essential in the appellant's case is that the emeralds themselves or their cash value should vest in the receiver as the after-acquired property of the insolvent under section 28 of the Provincial Insolvency Act. That section deals both with the actual property of an insolvent at the time of his adjudication and property which may pass into his possession after the adjudication. In the case of property coming into his possession after adjudication—it is after-acquired property—that shall forthwith vest in the receiver. There is another class of property dealt with in that section and that is the reputed property of the insolvent. Upon the facts of this case the value of the emeralds can, in no sense of the word, be described as the property of the insolvent. His own case was that this property was given to him by Sita Lakshmi Ammal for sale. He was a jeweller and goldsmith and so was the defendant. So that, in the ordinary course of business, according to his own case, these emeralds were entrusted to him for sale. That statement in his case completely negatives any position occupied by him other than as a bailee of goods for sale and it is important to remember that this statement that there had been an entrustment to the

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(1) (1928) 45 M.L.J. 827.

(2) (1927) I.L.R. 54 Cal. 595.

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insolvent, of these emeralds as a bailee is not controverted anywhere in the written statement of the defendant. Clearly the emeralds were not the property of the insolvent, but it has been urged before us that, although they are not the property of the insolvent, they may yet be his reputed property. Where goods, precious stones and such like things are given into the hands of a goldsmith or a jeweller either for the purpose of being converted into ornaments or for sale, they are given to him in the ordinary way of his business; and assuming that at the time of his adjudication he is in possession of those jewels, clearly they are not his jewels at all but they are the jewels of the bailor and as such, being easily identifiable, do not pass to the receiver in the insolvency. The further question arises as to what is to happen if he had recovered the proceeds of the sale. Here again, if those proceeds have not been inter-mixed with the money belonging to the creditors and can easily be identified, the money does not vest in the receiver; but this case is a stronger one from the respondent's point of view, because the jewels had been parted with and the insolvent had no money in his possession which he had received in respect of the sale. He claims in his suit to get that money from the defendant. If he succeeds, no one, I think, would contest that that money is clearly ear-marked as money belonging to the real owner of the jewels, namely, Sita Lakshmi Ammal, up to the extent of the agreed value Rs. 1,000 and is not available at all for distribution by the receiver amongst the creditors in the insolvency. This matter, I think, is made perfectly clear by the notes to section 38, which is the vesting section, in the English Bankruptcy Act. See Williams on "Bankruptcy," XIII Edition, page 229. The marginal note is

"Trusts arising from employment of bankrupt."

and the note says

"Lastly, then, there is the third class of trusts, where the bankrupt has not the general, but only a special property, e.g., where property is vested in the bankrupt as an agent, such as a factor, etc., such property, so long as it or its proceeds remain distinguishable from the mass of the bankrupt's property, will not pass to the trustee of the creditors."

Then again at page 230, it is stated:

"It is always to be remembered that, although goods in the hands of an agent may be easily distinguishable, they may yet, on the bankruptcy of the agent, pass to his trustee if the principal has permitted the agent to have a possession not consistent with the ordinary usages of trade, and raising a reputation of ownership in the bankrupt."

Here the case for the plaintiff, uncontradicted by the defendant in his written statement, is that there was no entrustment at all which was not consistent with the ordinary usages of trade. As before stated, the insolvent was a jeweller and goldsmith and he himself says that the emeralds were entrusted to him for sale—that is what a jeweller and goldsmith does—and it cannot be said that the emeralds or their value were the reputed property of the insolvent. Under these circumstances and upon the facts of this case the question before us really does not arise. It would arise if the property were property which vested in the Official Assignee or the receiver, as the case may be. Therefore, we decline to decide the question. We need express no opinion upon what would happen had the property been the after-acquired property of the insolvent. With regard to the claim for Rs. 250 no question arises with regard to that because that claim has been disallowed in all the Courts.

The case must therefore be dealt with by the referring Judge in the light of these observations.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt. Chief Justice,
Mr. Justice Sundaram Chetti and Mr. Justice Pakenham Walsh.

1930,
July 30.

TATICHERLA PICHAMMA (FIRST RESPONDENT), APPELLANT,

v.

THE OFFICIAL RECEIVER OF CUDDAPAH AND
OTHERS (PETITIONER AND RESPONDENTS 2 TO 4), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 53—Amending Act (X of 1930), sec. 6—Effect of—Application to set aside transfer by insolvent—Transfer more than two years from date of adjudication but within two years of date of petition for adjudication—Amending Act (X of 1930), if retrospective.

A transfer of property of the description given in section 53 of the Provincial Insolvency Act (V of 1920), made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication, can be annulled by the Court under section 53 of the Act, at the instance of the Official Receiver.

By reason of the amendment of section 53 by Act X of 1930, by the insertion of the words "on a petition presented" after the words "is adjudged insolvent" in that section, the doubt as to the construction of the section on this matter has been set at rest by the Legislature.

The amendment made by Act X of 1930 has a retrospective effect and will apply to a pending proceeding.

Veerappa Chettiar v. Subramania Ayyar, (1929) I.L.R. 52 Mad. 123 (F.B.), applied.

APPEAL against the order of the District Court of Cuddapah in Original Petition No. 73 of 1926.

*Appeal Against Order No 168 of 1928.

This appeal came on for hearing before ANANTA-KRISHNA AYYAR and CORNISH JJ. who referred the question specified in the opinion to a Full Bench.

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T. V. Muthukrishna Ayyar for appellant.—The question is from what point of time the period of two years, mentioned in section 53 of the Provincial Insolvency Act, 1920, should be reckoned in an application to set aside an alienation by an insolvent. The amending Act (X of 1930) was passed to settle the conflict as to the construction of the section. The question still remains, whether the amending Act has retrospective effect. The reference to the Full Bench in this case was two days prior to the passing of the amending Act. The Act is not declaratory in its nature. There are no such words as "it is hereby declared" in the amending Act. The principle contained in the Full Bench decision in *Veerappa Chettiar v. Subramania Ayyar*(1) cannot be applied to the operation of the amending Act (X of 1930). The amending Act, therefore, does not apply to the present case.

B. Somayya (with him *Kasturi Seshagiri Rao* and *G. N. Thirumalachari*) for respondents 1 to 3.—The amending Act (X of 1930), section 6, is conclusive as to the construction of section 53, as it originally existed; the amending Act simply makes clear the intention of section 53; it has necessarily a retrospective effect. [Reference was made to the preamble of the amending Act and to the principle of the decision in the Full Bench case in *Veerappa Chettiar v. Subramania Ayyar*(1).]

The OPINION of the Court was delivered by

SUNDARAM CHETTI J.—The question referred to us for decision runs as follows :—

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"Whether a transfer of property of the description given in section 53 of the Provincial Insolvency Act (Act V of 1920) made by an insolvent more than two years before the date of the actual order of adjudication but within two years of the date of the presentation of the petition for adjudication could be annulled by the Court under section 53 of the Act at the instance of the Official Receiver."

The decision of this question depends upon the correct interpretation of the wording in section 53 of

(1) (1929) I.L.R. 52 Mad. 128.

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the Act. The portion of the section relevant for our purpose is where it says that the adjudication of the insolvent should have been made within two years after the date of the transfer. As to the meaning to be attached to the point at which limitation has to be computed, there has been a conflict of judicial opinion. This High Court as also the Calcutta High Court has been of one opinion, namely, that a petition to annul an alienation can be filed, if it is within two years before the presentation of the insolvency petition. The decisions of these High Courts proceeded on the view that the adjudication relates back to the presentation of the petition and, following the view taken in the English decisions, it has been so held. But a different view has been taken by the High Courts of Bombay, Rangoon and Lahore. The question of interpreting the section is not quite free from difficulty; but, in view of the recent amendment of this section by Act X of 1930 which received the assent of the Governor-General on the 20th March 1930, any doubt on this matter must be taken to have been set at rest.

The only point now to be considered is whether the amendment made by section 6 of this Act has a retrospective effect, that is, will apply to a pending proceeding such as the one in question. If, by means of this amendment, a new or altered period of limitation is prescribed, then it may be for consideration whether such an alteration in the law will have retrospective effect or not; but what would appear from the statement of objects and reasons in connexion with this amending Act is that, in view of different interpretations having been put by several High Courts which led to a conflict of view, the Legislature wanted to set that doubt at rest by declaring clearly what the real meaning of the expression in the section was. By the insertion of the

words "on a petition presented" after the words "is adjudged insolvent" the meaning is made clear and that meaning is in accordance with the view taken by this High Court and the Calcutta High Court. If the amendment in question has not introduced a new period of limitation but has only clarified the meaning of the old section, there is no doubt that it must be taken to apply to the present case. The recent Full Bench decision of this Court in *Veerappa Chettiar v. Subramania Ayyar*(1) supports the view which we are taking. That case was in respect of an amendment made to a certain section in the Transfer of Property Act as to the meaning of the word "attestation," and it was held that that amendment had retrospective effect. It is difficult to distinguish in principle the present case from the one dealt with by the Full Bench. That being so, we think it unnecessary to canvass the decisions of the several High Courts which were given under section 53 of the Act before the amendment. We, therefore, answer this question in the affirmative.

K.B.

(1) (1929) I.L.R. 52 Mad. 123.

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APPELLATE CRIMINAL—FULL BENCH.

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

1930,
April 15.

POLUR REDDI (COMPLAINANT), PETITIONER,

v.

MUNISWAMI REDDI AND SEVEN OTHERS
(ACCUSED), RESPONDENTS.*

Code of Criminal Procedure, 1898, sec. 34: (1) and (2)—Case submitted to magistrate under sec. 346 (1)—Magistrate of opinion that evidence disclosed offence properly triable by magistrate submitting case—Jurisdiction of magistrate under sec. 346 (2) to refer case back to magistrate submitting.

If a magistrate to whom a case is submitted under section 346 (1) of the Code of Criminal Procedure is of opinion that the evidence disclosed an offence properly triable by the magistrate who submitted the case, he has jurisdiction under section 346 (2) of the Code to refer the case back to the magistrate who originally submitted the case.

In re Kottur Hampanna, (1922) I.L.R. 45 Mad. 846, considered.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Vellore, dated 25th June 1929, and made in Criminal Miscellaneous Petition No. 61 of 1929 (C.C. No. 56 of 1929 on the file of the Joint Magistrate, Tiruppattur).

This Criminal Revision Petition came on for hearing in the first instance before JACKSON J., who was of opinion that certain observations in *In re Kottur Hampanna* (1) cited before his Lordship should be scrutinized by a

* Criminal Revision Case No. 883 of 1929.
[1] (1922) I.L.R. 45 Mad. 846.

Full Bench and 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.

S. T. Srinivasa Gopala Chari for petitioner.

N. S. Muni for Public Prosecutor (*L. H. Bewes*) for the Crown.

No one appeared for respondent.

The JUDGMENT of the Court was delivered by

BEASLEY C.J.—This case comes before us on a reference made by our learned brother JACKSON J.

The facts of the case are that a complaint was made against eight persons on a charge of dacoity and came before the Second-class Sub-Magistrate of Tirupattur. The Sub-Magistrate thought that there was no basis for that charge; but, as of the eight persons accused before him one was alleged to have been armed with a stick and a deadly weapon, he thought that the charge was one under section 148 of the Indian Penal Code, namely, rioting armed with deadly weapons, and accordingly sent the case on under section 346 (1) of the Criminal Procedure Code to the Joint First-class Magistrate for disposal. The Joint First-class Magistrate, after going into the case, differed from the view taken by the Second-class Sub-Magistrate and thought that the evidence disclosed that the accused might be guilty of some lesser offence. In dealing with the matter he pointed out that the fifth accused, who was the only accused stated to have been there armed with deadly weapons and having taken part in the riot, was merely a spectator and took no part whatever in the rioting, and dismissed the complaint against him. He referred the case back, under section 346 (2), Criminal Procedure Code, to the Second-class Magistrate on the 30th of May 1929. The complainant in the case feeling aggrieved at this order preferred a revision petition to

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the District Magistrate, and he dismissed it, as he came to the conclusion that the case had been properly dealt with by the Joint Magistrate. Against this order the complainant presented a revision petition to the High Court. JACKSON J., before whom it came, whilst strongly holding the view that the Joint First-class Magistrate was acting within his jurisdiction when he referred the case back to the Second-class Sub-Magistrate, felt himself very much embarrassed by a decision in *In re Kottur Hampanna*(1). This decision he took to be one holding that the question of jurisdiction is irrevocably fixed by the lower Court when it submits the case under section 346 (1) to the superior Magistrate. Section 346 (2) reads as follows:—

“The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.”

If our learned brother JACKSON J. is right in his interpretation of the judgment in *In re Kottur Hampanna*(1), then we are clearly of the view that that case was wrongly decided. But, first of all, we have got to see whether the interpretation placed upon that judgment by our learned brother is correct or not. He has taken the last paragraph of that judgment on page 848 to mean that the Magistrate therein referred to is the Magistrate who makes the submission under section 346 (1) and not the Magistrate who refers the case under section 346 (2). In that view of the judgment, that case does decide that it is the charge which the Magistrate who submits the case under section 346 (1) thinks is the right one that the Magistrate to whom he submits the case has to deal with and that charge alone. He has got to try it and dispose of it himself or commit the accused for trial. If that is the correct understanding

(1) (1922) I.L.R. 45 Mad. 846.

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of that judgment, then, as before stated, we are clearly of the opinion that that judgment is wrong. Sub-section (2) to section 346 is perfectly clear, definite and wide, and the Magistrate to whom the case is submitted has got to do three things; he has either got to try the case himself, or after having heard it to a certain point, refer it to any Magistrate subordinate to him who has got jurisdiction to try the case, or to commit the accused for trial. We think that that is really what was meant in *In re Kottur Hampanna*(1) and that the Magistrate therein referred to is the Magistrate making a reference under section 346 (2). Although the section alone is referred to and no sub-sections are referred to, we think, having regard to the facts of the case and the observations made at page 847 that the Magistrate to whom the case had been submitted was intended to be referred to. At page 847 it is stated as follows:—

“It may be urged that the Sub-Magistrate, who sent up the case, was subordinate to the Subdivisional Magistrate and that his order was in effect a reference to him. If so, the reference should have been made explicitly and with some distinct indication of what action the Sub-Magistrate was to take, not with an obscure injunction, which could afford no real guidance.”

What happened in that case was that the First-class Subdivisional Magistrate to whom the case had been submitted by the Sub-Magistrate made an order as follows:— “The Subdivisional Magistrate declines to transfer the case to the file of another Sub-Magistrate.” And then later on “As regards the section under which the offence, if proved, is likely to fall, the Sub-Magistrate is requested to study the commentary carefully under section 379 of the Indian Penal Code.” In the opinion of the Bench that was not the proper way to deal with the case submitted to him. Reference was made in that

(1) (1922) I.L.R. 45 Mad. 846.

POLUR REDDI case to two unreported cases, *Queen Empress v. Makira* (1), and *Queen Empress v. Purushotam* (2), as authority for the position that a superior Magistrate cannot simply return a case to the Subordinate Magistrate from whom it comes but must refer it to some other Magistrate or dispose of it himself. But these cases on examination do not seem to go to that length. If they do, we are clearly of the opinion that those cases were wrongly decided, because the terms of sub-section (2) to section 346 are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it. In our view, therefore, there is no warrant for saying that the Magistrate who acted under section 346 (2) had no jurisdiction in this case so to act.

The question argued before our learned brother JACKSON J. was merely the question of jurisdiction. No argument was addressed to him upon the merits. We have heard a brief argument upon the merits of the case, and in view of the order of the Magistrate in which he states that the evidence points to the fact that the fifth accused, who is the only person alleged to have been present armed with deadly weapons, was merely a spectator, we think that the view he took with regard to the offence possibly committed by the accused persons was correct. As soon as the fifth accused was eliminated from the charge, obviously no charge against the other accused persons of rioting armed with deadly weapons could possibly lie.

In view of the observations we have made, the petition must be dismissed.

B.C.S.

(1) (1890) Ratanlal's Unreported Cases 499.
(2) (1891) Ratanlal's Unreported Cases 554.

SPECIAL BENCH.

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

THE COMMISSIONER OF INCOME-TAX,
MADRAS, PETITIONER,

1930,
April 11.

v.

T. MANAVEDAN TIRUMALPAD,
SENIOR RAJAH OF NILAMBUR, RESPONDENT.*

*Indian Income-tax Act (XI of 1922) — Forest produce, sale of—
Amount received by owner of unassessed land by sale of
timber trees thereon, whether liable to Income-tax.*

Amounts received by the owner of unassessed forest lands, by the sale of timber trees thereon, are income liable as such to income-tax.

REFERENCE under section 66 (1) of the Income-tax Act (XI of 1922). In the matter of the Income-tax Act, 1922, and in the matter of the assessment of T. Manavedan Tirumalpad for the year 1928-29.

The material facts appear from the Judgment.

T. R. Venkatarama Sastri (with him *T. B. Balagopalan*) for the assessee:—Income derived from the sale of forest produce is not taxable under the Indian Income-tax Act (XI of 1922). The Commissioner holds that there is no deterioration of capital by the sale of such produce, and that consequently the income is liable to tax. The land here is unassessed land. If land was assessed, there is no doubt that the produce is not liable to Income-tax; though this land is unassessed, the sale proceeds of the produce thereon is not liable to income-tax. Sale of trees on unassessed land is sale of movable property. A man who sells such property is not liable to tax for the price realized by the sale. See *Sri Sri Raja Shiva Prasad Singh v. The Crown* (1).

* Original Petition No. 152 of 1929.
(1) (1924) I.L.R. 4 Pat. 73.

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This is not a case of a "business" of the owner of the forest. In the case of paddy, it is produced by agricultural operations, which is a "business," and so it is specially exempted by the Income-tax Act. So also in the case of an owner of herds of cattle, some of which may be sold and income realized, he may be liable to tax for such income, as rearing of cattle is a business. In the case of forest produce (such as timber trees), there is deterioration caused to the capital by the cutting of trees. The case of mines and quarries is not analogous to this case.

M. Patanjali Sastri for Commissioner of Income-tax:—
The case of sale of forest produce is similar to the sale of the produce of mines and the sale of stones quarried or the case of sale of paddy grown on land. In the case of paddy, the profits earned by the sale would be liable to income-tax but for the special exemption of such income under the Income-tax Act.

JUDGMENT.

The question referred to us by the Commissioner of Income-tax is

"Whether the amounts received by sale of timber trees are income, liable as such to income-tax."

The assessee is the owner of unassessed forest lands in Malabar and was assessed by the Income-tax Officer, Palghat, for the year 1928-29 on an income of Rs. 5,395 from property and Rs. 3,07,629 from fees received in respect of timber cut and removed from the forests and other miscellaneous receipts. The assessee objects to the latter assessment. Before the Commissioner, his contention was that he had purchased the forests with trees growing therein and that, as the trees were cut down and carried away, the capital was thereby decreased. The Commissioner of Income-tax has pointed out that similar circumstances exist in the case of mines and quarries—this is conceded by Mr. Venkatarama Sastri who appears for the assessee—and that in neither of those cases is any deduction allowed by reason of the

fact that as years go on the amount of coal under the land in the case of the mines is diminished and the amount of the stones to be quarried in the case of the quarry is diminished. Similar views have been taken in the English Courts with regard to minerals. Mr. Venkatarama Sastri here argues that this is not to be treated as assessable income at all, although he admits that he can see no difference between the income derived from the sale of coal and the sale of stone quarried in a quarry or from income derived from the sale of paddy grown on land. Of course, we are unable to distinguish between the income derived from the sale of paddy which is grown on land and the income derived from the sale of timber cut in a forest; but the profits earned from the sale of paddy would be assessable to income-tax but for the special exemption given to that income in the Income-tax Act, by reason of its being agricultural income.

There is no such exemption in the case of income derived from the sale of timber. Under the circumstances, we answer the question referred to us in the affirmative. The assessee will pay Rs. 250 costs to the Commissioner of Income-tax.

K.R.

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APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1930,
February 11.

KOMALANGI AMMAL (MINOR) BY HER FATHER AND
GUARDIAN KANDASAMI CHETTIAR (FIRST DEFENDANT),
APPELLANT,

v.

M. K. SOWBHAGIAMMAL AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

*Will—Caveat—Nature of interest entitling a person to lodge—
Person setting up title adverse to testator—Whether can be
said to have an interest in the estate of deceased.*

The interest which entitles a person to lodge a caveat in an application for the probate of a will must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate.

A person, who alleges that jewels which the testator has disposed of by his will are her own jewels, and thus sets up a title adverse to that of the testator, cannot be said to have an interest in the estate of the deceased.

ON APPEAL from the judgment and decree of VENKATASUBBA RAO J. dated the 16th, 17th, 18th and 24th days of January 1928 and passed in the exercise of the Original Testamentary Jurisdiction of the High Court in Testamentary Original Suit No. 13 of 1927 (Original Petition No. 198 of 1927).

The facts necessary for this report are :

One Mangadu Ellappa Chetti died leaving considerable assets. He was said to have left a will and an application for probate of that will was taken out by M. K. Sowbhagiammal and K. Thangavelu Chetti, executrix and executor respectively under the aforesaid will. A caveat was filed by Komalangi Ammal, the wife of

Gopala Chetti, the minor grandson of the testator, mainly on the ground that the testator purported to dispose of by the will her stridhanam jewels, as if they belonged to himself, and that his will in regard to them was inoperative. VENKATASUBBA RAO J. dismissed the caveat holding that the caveator was not possessed of any interest entitling her to oppose the grant of probate; and, after taking evidence in the matter, directed the grant of probate to the petitioners. The caveator filed an appeal against the said orders.

B. C. Seshachala Ayyar for appellant.

V. Radhakrishnayya and *A. Kuppuswami Ayyar* for respondents.

JUDGMENT.

RAMESAM J.—Most of the decisions of all the High Courts are against the appellant. They are referred to by the learned trial Judge and need not be repeated. The learned Advocate for the appellant relies on *Hunumantha Rao v. Letchamma*(1). This case has been considered by the trial Judge. It is based on *In the matter of the Petition of Bhobosoonduri Dabee*(2), a case which has not been followed in the Calcutta High Court ever since, and certain other decisions. The decisions in *Arakal Bastian Ansap v. Narayana Ayyar*(3) and *Kishen Dai v. Satyendra Nath Dutt*(4), also referred to in it, are cases of judgment-creditors of a son of the testator. In *Arakal Bastian Ansap v. Narayana Ayyar*(3), the will was revoked and it was not necessary to rely on *In the matter of the Petition of Bhobosoonduri Dabee*(2). The decision in *Brinda Chowdhraïn v. Radhica Chowdhraïn*(5) is the case of a widow entitled to maintenance against

(1) (1926) I.L.R. 49 Mad. 980.

(2) (1880) I.L.R. 6 Calo. 460.

(3) (1910) I.L.R. 34 Mad. 405.

(4) (1901) I.L.R. 28 Calo. 441.

(5) (1885) I.L.R. 11 Calo. 492.

* Original Side Appeal No. 27 of 1928.

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RAMESAM J.

her husband's estate, the husband being the alleged testator. I do not see how *Kishen Dai v. Satyendra Nath Dutt*(1) supports the decision in *Hanumantha Rao v. Letchamma*(2). It is unnecessary for us to say whether *Hanumantha Rao v. Letchamma*(2) is correctly decided or not, and we are not to be taken as agreeing with all the observations in it.

In a case of the kind before us, all the authorities are agreed that the caveator has no interest to oppose the grant of the probate. In so far as she claims that the jewels dealt with in the will are hers, it is not an interest in the estate of the deceased according to all the authorities. Whether the will is genuine or not, her right to the jewels cannot be affected. In so far as she claims to be the wife of one of the grandsons, and can claim to be supported from the estate, her position under the will is no worse than if the will did not exist.

The case of *Kipping and Barlow v. Ash and others*(3) does not help the appellant. The appeal is dismissed with costs.

CORNISH J. CORNISH J.—I agree that the appeal should be dismissed. The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate, see *Pirojshah Bikhaji v. Pestonji Merwanji*(4) and *Kalajit Singh v. Parmesher Singh*(5). But here the caveator is alleging that the jewels which the testator has disposed of by his will are her own property. In other words, she is setting up a title adverse to the testator's title to the property. It is impossible to say that she has an interest in the deceased's estate when she is claiming that the property

(1) (1901) I.L.R. 28 Calo. 441.

(2) (1926) I.L.R. 49 Mad. 960.

(3) (1845) 1 Rob. Eccl. 270.

(4) (1910) I.L.R. 34 Bom. 459.

(5) (1917) 39 I.C. 573.

in question does not form part of the deceased's estate. It has long been settled that it is not the province of a Court of Probate to determine questions of title to property which a testator purports to dispose of by his will; the reason being that the grant of probate does no more than establish the *factum* of the will and the appointment of the executors (if any) named in the will. The grant of probate will not, therefore, prevent the appellant from bringing a suit, if she should be so advised, to recover from the executors, or any other persons in possession, the jewels which she claims as her own property.

B.C.S.

APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Curgenvven.

SUBBA RAO AND FIVE OTHERS (PLAINTIFFS 2 TO 7),
APPELLANTS,

1930,
March 27.

v.

MAHALAKSHMAMMA AND TWO OTHERS (DEFENDANTS 1 TO 3),
RESPONDENTS.*

Indian Registration Act (XVI of 1908), ss. 17 and 49—Unregistered partition list evidencing partition—Admissibility of, to prove division of particular properties or to prove division in status—Admissibility of conduct to prove division in status—Hindu Law—Custom—Illatom relationship, incidents of—Necessity for strict proof—Extent of legal rights flowing from illatom relationship, not matter of law, but matter of proof of custom.

A document between two persons containing lists of properties that fell to the share of each on a partition, written in

* Appeal No. 116 of 1928.

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duplicate, signed by each and attested and intended to be the evidence of the partition, must be regarded as the formal and operative deed of partition between them; and unless registered as required by section 17 of Indian Registration Act, it will be inadmissible in evidence under section 49 of the Act, to prove what properties were taken by each on partition; but it is admissible to prove a division in status. It is not the less a partition deed because its contents were previously discussed and decided upon and then alone put into writing. A division in status may also be proved by other evidence e.g. the conduct of parties.

The legal incidents of an *illatom* adoption have not been judicially settled nor are they of universal application; they have to be proved in each case by evidence.

Held, that an *illatom* relationship to a father-in-law's brother was very unusual and that on the evidence in the case the relationship was not established.

APPEAL against the decree of the Court of the Subordinate Judge of Masulipatam in Original Suit No. 100 of 1926.

In this suit the first plaintiff sued to recover certain properties from defendants 1 to 3 on the ground that they belonged to him and his undivided brother (Sambayya), that he became the sole owner by survivorship on Sambayya's death and that the defendants 1 and 2 (Sambayya's widow and son-in-law) were in unlawful possession of the same. These two defendants pleaded *inter alia* that the two brothers became divided, in 1924, before their death, that Sambayya executed a will thereafter by which he bequeathed the properties to them, that the first plaintiff brought up Sambayya's daughter (second defendant's wife) as his foster-daughter and took the second defendant as his *illatom* son-in-law and that as the second defendant thus became joint in estate with the first plaintiff, the suit brought for the recovery of the properties as if the first plaintiff was

the sole owner was not maintainable. The Subordinate Judge found that the brothers were divided, that the properties in the suit fell to the share of Sambayya and that the second defendant was the *illatom* son-in-law of the first plaintiff. He accordingly dismissed the suit. The other plaintiffs and the third defendant were alienees from the first plaintiff. The plaintiffs preferred this appeal.

Advocate-General (A. Krishnaswami Ayyar) (with him *Ch. Raghava Rao*) for appellants.—Exhibit VIII itself effects on its date a division of lands by metes and bounds. Being unregistered it is not receivable in evidence for any purpose whatever, not even to prove a division in status. The prohibition in clause (c) of section 49 of the Registration Act is wider than in clause (a). Section 49 is wider than section 17. *Pothi Naicken v. Naganna Naicker*(1), on appeal from *Pothi Naicken v. Naganna Naicker*(2), *Ayyakutti Mankondan v. Periaswami Koundan*(3), *Sikhamani Pandithar v. Ammani Ammal*(4), *Skinner v. Skinner*(5), *Narayanan Chetty v. Muthiah Servai*(6), *Gopayya v. Kristnayya*(7), *Ramaswamy Ayyar v. Thirupathi Naick*(8). There is no evidence in this case, of any partition prior to the date of Exhibit VIII. If there was no partition, then there is no right to bequeath. An *illatom* son-in-law is not like an adopted son. His legal rights flow only from custom, which, being a variation of the ordinary law, must be strictly proved, *Narayudu v. Venkamma*(9); especially, when one is said to be *illatom* not to his father-in-law but to the father-in-law's brother, which is unusual. The evidence in this case has established neither the existence of this relationship nor its incidents according to the custom applicable to this family. The legal incidents flowing out of this relationship are neither settled nor of universal application. An *illatom* son-in-law takes the property left by his father-in-law as his own self-acquisition, so that his own sons have no right by birth therein, *Challa Papi Reddi v. Challa Koti Reddi*(10); he takes a

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(1) (1915) 30 M.L.J. 62.

(3) (1913) 30 M.L.J. 404.

(5) (1929) 30 L.W. 451 (P.C.).

(7) (1922) 16 L.W. 784.

(9) (1890) 22 M.L.J. 265.

(2) (1915) 28 M.L.J. 423.

(4) (1917) 40 I.C. 36.

(6) (1910) I.L.R. 35 Mad. 63.

(8) (1903) I.L.R. 27 Mad. 43.

(10) (1872) 7 M.H.C.R. 25.

SUBBA RAO v. MAHALAKSHMAMMA. share along with the father-in-law's after-born sons, *Hanumanthamma v. Rami Reddi*(1); he does not lose his rights in his natural family, *Balarami v. Pera*(2); there is no coparcenary between him and the natural sons of his father-in-law and so no right of survivorship between them, *Chenchamma v. Subbayya*(3), *Malla Reddi v. Padmamma*(4), *Emi Sooramma v. Yrabati Varahalu*(5); his natural brothers succeed to his *illatom* property, *Ramakristna v. Subbakka*(6). Where there is no coparcenary there is no right to partition and no right to interdict alienation either *inter vivos* or by will, *Sartaj Kuari v. Deoraj Kuari*(7). The *illatom* son-in-law takes only a chance of succession. This relationship does not imply an agreement not to alienate by deed or by will. Even if there is a contract to take another as heir, that cannot deprive the owner of his power to alienate by deed or by will, *Narain Das v. Ramanuj Dayal*(8), and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(9). *Venkayamma v. Appa Rao*(10) does not apply.

S. Varadachari (with him *V. Govindarajachari* and *S. Subrahmanya Sastri*) for respondents.—Exhibit VIII is only a list or record of properties that fell to each at a previously completed oral partition. It does not itself effect a partition and there are no operative words of partition at all therein; hence it does require registration; *Reference under Stamp Act, s. 49* (11), *Ramaswamy Ayyar v. Tirupathi Naik*(12), *Jiwan Ali Beg v. Basa Mal*(13), *Gnanamuthu Nadan v. Veilukanda Nadathi*(14).

Even if it be inadmissible in evidence to show what properties actually fell to the share of each in partition, it is admissible to prove a division in status; *Rajangam Ayyar v. Rajangam Ayyar*(15), *Veerappan v. Mylai Udayan*(16), *Saraswatamma v. Paddayya*(17), *Ramu Chetty v. Panchammal*(18), *Subramania Aiyar v. Savitri Ammal*(19), and *Ahobilachariar v. Thulasi*(20).

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| (1) (1881) I.L.R. 4 Mad. 272. | (2) (1888) I.L.R. 6 Mad. 267. |
| (3) (1885) I.L.R. 9 Mad. 114. | (4) (1823) I.L.R. 17 Mad. 48. |
| (5) (1926) 101 I.C. 828. | (6) (1889) I.L.R. 12 Mad. 442. |
| (7) (1885) I.L.R. 10 All. 276, 286. | (8) (1897) I.L.R. 20 All. 209 (P.C.). |
| (9) (1899) I.L.R. 22 Mad. 383 (P.C.). | |
| (10) (1916) I.L.R. 39 Mad. 509 (P.C.). | |
| (11) (1884) I.L.R. 7 Mad. 385 (F.B.). | (12) (1903) I.L.R. 27 Mad. 48. |
| (13) (1886) I.L.R. 9 All. 108 (F.B.). | (14) (1923) 19 L.W. 494. |
| (15) (1922) I.L.R. 43 Mad. 373 (P.C.). | (16) (1924) 87 I.C. 285. |
| (17) (1922) I.L.R. 46 Mad. 349. | (18) (1925) 92 I.C. 1928. |
| (19) (1908) 19 M.L.J. 228. | (20) (1927) A.I.R. (Mad.) 830. |

The fact of partition can be proved by other evidence (e.g.) (a) evidence of conduct; *Chhotalal Aditram v. Bai Mahakore*(1), and *Mahalakshamma v. Suryanarayana*(2), and (b) the character in which properties are possessed, *Varada Pillai v. Jeevarathnammal*(3). [He distinguished the cases quoted by the appellant on this point.]

Illatom relationship is a mixture of contract and status; and hence the legal rights flowing from that relationship are the results based partly on contract and partly on custom, which have been recorded in judicial decisions; *Kristnamma v. Venkatasubboyya*(4), *Malla Reddi v. Aswaratha Reddi*(5). Even the decisions quoted by the appellant show that the *illatom* son-in-law becomes equal to a son for the purpose of division of property; *Emi Sooramma v. Yrabati Varahaloo*(6) and *Vachooru Balarama Reddy v. Vachooru Ramamma*(7). The evidence in this case establishes the relationship of *illatom*. Where there is a completed contract to give or bequeath property to another for consideration flowing from the other, the contract is enforceable, *Venkayamma v. Appa Rao*(8). In *Narain Das v. Ramanuj Dayal*(9), there was no completed contract, but there was only an intention to give. *Sri Raja Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards*(10) is a case of an owner of an impartible zamindari having power to disinherit even a natural son; and an agreement to adopt another as a son cannot put the latter on a higher position than a natural son.

Ch. Raghava Rao in reply.—The rights of an *illatom* son-in-law depend upon proof of custom prevailing in the particular family; A. S. No. 206 of 1912 (unreported) referred to.

JUDGMENT.

BEASLEY C.J.—Plaintiffs 2 to 7 are the appellants. The first plaintiff died after the suit was filed. The first defendant is the wife of Sambayya, the deceased brother of the first plaintiff, and the second defendant is the son-in-law of Sambayya, having married Suramma,

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| (1) (1917) I.L.R. 41 Bom. 466. | |
| (2) (1928) I.L.R. 51 Mad. 977. | (3) (1914) I.L.R. 43 Mad. 244 (P.C.). |
| (4) (1919) I.L.R. 42 Mad. 805 (P.C.). | (5) (1905) 15 M.L.J. 494. |
| (6) (1926) 101 I.C. 828. | (7) (1918) 13 M.L.T. 113; 18 I.C. 698. |
| (8) (1916) I.L.R. 39 Mad. 509 (P.C.). | (9) (1897) I.L.R. 20 All. 209. |
| (10) (1899) I.L.R. 22 Mad. 383 (P.C.). | |

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his fourth daughter. The first plaintiff and Sambayya were formerly members of an undivided Hindu family in possession of large properties. It is alleged in the plaint that Sambayya managed the family property and that he died an undivided member of the family on the 24th November 1925. He was at the time of his death the village munsif of Dokiparru. One of the questions to be decided in this appeal is whether the first plaintiff and Sambayya became divided or not. Neither the first plaintiff nor Sambayya had any male issue. They had only daughters. It is alleged in the plaint that after the death of Sambayya the entire property of the joint family devolved upon the first plaintiff by right of survivorship. It is alleged that the first and second defendants nevertheless took possession of the joint family property, and a decree is sought establishing the right of plaintiffs 2 to 7 and the third defendant to enjoy the property set out in Schedule A, and a permanent injunction is claimed restraining the first and second defendants from causing obstruction to the enjoyment of plaintiffs 2 to 7 and the third defendant in this property, and other reliefs. The plaintiffs therefore base their claim on a right to enjoy the undivided property of the first plaintiff and Sambayya. To meet this case the defendants set up the plea that Ramayya (the first plaintiff) and Sambayya were divided members and that the share of Sambayya did not pass to the first plaintiff after his death by right of survivorship. It is alleged that a partition was effected in November 1924 between Sambayya and Ramayya and that share lists showing a division of the properties were prepared at Bunder on the 9th November 1924, and in paragraph 5 of the written statement the items which fell to the share of Sambayya are set out. At this time Sambayya was

very ill and he died on the 24th November 1925. Before he died, it is alleged that he made a will at Bunder disposing of the property which fell to his share in the partition. The date of this alleged will is the 26th February 1925. Under the terms of this document, Exhibit VII, 15 acres of land passed to his daughters, 12 acres, under a codicil of the same date, to the second defendant, some 5 acres of land and godowns, to a temple and the residue to one Koti Reddi who was the son of the second defendant and whom, it is alleged by the defendants, Sambayya adopted. Sambayya's second daughter, Sowbhagyam, who was a widow living in Sambayya's house was not provided for in the will. In Exhibit VII, Koti Reddi is described as the adopted son of Sambayya and it is also stated in it that Sambayya had given authority to the second defendant, the natural father of Koti Reddi, to act as guardian of Koti Reddi and to act as village munsif during his minority and to manage all his properties. The rice mill at Gudlavalleru, which, in the will, is stated by Sambayya to be his self-acquired property was bequeathed to Koti Reddi. This alleged will—I describe it as an alleged will because it is the plaintiff's case that it is a spurious document—was attested by four witnesses, namely, Divi Rangacharyulu, a doctor who was attending on Sambayya, Pamireddi Ramayya, the first plaintiff, Korapaty Venkatakrishnayya (D.W. 4) and another witness whose signature is illegible but who was examined as D.W. 5. It is not disputed by the plaintiffs that the signature of the first plaintiff is his, but it is alleged that he was an uneducated man and under the influence, at this time, of the second defendant and that he either signed the document being unaware of its contents or the document was written on blank paper which bore the signature of the first plaintiff. It will be seen, therefore, that the

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respondents' case is that Sambayya, having effected a partition with Ramayya, disposed of by will the share which fell to him by reason of the partition and that, therefore, the plaintiffs have no right to any of the property of Sambayya so disposed of; and a matter of considerable importance to be considered here is whether the allegation by the defendants that the second defendant's son Koti Reddi was adopted by Sambayya is true or false. It should be mentioned that the second defendant's son Koti Reddi died on the 1st January 1926. Not however content with setting up a defence claiming Sambayya's property, a claim for Ramayya's property is also made by reason of an alleged relationship of *illatom* son-in-law to Ramayya. The second defendant, it will be remembered, married Sambayya's fourth daughter. He was therefore a son-in-law of Sambayya, but, notwithstanding this, it is the case of defendants 1 and 2 that Ramayya who had no unmarried daughters and no male issue brought up Surammal and gave her in marriage to the second defendant. In the written statement of the first and the second defendants it is stated that Sambayya and Ramayya effected an arrangement to the effect that Ramayya should take Surammal as his foster-daughter and she should be given in marriage to his sister's son, the second defendant, that the latter should have a joint right to the property of Ramayya and that, after the death of Ramayya, the entire property forming the share of Ramayya should pass to him. This *illatom* relationship and the rights attaching thereto are denied by the plaintiffs. It is also alleged by the defence—and this is admitted by the plaintiffs—that whilst the suit was pending, Ramayya, the first plaintiff, disposed of the bulk of the plaint properties, having by means of a *dhakal* deed disposed of immovable properties worth Rs. 50,000

and under another *dhakal* deed properties worth Rs. 8,000. Ramayya died in July 1926.

Several points of great importance and difficulty arise in this appeal. They are—(1) did Ramayya and Sambayya become divided before the death of the latter? (2) Is the will, Exhibit VII, and its codicil genuine? (3) Was Koti Reddi the adopted son of Sambayya? (4) Was the second defendant the *illatom* son-in-law of Ramayya? (5) If he was, to what share of Ramayya's property is he entitled? and (6) Was the rice mill in Gudlavalleru, the self-acquired property of Sambayya? In considering the before-mentioned matters several difficult questions of fact and law present themselves.

In dealing with the first question, what we have to consider is whether what is described by the defendants as a "share list" can be properly given that description and whether it is a deed effecting a partition as is contended by the plaintiffs. This question is a most important one because that document is an unregistered one. If it is a document which under the Registration Act is required to be registered, then the question arises whether it can be referred to in evidence in order to prove that there was a partition or division in status as between Sambayya and Ramayya or whether it can be disregarded altogether and parol evidence admitted to prove a division in status or a partition. First of all, does this document require registration? Under section 17 (b) of the Registration Act (XVI of 1908) amongst other documents required to be registered are non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property. If Exhibit VIII is a document of this description, then

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under section 49 of the same Act it shall not affect any immovable property comprised in it or be received as evidence of any transaction affecting such property unless it has been registered. Therefore the first thing to be considered is whether this is a document such as is described in section 17 (b) of the Registration Act. Exhibit VIII is headed

“Particulars of the immovable properties which fell to the share of Pamireddi Sambayya in the division of the family properties effected on the 9th November 1924 between the sons of Pamireddi Lakshmanna, (1) Sambayya and (2) Pamireddi Ramanna’s adopted son Ramayya, residents of Dokiparru village.”

Then follow the survey numbers of the properties, their situation and their rough extent. This document was signed by both Sambayya and Ramayya. The writer of the document is stated to be Burra Ramayya (D.W. 3) and there are the signatures of two attesting witnesses, Nagabhushanam, who was not called as a witness in the Court below, and Seetaramaswami (D.W. 7). For the plaintiffs it is contended that this document operates to create an interest in the immovable property described in it, and by the defence it is contended that it is nothing more than a memorandum of a division of properties previously agreed upon. A wealth of authority upon this question has been presented to us in the course of the argument by both sides. Amongst the cases to which we were referred are the following: *Pothi Naicken v. Naganna Naicker*(1). There the document in question reads as follows:—

“As we have, in the presence of the undermentioned panchayatdars, divided, into equal moieties, the cash, movables, and immovables, Court decrees, etc., of which we are now possessed, valued at Rs. 80,000 our connexion shall hereafter be only by relationship, but we shall have no monetary connexion in respect of these properties.”

(1) (1915) 30 M.L.J. 62.

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It was there held by Sir JOHN WALLIS C.J., SADASIVA AYYAR and SESHAGIRI AYYAR JJ. constituting a Full Bench, that the document had the effect of causing immovable properties heretofore held by the coparcener as joint tenants thenceforward to be held by them as tenants in common, and as such, without registration, could not affect immovable property. In my view, the document in question did not create much difficulty on the face of it. It did more clearly appear to be a document effecting partition than otherwise. The question whether a document is a deed of partition or a mere memorandum of partition is a pure question of fact to be decided on a perusal of the actual document. This was the opinion of JACKSON J. in *Veerappan v. Mylai Udayan*(1) and also of SPENCER J. in *Ayyakutti Mankondan v. Periasawmi Koundan*(2). In the former case, after an award directing a partition was passed by panchayatdars, a list was drawn up which contained the shares given to the different members and was signed by them and attested by witnesses. JACKSON J. held that the document was a deed of partition declaring an interest in the immovable property mentioned therein and, if unregistered, was inadmissible in evidence respecting any transaction affecting such property. JACKSON J. however, thinks that at the most it will be evidence of an intention to divide and receivable in evidence as proof of such intention. The latter opinion deals with the question as to admissibility and the former as to whether it purports to create an interest in immovable property. In *Saraswatamma v. Paddayya*(3), the document was described as a “list of shares of division.” Lands were divided in it, and then the residential house and it contained the statement “both

(1) (1924) 87 I.C. 285.

(2) (1918) 80 M.L.J. 404.

(3) (1922) I.L.B. 46 Mad. 349.

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of us have agreed to the said shares and effect settlement without any dispute whatever." VENKATA-SUBBA RAO J. was of the opinion that this document afforded clear evidence of conduct from which an intention to divide on the part of the executants was deducible, but that, all the co-parceners not being parties to the document, it did not effect an immediate division in status. With this opinion SPENCER J. agreed. On page 369 he states:—

"On the same principle, I think that documents which are instruments of partition, as defined in section 2 (15) of the Stamp Act, that is, instruments, whereby co-owners of any property divide or agree to divide such property in severalty, are required by section 17 of the Indian Registration Act to be registered when the property to be divided is immovable property over Rs. 100 in value, and if they are not so registered, they cannot by reason of section 49 be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving division of the status among the parties to the documents. When so used, they do not 'affect' immovable property nor is the division of status a 'transaction affecting immovable property' in the sense intended by the Act to be given to the word 'affect.' Documents that do not fall under the above description are not required to be registered at all and are admissible in evidence without registration."

The observations of SPENCER J. are useful in our consideration of the question whether, and for what purpose, a document inadmissible under section 49 of the Registration Act by reason of want of registration may yet be used in evidence. In *Gopayya v. Kristnayya*(1), it was held by KRISHNAN and VENKATASUBBA RAO JJ. that if the parties had treated the "share list" as final, it would be inadmissible in evidence without registration and that an oral agreement as to partition could be proved, and, if proved, the written deed could

(1) (1922) 18 L.W. 784.

be treated as the minutes of agreement between the parties and not as a completed partition deed, and, even though unregistered, could, under these circumstances, be admitted in evidence to prove the terms agreed to. In *James R. R. Skinner v. R. H. Skinner*(1), it was held that an agreement for the sale of immovable property is a transaction affecting the property within the meaning of section 17 of the Registration Act, inasmuch as, if carried out, it will bring about a change of ownership and that to allow a document which does itself create such an interest to be used as the foundation of a suit for specific performance appeared to be little more than an evasion of the Act. This case was strongly relied upon by the learned Advocate-General in support of his argument, but, when the agreement for sale is examined, it will be seen that it, on the face of it, affected the property. In it, clause 8 reads as follows:—

"The said vendor confirms this to be a complete and conclusive sale binding on the said vendor and on all his heirs or assigns, etc. in favour of the said vendee . . . and if the vendee should ever consider it necessary to execute a registered sale-deed . . . vendor or his heirs, assigns, etc. will always be ready to execute and register the same at the expenses of the vendee."

It will be seen that this clearly purports to transfer the vendor's interest in immovable property. In *Gnanamuthu Nadan v. Veilukanda Nadathi*(2), ODGERS and HUGHES JJ. held that a partition list containing a list of the properties which fell to each sharer on a partition did not require registration, even though signed by all the co-sharers and attested, when it contained no words which could be construed as creating a partition of status. In this case, *Gopayya v. Kristnayya*(3) was followed. This decision strongly supports the contention

(1) (1929) 30 L.W. 451 (P.C.). (2) (1923) 19 L.W. 494.
(3) (1922) 18 L.W. 784.

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of Mr. Varadachariar on behalf of the respondents that the document is not one required to be registered. In *Referred Case No. 5 of 1883, Reference under Stamp Act, s. 49 (1)*, it was held by a Full Bench of this Court that a document signed by the members of a Hindu family and attested by witnesses, which purported to be an account or list of the share of one member of the family in the family property and in which it was recited that the parents of the family were to enjoy certain lands and that the outstanding debts should be divided at a future date was not liable to stamp duty as a partition deed. In *Ramaswamy Ayyar v. Thirupathi Naick*(2), a case relied upon by the learned Advocate-General on behalf of the appellants, it was stated that the criterion for purposes of registration is what is expressed on the face of the document, not what incidents may be annexed by custom to a grant of the kind. This case was relied upon by the appellants, because it was there held that the document must be taken to be an agreement to lease and in consequence subject to the provisions of the Registration Act as if it were a lease.

On a consideration of these cases, I have come to the conclusion, although not without some hesitation, that this document cannot be said to be merely the minutes of a previous oral agreement to divide. The fact that it is of the same date as the alleged oral agreement to divide is of importance, but it does not necessarily follow that the proper conclusion to be drawn from that is that it is an agreement to partition, and I am not basing my conclusion merely upon that fact, because it seems to me that the document being signed and the other document (not produced) which is its counter-part

(1) (1884) I.L.R. 7 Mad. 385.

(2) (1903) I.L.R. 27 Mad. 48.

also being signed indicates that it was intended that this document and the other should be the evidence of the partition. It must be borne in mind that no partition deed is effected without some previous discussion of its terms and it is not rendered any the less a partition deed on that account, and although this case is not very dissimilar to *Gnanamuthu Nadan v. Veilukanda Nadathi*(1), for the reasons already given, Exhibit VIII, in my view, required to be registered, and not having been so, it is not admissible in evidence for the purpose required. But even though inadmissible in evidence to prove a partition, I am of the view that it could be used in evidence not for what it contains but as evidence of a division in status. As JACKSON J. stated in *Veerappan v. Mylai Udayan*(2), it would be evidence of intention to divide, and as SPENCER J. stated in *Saraswatamma v. Paddayya*(3), being unregistered it could be used to prove a division in status. In *Ramu Ohetty v. Panchammal*(4), it was held by KUMARASWAMI SASTRI and VENKATASUBBA RAO J.J. that a division of status can be proved even if the deed of partition is inadmissible in evidence for want of registration, that an unregistered document may be used to determine the nature of the possession held by a party, and that, where a deed of partition is inadmissible in evidence for want of registration, the terms of the partition cannot be proved except by the document itself, but, if it is unnecessary to decide the terms of the partition, it is open to a Court to infer from the conduct and dealings of the parties that there was a division in status. On page 1029, KUMARASWAMI SASTRI J. states as follows:—

“So far as the division of status is concerned, a recent decision of the Privy Council in *Rajangam Ayyar v. Rajangam Ayyar*(5), is clear to the effect that a division of status can be

(1) (1923) 19 L.W. 494.

(2) (1924) 87 I.C. 285.

(3) (1922) I.L.R. 48 Mad. 349.

(4) (1925) 92 I.C. 1028.

(5) (1922) I.L.R. 48 Mad. 373 (P.C.).

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proved even though the document has not been registered. It has also been held by their Lordships of the Privy Council that an unregistered document may be used to determine the nature of the possession held by a party. The Subordinate Judge has not relied upon any unregistered partition deed. For the purpose of coming to the conclusion he has arrived at, he takes the conduct of the parties into consideration and comes to the conclusion that not only has the division of status been proved but all the properties have been enjoyed by the defendant's husband in his own right. I do not see why the evidence as regards the conduct of the parties in their dealings with each other and with regard to specific items of property should not, coupled with the finding of a division of status, be used and relied upon to show that certain properties, which the plaintiff claims, are not in wrongful possession of the defendant but belonged to the defendant's husband. I do not think that on the facts of the case, section 92 of the Evidence Act is necessary to be invoked by any of the parties. The plaintiff comes into Court and says that he is the absolute owner of the property, because he is a member of an undivided family."

I may pause here and say that that is what the plaintiffs in this suit base their claim upon

"The defendant says that her husband was not a member of an undivided family, that he was divided in status, and that he enjoyed certain properties separately as a divided member of the family."

That is what the first and the second defendants say in this suit—

"This is not a case when a claim is made by the defendant to any property on the allegation that it came to her by virtue of a deed of partition which is unregistered and so inoperative. The plaintiff's claim as a member of a joint family could not be sustained."

Although the correctness of KUMARASWAMI SASTRI J.'s opinion in stating the effect of the decision in *Rajangam Ayyar v. Rajangam Ayyar*(1) has been questioned, his judgment in other respects is a very strong one in support of the respondent's contention here. Another case relied upon by the respondents

(1) (1922) I.L.R. 46 Mad. 373.

is *Chhotalal Aditram v. Bai Mahakore*(1). There it was held that the fact of partition may be proved by oral evidence, although the deed embodying the terms of partition cannot be proved for want of registration. In the course of the judgment, paragraph 405 of Taylor on Evidence (10th Edition) was quoted. It is as follows:—

"The fact of the existence of a particular relationship may be shown by parol evidence though the terms which govern such relationship appear to be in writing . . . The fact of partnership may be proved by parol evidence of the acts of the parties without producing the deed."

In *Ahobilachariar v. Thulasi Ammal*(2), RAMESAM J. took the same view. In *Subrahmania Ayyar v. Savitri Ammal*(3), SANKARAN NAIR J. held that a partition deed not registered is admissible in evidence to prove the status of the members but is inadmissible in evidence to prove the transaction so far as it affects immovable properties, and PINHEY J. held that such a partition deed cannot affect any immovable property comprised therein nor be received in evidence of any transaction affecting such property, but is admissible to prove the fact of a partition having been effected. In *Sikhamani Pandithar v. Ammani Ammal*(4), SPENCER and PHILLIPS JJ. held that a document which effects a partition by itself where there has been no prior partition is not admissible in evidence to prove a unilateral declaration or division in status, but if such declaration has taken place prior to the document, it can be received as evidence of that division in status. There is no doubt now that an unequivocal declaration by a member of an undivided family of his intention to be divided in status is sufficient to effect a partition, and in *Girja Bai v. Sadashiv Dhumdiroj*(5), it was held that a letter by a member of a Hindu family indicating his intention to

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(1) (1917) I.L.R. 41 Bom. 463. (2) (1927) A.L.R. (Mad.) 890.
(3) (1908) 19 M.L.J. 228. (4) (1917) 40 I.O. 86.
(5) (1916) I.L.R. 42 Cal. 1031 (P.O.).

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separate himself and enjoy his share in severalty, coupled with a suit for partition, was as unequivocal and clearly expressed an intention as could be made, and that it amounted to a separation with all its legal consequences. The case referred to by KUMARASWAMI SASTRI J. in *Ramu Chetty v. Panchammal*(1), viz., *Rajangam Ayyar v. Rajangam Ayyar*(2) and his opinion as to the effect of this judgment has been doubted as before stated, and, in my view, it does no more than decide that the document in that case, not being a document by itself creating, assigning, limiting or extinguishing any right or interest in immovable property and not therefore requiring registration, was admissible in evidence so far as it went. It did not decide that a document which did require to be registered could yet be used in evidence to prove a division in status although cases since that time, namely, *Gnanamuthu Nadan v. Veilukanda Nadathi*(3), *Ramu Chetty v. Panchammal*(1), and *Mahalakshamma v. Suryanarayana*(4), have clearly laid down that a document required to be registered as effecting a partition can be used as evidence of a division in status. In the latter case, *Mahalakshamma v. Suryanarayana*(4), on page 990 REILLY J. states:—

“The effect of the ruling of the Privy Council in *Varada Pillai v. Jeevarathnammal*(5) is that, while such a document cannot be used to prove such a transaction, it can be used to prove a different fact relating to the property even though that fact is intimately connected with the transaction.”

And on page 991 dealing with the unregistered document he states:

“But the opinion has been expressed—and I venture to think rightly—that it can be used to prove a division in status, which we can dissociate from, and which does not necessarily imply, a division of property.”

(1) (1925) 92 I.C. 1928.

(3) (1923) 19 L.W. 491.

(2) (1922) I.L.R. 46 Mad. 873.

(4) (1928) I.L.R. 51 Mad. 977.

(5) (1919) I.L.R. 43 Mad. 244.

In *Varada Pillai v. Jeevarathnammal*(1), there was a document reciting a gift and it was not registered and it was held that the gift was invalid and that the recitals in the document could not be used as evidence of a gift but might be referred to as explaining the nature and character of the possession thenceforth held by the person to whom the gift had been made. On page 251, VISCOUNT CAVE, in delivering the judgment of their Lordships of the Privy Council, states:—

“It should be added that, although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may, nevertheless, be referred to as explaining the nature and character of the possession thenceforth held by Duraisani.”

A consideration of these cases leads me to the conclusion that Exhibit VIII was admissible in evidence to prove a division in status but could not be used as evidence of how the property was divided; and furthermore, in my opinion, it was not necessary even to refer to Exhibit VIII at all for the purpose of proving a division in status, as such division could be proved by evidence as to the conduct of Sambayya and Ramayya. When that conduct is considered, it seems to me clear that there was a division in status between them. [His Lordship then considered the evidence on this point and proceeded as follows:—]

Then there is the will of Sambayya, Exhibit VII. In it Sambayya states:—

“Myself and my younger brother Ramayya remained jointly for a very long time and he and myself recently became divided and in that division A scheduled immovable properties fell to my share.”

And he then proceeds to dispose of those properties. Ramayya was a witness to the will and it is inconceivable that he did not know that there was that statement in the will and that Sambayya was disposing of the property

(1) (1919) I.L.R. 43 Mad. 244.

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as if it were his own. The question, of course, has still to be considered whether this will was genuine or not. [His Lordship discussed the evidence on this point and held as follows :—]

I see no reason for thinking that the will, Exhibit VII, is not genuine or for believing that Ramayya did not know what it contained. That being so, he acquiesced in the position taken up by Sambayya, namely, that of a divided brother. This, coupled with his own statement in Exhibit I, is sufficient evidence that he and Sambayya were at least divided in status. This disposes of the appellants' contention that they are entitled to the whole of Sambayya's property by right of survivorship. It is quite true that Exhibit VIII cannot be referred to in order to say what properties fell to the share of Sambayya and I do not think that the will can be referred to for that purpose either. The fact remains that he had a power of disposition over his half-share in each of the joint family properties. It is quite clear from the evidence already referred to that Sambayya took Koti Reddi in adoption. But the respondents' case is that the appellants are not entitled to any share in Sambayya's property because the second defendant was his *illatom* son-in-law and by survivorship he is entitled to the whole of that property. It lies upon the defendants to prove this relationship and it must be proved very clearly and must not be left a matter of speculation at all. I have had the advantage of reading the judgment of my learned brother CURGENVEN J. and entirely agree with the conclusions he has arrived at with regard to the alleged *illatom* relationship between the second defendant and Ramayya, both on the facts and upon the law, and I also agree with him in his opinion as to the effects of an *illatom* relationship, if proved, on the shares in the property. With regard to the rice mill, I am satisfied that it was the self-acquired property

of Sambayya and, as this question has been fully dealt with in the judgment of my learned brother, I do not think it is necessary for me to add anything further upon this point.

The appeal is allowed in part. In modification of the decree of the lower Court we declare that the late Pamireddi Sambayya and Ramayya died divided in status from each other, that the plaintiffs 2 to 7 and first and third defendants are entitled to the right and enjoyment of the first plaintiff's half-share of items 1 to 51 of the plaint A schedule, and to be placed in joint possession of the same along with defendants 1 and 2 as co-owners in respect of the said items, and that items 52 and 53 of the said A schedule were the self-acquired properties of the late Sambayya to which the plaintiffs have no right; and we further order that except as to the declaration before granted in respect of items 1 to 51 of plaint A schedule, the decree of the lower Court is confirmed and that each party do bear his own costs throughout.

CURGENVEN J.—The main facts of this case have been summarized in the judgment which my Lord has just delivered. The question of fact first arising is whether the partition deed, Exhibit VIII, and the will, Exhibit VII, purporting to have been executed by Sambayya, are genuine. [After considering the evidence, his Lordship held both documents to be genuine and proceeded as follows :—] It necessarily follows that the adoption of Koti Reddi, recited in the will, must be considered established.

It has next to be considered whether Exhibit VIII is admissible in evidence to prove the partition. The document opens thus—

“Particulars of the immovable properties which fell to the share of Pamireddi Sambayya in the division of the family

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properties, effected on 9th November 1924 between the sons of Pamireddi Lakshmanna (1) Sambayya and (2) Pamireddi Ramanna's adopted son Ramayya, residents of Dokiparru village."

Then follows a list of the items of property comprising Sambayya's share. The circumstances, in which this document and the corresponding document setting out Ramayya's share, which is not now forthcoming, were executed are narrated by the writer of them, D.W. 3. Sambayya gave him rough drafts and he wrote the fair copies from them in the presence of the two brothers, Sambayya himself dictating the particulars from the drafts. The deeds were then signed and attested. We have to consider whether, in the terms of section 17 of the Registration Act, Exhibit VIII "purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in immovable property," and the first test to apply is whether the document formed an essential part of the process of dividing the property or whether there is ground to suppose that the partition had already taken place, perhaps by oral arrangement, and was complete when the document was executed. It appears to me that the circumstances narrated by the writer show that this was not a case of an oral partition completed and done with, and lists separately and subsequently drawn up. I think that if ever a partition deed can be regarded as an integral part of the partition, Exhibit VIII was such a deed. The importance attached to it is shown by the previous preparation of a rough draft and by the employment of a draftsman, and its formal and binding character is apparent from its being signed by both the brothers and attested by witnesses. So far then as intention can be gathered from the course taken, it was not merely to prepare a list or memorandum but to execute a legally valid deed. In

point of fact it affords virtually the only evidence relied upon in proof of the partition in this case, although it so happens that other incidental evidence of the fact of partition is forthcoming.

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It is then necessary to see whether Exhibit VIII can be said to purport or operate to affect immovable property within the meaning of section 17. We have had a variety of other cases relating to partition documents brought to our attention, but no very useful purpose will be served by discussing them in detail as each document must be dealt with according to its terms. An instance of a somewhat extreme view is afforded by *Jiwan Ali Beg v. Basa Mal*(1), which dealt not with a partition document but with a receipt for money paid under a mortgage bond. The contention was that the document *pro tanto* extinguished the mortgage debt and accordingly should be registered. I only refer to the case, because *EDGE* C.J. who delivered the leading judgment expressed the view that the strictest construction must be placed upon the provisions of the Registration Act and it must be clear that the document objected to comes within the four corners of those provisions. An alternative view is that the Court should ensure that the provisions of the Act are not evaded by any mere informality in the language, so long as the document was intended to operate and does operate in the manner laid down in section 17. In *Reference under Stamp Act, s. 49, Referred Case No. 5 of 1883* (2), a Full Bench had to consider on a reference under section 49 of the Stamp Act, whether the referred document was a partition deed, but, in that case, I think, the terms of the document, which were bare of any operative words, led without difficulty to the conclusion that it was

"a note that a certain property had on partition been allotted for the maintenance of parents, and a memorandum of

(1) (1886) I.L.R. 9 All. 108.

(2) (1884) I.L.R. 7 Mad. 355.

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the particulars of property which had on partition fallen to the share of one of the brothers."

So too, the document in *Gnanamuthu Nadan v. Veilukanda Nadathi*(1) was a mere list of property headed with the name of the sharer to whom it fell, and although it was signed and attested, it was held to be admissible in evidence. Of a different character was the partition deed in *Pothi Naicken v. Naganna Naicker*(2), which contained the recital "As we have in the presence of the undermentioned panchayatdars divided . . ." and which was held actually to effect a division and so to be inadmissible for want of registration. No doubt the legal character and effect of Exhibit VIII would be clearer if it contained some such formal declaration as "we hereby divide" but mere informality of language should not, in my view, be allowed to defeat the provisions of the Registration Act. The document says

"Particulars of the immovable property which fell to the share of Pamireddi Sambayya in the division of the family properties effected on 9th November 1924."

If it had said "we hereby declare that the following are the particulars of immovable property, etc.", no doubt could be entertained as to its nature; and since it is in substance and intention a declaration to that effect, it must, I think, be deemed to operate within the meaning of section 17. Indeed, had it been a registered document and tendered in proof of Sambayya's title to his share in the property, I have no doubt that any Court would accept it as such. In these circumstances, I am clearly of opinion that, under section 49 of the Registration Act, it must be excluded in so far as it is evidence of a transaction affecting immovable property.

Assuming then that the deed is inadmissible to show what disposition of the family property was made at

(1) (1923) 19 L.W. 494.

(2) (1915) 30 M.L.J. 62.

the division, the point next arising is whether it is admissible to prove a division of status. Mr. Varadachari has endeavoured to show, I think successfully, that upon this question, judicial opinion, as revealed by the decisions of this Court, had gradually but unmistakably settled to the view that a partition deed, otherwise inadmissible, may be received in evidence of a division of status. As an instance of the earlier view that such a document is in all respects inadmissible may be cited the judgment of OLDFIELD J. in *Pothi Naicken v. Naganna Naicker*(1). The learned Judge held that a division in status alone necessarily converted the joint tenancy of a coparcener into a tenancy-in-common, and that this change extinguished one kind of right in the property and created another within the meaning of section 17 of the Registration Act. The other member of the Bench, SANKARAN NAIR J. took the different view that a document merely creating a separation in status did not fall within the provisions of the Registration Act, because the consequential change in the tenure of the property was by operation of rules of Hindu Law and not by virtue of the instrument. In the Letters Patent Appeal from these judgments—*Pothi Naicken v. Naganna Naicker*(2)—the view was taken that the document must be treated as a whole, and as a whole, was inadmissible, notwithstanding that it dealt with movables as well as immovables. *Ayyakutti Mankondan v. Periasami Koundan*(3) is another Letters Patent Appeal from differing judgments of two learned Judges, SPENCER and SADASIVA AYYAR JJ. SPENCER J. thought that the document did not require registration at all, so that the further question did not arise; SADASIVA AYYAR J. took the opposite

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(1) (1915) 28 M.L.J. 423.

(2) (1915) 30 M.L.J. 62.

(3) (1913) 30 M.L.J. 403.

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view and considered further that the division of status created by it could not logically or properly be separated from the extinction of joint rights in immovable property effected by the same document, which is the same view as OLDFIELD J. took in *Pothi Naicken v. Naganna Naicker*(1). We find this opinion adopted again by SPENCER AND PHILLIPS JJ. in *Sikhamani Pandithar v. Ammani Ammal*(2). Two judgments of their Lordships of the Privy Council appear to have contributed more than anything else to an alteration of opinion. One is the well-known case, *Girja Bai v. Sadashiv Dhundiraj*(3), which held that an un-equivocal expression of intention on the part of a coparcener was sufficient to effect a division of status. The other was *Rajangam Ayyar v. Rajangam Ayyar*(4), which dealt with the admissibility of a document drawn up in certain partition proceedings. Admittedly the document in the latter case effected a division of status, and although their Lordships did not refer to or discuss any of the Madras decisions upon this point, the only conclusion compatible with their judgment is that a document declaring a division of status does not require registration on the ground that such a division must necessarily affect the family property within the meaning of section 49 of the Registration Act. In *Saraswatamma v. Paddayya*(5), a partition deed which was inadmissible to prove particulars of partition was accepted to prove an intention to be divided in status, the learned Judges relying much on *Girja Bai v. Sadashiv Dhundiraj*(3), in coming to this conclusion. *Ramu Chetty v. Panchammal*(6), is another decision to the same effect; and the principle was

(1) (1915) 28 M.L.J. 423.

(3) (1916) I.L.R. 43 Calo 1031 (P.C.).

(5) (1922) I.L.R. 46 Mad. 349

(2) (1917) 40 I.C. 38.

(4) (1922) I.L.R. 46 Mad. 373.

(6) (1926) M.W.N. 45.

accepted by KUMARASWAMI SASTRI and REILLY JJ. in *Mahalakshamma v. Suryanarayana*(1). I think, accordingly, that, following the current of recent judicial opinion, there is no question but that we may look into Exhibit VIII to decide whether the brothers were joint or several in status. Even if the correct course were to exclude the document altogether, there is ample authority for the view that evidence of division may be received from other sources. Direct authority for this proposition is furnished by *Ohhotalal Aditram v. Bai Mahakore*(2), where it is explained that section 91 of the Evidence Act does not preclude proof by parol evidence of a fact which is not a term of the document; and the fact of division is not such a term any more than would be, for instance, the fact of relationship of mortgagor and mortgagee or of landlord and tenant. A case of this Court dealing with the same matter is *Ramu Chetty v. Panchammal*(3). The evidence, in order not to offend against section 91 of the Evidence Act, must be restricted to the fact that a partition has taken place and must not extend to the particulars of the division, as for instance, the items which fell to Sambayya's share. That, apart from the recital in Exhibit VIII, there is ample evidence of the fact of a partition cannot be disputed. It is unnecessary, I think, to go further than the will, Exhibit VII itself, attested as it is by Ramayya. Therein it is stated that Sambayya and his younger brother remained joint for a very long time and recently became divided. Exhibit I, Ramayya's petition to the Deputy Collector, contains an express admission to the same effect. The finding that Exhibit VIII is inadmissible to show what property fell to each brother's share must result in the conclusion that each enjoyed

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(1) (1928) I.L.R. 51 Mad. 977.

(2) (1917) I.L.R. 41 Bom 466.

(3) (1925) 92 I.C. 1028.

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an undivided share in each item of property, a conclusion which must necessarily involve an alteration in the decree which has been passed in this suit.

The next question is whether the second defendant has succeeded in proving his relationship as *illatom* son-in-law to Ramayya. [After discussing a portion of the evidence on this point, his Lordship proceeded as follows:—] An *illatom* relationship to a father-in-law may or may not be rare in the community to which the parties belong but there can be no question that such a relationship to a father-in-law's brother is quite unusual, so that it is unlikely on *a priori* grounds that such an expedient would be resorted to; nor is it easy to see with what motive or intention an undivided brother would adopt such a course. [His Lordship considered further the evidence on this point and proceeded as follows:—]

As has been observed by a Bench of this Court in *Panda Patyya v. Panda Venkamma*(1), claims of this nature should be very carefully scrutinized, as an ordinary son-in-law may be tempted to get possession of his father-in-law's property by such means. [After considering further the evidence on this point his Lordship concluded as follows:—] However that may be, the oral evidence does not, in my view, establish the status, and, differing from the trial Court, which appears to regard as proved an unqualified agreement by Ramayya to make the second defendant his heir, I am unable to accept the fact of *illatom*.

Even if the *illatom* relationship had been established, I do not think that the learned Advocate for the respondents has succeeded in demonstrating that a father-in-law who takes a son-in-law in *illatom* thereby

deprives himself of the right to devise his property—much less to alienate any portion of it while still alive. It is not disputed that in the Reddi community to which the parties belong, the custom is to be found of taking a son-in-law into the family, especially where there is no son. This may be done, it seems, without the execution of any documents or the performance of any ceremony, though it cannot be inferred that every son-in-law who becomes an inmate of his wife's family house thereby acquires the status of *illatom* son-in-law. The practice is a departure from ordinary Hindu Law, and accordingly, it lies upon the party claiming by virtue of the status to override the provisions of that law to substantiate his claim. This cannot, in general, be done, as, for instance, can be done in a case of adoption, by appeal to settled rules of law, because the practice of *illatom*, being of rare occurrence and confined to certain castes, has never become crystallized into fixed rules of law by a long course of judicial decisions. Thus, we frequently find that, when some legal consequence of the relationship has had to be decided, the Court has found it necessary to base its finding upon evidence specially recorded for the purpose. Upon the question now before us, no such evidence is available, and Mr. Varadachari has had to depend upon the available case law as the only means whereby to demonstrate his proposition.

Unfortunately, little, if any, direct authority for it or against it has been found. There are cases where the question arose as to the right of an *illatom* son-in-law compared with that of a natural born son, as for instance, *Hanumantamma v. Rami Reddi*(1), where the procedure I have already alluded to, that of taking evidence *ad hoc*, was resorted to, and the trial Court returned a finding

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(1) (1915) 29 I.C. 54.

(1) (1881) 1 L.R. 4 Mad. 272.

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that the *illatom* takes the same share as would be taken by an adopted son, while the High Court held that upon the evidence, he should take an equal share with a natural born son, a difference of view which shows how doubtful may be the incidents of this custom. In the same case, the power of an *illatom* to demand partition was a question raised but not decided; and this same question was in *Chinna Obayya v. Sura Reddi*(1) held to depend upon custom and to be determinable only upon evidence. The case was remanded for evidence to be taken, but what the result was has not been discovered. In *Chenchamma v. Subbayya*(2), the status of an *illatom* arose for consideration, and it was held that he was not a coparcener with an after-born son, nor a joint tenant, but a tenant-in-common. It has not been seriously contended that a coparcenary exists between the *illatom* and his father-in-law, and there is authority, as for instance, in *Emi Sooramma v. Yarabati Varahalu*(3), that on the father-in-law's death he gets no right of survivorship. It is not possible, I think, to deduce from these decisions, even were they capable—which they are not—of universal application, that the *illatom* has, during the father-in-law's lifetime, such an interest in the latter's property as would give him a right to interdict alienation and devise. Mr. Varadachari admits that the interest enjoyed is of a peculiar kind, which he would define as vested but variable. It would certainly be a very strong thing to hold that the father-in-law debars himself from disposing of any property thenceforward, and indeed the learned Advocate only goes to the length of suggesting that alienation for the purpose of defeating the *illatom* rights would be invalid as against it. It would be more reasonable to impose a limit upon the

(1) (1897) I.L.R. 21 Mad. 226.

(2) (1885) I.L.R. 9 Mad. 114.

(3) (1926) 101 I.C. 823.

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father-in-law's power of devise, although, whether this should be total or partial would need to be decided by reference to evidence of usage. On the whole, later cases appear to me not to be in conflict with the earliest cited to us, *Challa Papi Reddi v. Challa Koti Reddi*(1). The finding in that case was that the defendant's father obtained his rights in pursuance of a special custom which entitled his father-in-law to select a son-in-law who would take his property as if a son. HOLLOWAY J. (with whom INNES J. agreed) held that the son-in-law did not become a joint tenant, and the father-in-law had no such restrictions imposed upon his powers of alienation as the existence of a son would entail. He goes on:

"The power of complete disposition as against both a widow and daughters has, rightly or wrongly, been upheld, and there would be great difficulty in saying that the son-in-law so affiliated could be in a better position. . . There is nothing illogical in saying that the person so affiliated shall inherit all of which the affliator died possessed but that he does not and cannot stand in the same position as one who became a joint tenant at the instant of birth."

So far as I can see, it is only by reference to a special agreement that this conclusion can be successfully resisted. In the present case, even if the evidence is relied upon to the full, I do not think that more could be derived from it than that Ramayya agreed to take the second defendant as *illatom*, subject to what were known or understood to be the incidents of that status. As was held by the Judicial Committee in *Narain Das v. Ramanuj Dayal*(2), a promise to make a person one's heir may, while giving rise to an expectation, fall short of a contract.

Near the conclusion of the arguments, Mr. Raghava Rao for the appellants drew our attention to an

(1) (1872) 7 M.H.C.B. 25.

(2) (1897) I.L.R. 20 All. 209.

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unreported case of this Court, A.S. No. 206 of 1912, where the very question which now engages us arose. The learned Judges found the evidence available for the decision of the point so unsatisfactory that they called for a finding upon fresh evidence; and the District Judge, after examining numerous witnesses on each side, returned a finding that the father-in-law was not precluded from disposing of his property either *inter vivos* or by will, which was accepted by the Bench. The case came from the Kurnool District, and while it may not be permissible to import the conclusion, as partly a conclusion of fact, into this case, yet the procedure adopted is only one further illustration of the correct method of settling a disputed question of usage. It lay heavily upon the second defendant, in my view, to show that, by specific customary law overriding the general Hindu Law, he had a preferential right to the rights of Ramayya's alienees, and, in this respect too, I think that this case fails.

A question that remains is whether the mill and godown, items 52 and 53, were owned jointly by the brothers or were the separate property of Sambayya.

[After discussing the evidence on this point his Lordship held that they were the separate property of Sambayya and concluded as follows:—]

These are all the questions that have been argued in this appeal, and, agreeing with my Lord as to the answers which should be given to them, I agree also as to the practical consequences which should follow, and the orders which should be passed.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Jackson.

UNNAMALAI AMMAL (PLAINTIFF), APPELLANT,

v.

GOPALASWAMI CHETTI AND OTHERS (DEFENDANTS
1 TO 3), RESPONDENTS.*

1930,
April 28.

Transfer of Property Act (IV of 1882), sec. 81—Marshalling—Contribution—Purchaser in execution of money-decree against mortgagor of plot not mortgaged to puisne mortgagee—Payment by him of the decree amount of first mortgagee—Purchaser of plot mortgaged to both mortgagees in execution of decree on the second mortgage—Right of former purchaser to contribution from the latter—Right of latter to marshal as against the former.

Where two plots of land (A and B) were mortgaged to one person, and plot A alone was subsequently mortgaged to another, a purchaser of plot B in execution of a money-decree against the mortgagor, who paid off the full amount of the decree obtained by the first mortgagee on his mortgage, is entitled to contribution rateably from plot A in the hands of the puisne mortgagee who had also purchased it in execution of his decree on his mortgage; and the latter is not entitled to enforce his right of marshalling on plot B as against the former, under section 81 of the Transfer of Property Act.

SECOND APPEAL against the District Court of West Tanjore in A.S. No. 68 of 1925, preferred against the decree of the Court of the District Munsif of Mannargudi in O.S. No. 511 of 1923.

R. Kuppuswami Ayyar for appellant.

A. V. Viswanatha Sastri for first respondent.

N. S. Rangaswami Ayyangar for third respondent.

The JUDGMENT of the Court was delivered by

RAMESAM J.—The facts of the Second Appeal may be stated as follows:—The first defendant was the original

RAMESAM J.

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owner of the suit properties which are described in schedules A and B of the plaint. Both these sets of properties were mortgaged to Kuppaswami Pillai on the 20th June 1910, under Exhibit I. Afterwards the first defendant effected a second mortgage of the properties in schedule A only, and some other properties not in the suit, in favour of third defendant's father in 1914, by Exhibit E. The plaintiff obtained a money-decree in Small Cause Suit No. 8 of 1915 against the first defendant and in execution of the decree purchased the properties in schedule B by a sale certificate Exhibit IV, dated 6th August 1917. Afterwards, the second defendant in execution of a decree in Small Cause Suit No. 1238 of 1904 purchased in Court auction the properties in schedule A. In 1917 a suit was filed by the first mortgagee to enforce his mortgage impleading the first defendant, the plaintiff, the second defendant and the third defendant and a decree obtained on the 8th February 1919: Exhibit C. He applied for execution of the decree in July 1923. The plaintiff paid off the decree amount. The plaintiff now brings the suit for contribution against "A" schedule properties in the hands of the third defendant. It may be mentioned that the third defendant himself in 1922 filed a suit on his mortgage and obtained a decree and purchased the properties in execution of his own decree (Exhibit II). This was on the 8th February 1924. Both the lower Courts, holding that the third defendant has got the right of marshalling under section 81 of the Transfer of Property Act, denied the right of contribution and dismissed the plaintiff's suit. The District Munsif in his judgment referred to *Rajkeshwar Prasad Narain Singh v. Mohammad Khalil-ul-Rahman*(1). It is also relied on by the Advocates for the respondents before us. That

(1) (1924) I.L.R. 3 Pat. 522.

decision and the decision in *Inderdawan Pershad v. Gobind Lall Chowdhry*(1), merely decide that the right of marshalling which a second mortgagee has got is not lost by the fact that he afterwards purchased in execution of his own decree. But the point with which we are concerned now is not whether the respondent is not entitled to the right of marshalling by reason of the fact that he has purchased in execution of his own decree but whether he has got the right of marshalling against a person in the position of the plaintiff. Section 81 of the Transfer of Property Act says that the right of marshalling exists against a mortgagor but not

"so as to prejudice the rights of the first mortgagee or any other person who has acquired for consideration an interest in either property."

As the section refers to the right of the second mortgagee to have the first mortgagee satisfied out of the property not mortgaged to the second mortgagee, it is clear that the time with reference to which the section is speaking is the time when the prior mortgagee seeks to realize his mortgage amount. If, at that time, there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee, then the right of marshalling does not exist. The section is, therefore, clearly in favour of the appellant. Primarily the right of marshalling is a right given against the mortgagor. Any further extension of the equity must be made very clear by the language of the statute. Halsbury's Laws of England, Vol. XXI, section 544, relied on by the respondent, is against him. It does not exempt the right of marshalling in express terms against purchasers. It allows it against mere judgment-creditors. This obviously refers to

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(1) (1896) I.L.B. 23 Cal. 790.

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judgment-creditors who had not become purchasers. The case cited in the foot-note "c", *Gray v. Stone*, refers to a case of judgment-creditors, who had not yet purchased before the question arose. The dictum of KAY L.J. in *Flint v. Howard*(1), viz., "It is not enforced against a mortgagee or purchaser of the other estate" supports the appellants. The right of the appellant not to be marshalled does not depend upon whether he had notice of the second mortgage. See Ghose on Mortgages, Vol. II, page 812. We think therefore that the Courts below have erred in dismissing the plaintiff's suit. The plaintiff is entitled to contribution. No finding has been given as to the amount to which the plaintiff is entitled. The Court will have to find the amount which can be rateably charged upon the properties in "A" schedule with reference to the value of the properties at the time of the first mortgage. The Court will submit its finding upon the fifth issue with reference to the above remarks with such incidental consideration of the third issue as may be necessary. Time one month after the re-opening of the High Court. Time for objections seven days.

K.R.

(1) [1898] 2 Ch. 54 at 73.

APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Pakenham Walsh.*

KONDA REDDI AND ANOTHER, PETITIONERS IN CRL.
R.C. No. 968 OF 1929 (ACCUSED 2 AND 3) AND
P. BAYAPPA REDDI, PETITIONER IN CRL. R.C. No. 969
OF 1929 (ACCUSED 5), PETITIONER,

1930,
July 14.

v.

MANGALA BABANNA, RESPONDENT IN BOTH (P.W. 2).*

Code of Criminal Procedure, 1898, sec. 428—Powers of an Appellate Court under—Certain persons convicted under ss. 347 and 384, Indian Penal Code—Finding of Appellate Court that evidence did not support conviction but charge under sec. 423 could be framed—Trial Court directed to take additional evidence—On receipt of it Appellate Court framed charge and convicted under section 423—Procedure adopted whether proper.

Certain persons were convicted under sections 347 and 384 of the Indian Penal Code by a Joint Magistrate, and on appeal, the Sessions Court decided that the evidence did not support the conviction of the accused of either offence, but that a charge under section 423 of the Code could be framed against some of the accused, and for that purpose, directed the Joint Magistrate to take additional evidence, and on receipt of such evidence framed a charge under section 423 against such accused—acquitting the other accused who remained before him—and convicted them under section 423.

Held, in revision, by the High Court, that, though section 428 of the Code of Criminal Procedure enabled an Appellate Court, if it thought it necessary, to call for additional evidence which would explain or supplement within limitations, the evidence for the prosecution in support of a charge which had resulted in a conviction and which conviction was the subject of an appeal, it did not entitle an Appellate Court to substitute an offence in respect of which there had been no conviction,

* Criminal Revision Cases Nos. 968 and 969 of 1929.

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and to direct additional evidence to be taken which may support such an offence, and that, therefore, the procedure adopted by the Sessions Court was not proper, and that the conviction should be set aside.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Anantapur Division in Criminal Appeal No. 5 of 1929 preferred against the judgment of the Court of the Joint Magistrate of Penukonda in Calendar Case No. 75 of 1927.

K. V. Sesha Ayyangar and *T. Jagannatha Rao Nayudu* for petitioners in Criminal Revision Case No. 968 of 1929.

K. S. Jayarama Ayyar and *D. R. Venkatesa Ayyar* for petitioner in Criminal Revision Case No. 969 of 1929.

K. Venkataraghavachari for *Ag. Public Prosecutor* (*K. N. Gunpati*) for the Crown.

No one appeared for the respondent.

The JUDGMENT of the Court was delivered by

BEASLEY
C.J.

BEASLEY C.J.—Four persons including the appellants in Criminal Revision Case No. 968 of 1929 (Accused 2 and 3) and the appellant in Criminal Revision Case No. 969 of 1929 (Accused 5) were convicted by the Joint Magistrate of Penukonda for offences under sections 347 and 384, Indian Penal Code, for wrongful confinement to extort property and extortion.

The facts can be dealt with quite shortly, and they are that on the 3rd December 1927 a document was registered by the District Registrar at Anantapur the material portions of which ran as follows:—

“Deed of sale caused to be written and given to Nethi Narayanappa of Pamdurthi. To discharge debts due to others for the purchase of mango trees, I have received from you in cash this day Rs. 300. The land sold to you for this sum is S. No. 882, extent 0.71 acres with the various fruit trees standing therein. I have put you in possession this day.

Henceforward you will have all my rights. My heirs and I will have nothing to do with it.”

Then there is the mark of Mangala Babanna who admittedly was an illiterate person and the two witnesses are accused 2 and 3. Upon this document were founded the two charges against the accused, the prosecution case being that Mangala Babanna was by confinement and extortionate methods made to execute that document, that he as a matter of fact was not the owner of the property at all and that it was a spurious document got for the purpose of defrauding others. In support of the prosecution case, some evidence was given to show that, whereas in the body of the document Rs. 300 was stated to have been paid by way of consideration, none in fact was paid. Though the question of consideration was quite an irrelevant one to the two charges then before the Court, because both the charges could be supported equally well, whether there had been consideration passing or not, the Joint Magistrate considered it as of some importance as supporting the case for the prosecution and dealt with it. This resulted, as before stated, in the conviction of four of the accused, three of whom are the appellants here. The case then came up before the learned Sessions Judge of Anantapur, and he after going very carefully into the facts in a very lengthy and elaborate judgment came to the conclusion, to put it quite shortly, that the evidence certainly did not support the conviction of the accused of either offence. He then resorted to a procedure which is called in question here. Having come to the conclusion that no conviction under sections 347 and 384, Indian Penal Code, could be supported upon the evidence, he dealt with the evidence given with regard to the consideration which passed for the document, and decided, for reasons which he has given

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in his judgment, that a charge could be framed under section 423, Indian Penal Code, and that in order that such a charge might be framed, there should be additional evidence before him; and he accordingly made an order that the Joint Magistrate should take evidence on the question as to whether or not the Rs. 300 consideration or any part of it passed on the date or at about the time of execution of that document. The result of that enquiry was that he proceeded upon the additional evidence which came before him and found that no consideration for the sale did pass. He thereupon framed charges against the appellants under section 423, Indian Penal Code, acquitting the other accused who remained before him; and having framed those charges, he proceeded at once, for the reasons which he has given in the earlier part of his judgment, to convict the appellants and ordered them to pay fines amounting in the case of the 3rd accused to Rs. 500, and in the case of the 2nd and the 5th accused to Rs. 1,000 each, in default of which there was to be a term of imprisonment.

The matter reduces itself to this, was the procedure adopted by the learned Sessions Judge a proper one or not? It is of course conceded that, under section 428 of the Code of Criminal Procedure, an Appellate Court in dealing with an appeal under the Chapter in which the section appears may, if it thinks it necessary, order additional evidence to be recorded, after stating its reasons for so doing, and may either take the evidence itself or direct it to be taken by a Magistrate, and it was purporting to act under this section that the additional evidence was ordered to be taken by the learned Sessions Judge. The strong criticism that is made here by Mr. Jayarama Ayyar is that the accused had been convicted under sections 347 and 384, Indian Penal

Code, and had appealed to the Sessions Court of Anantapur against their conviction for those offences and none other, and that there was no appeal against any conviction under section 423, Indian Penal Code, because there had not been any conviction or any trial even for an offence under that section. He contends that section 428, Criminal Procedure Code, merely deals with an appeal against a conviction, and does not enable the Appellate Court to substitute an offence in respect of which there has not been a conviction, and then say that additional evidence must be called which may support such an offence. We think that that criticism is clearly correct and well-founded, and that section 428, Criminal Procedure Code, merely enables an Appellate Court, if it thinks it necessary, to call for additional evidence which will explain or clear up or perhaps supplement within limitations the evidence for the prosecution in support of a charge, which has resulted in a conviction, and which conviction is the subject of an appeal, and that it does not enable an Appellate Court to adopt the procedure adopted in this case by the learned Sessions Judge. He might—although we say nothing about its being proper in this case, it is merely an indication of a possible procedure—have indicated that a charge under section 423, Indian Penal Code, might be framed and sent the case back again for retrial. But in this case he did not adopt that procedure, and we are of the opinion that this petition must be allowed. The convictions will be set aside and the fines paid, will be refunded to the appellants.

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APPELLATE CRIMINAL.

Before Mr. Justice Wallace and Mr. Justice Jackson:

In re CHINNA GANGAPPA (ACCUSED), APPELLANT.*

1930,
April 8.

Indian Penal Code, ss. 201 to 203—Person guilty of main offence—Applicability to—Practice—Accused charged in the alternative with the main offence and under secs. 201 and 203—Misjoinder—Person charged with murder—Finding by trial Court that accused did not inflict the fatal injuries but knew who had inflicted and gave false story to screen real offender—Conviction of accused under secs. 201 and 203—Legality of—Calculating of punishment under.

Sections 201 to 203 of the Indian Penal Code are applicable to a person who is guilty of the main offence, though in practice a Court will not convict an accused both of the main offence and under these sections.

There is no misjoinder in charging an accused in the alternative with the main offence and under sections 201 and 203 of the Indian Penal Code.

For the purpose of calculating the punishment to be awarded under section 201, it is necessary for the Court to decide not so much what offence—the evidence of which has been concealed—has been committed, as what offence the accused knew or had reason to believe had been committed.

Where a person was charged with murder, and the trial Court held that the evidence did not prove that the accused had inflicted the injuries that proved fatal, but that he knew who had inflicted such injuries and gave out a false story intending to screen the real offender, and convicted the accused under sections 201 and 203 of the Indian Penal Code, held, by the High Court, on appeal, that the conviction was legal.

APPEAL against the order of the Court of Session of the Bellary Division in Case No. 28 of the Calendar for 1929.

V. L. Ethiraj and M. C. Sridharan for appellant.
Public Prosecutor (L. H. Bewes) for the Crown.

* Criminal Appeal No. 640 of 1929.

JUDGMENT.

The appellant has been convicted by the learned Sessions Judge of Bellary under section 201, Indian Penal Code, for giving false evidence about the murder of his wife in order to screen the real offender, and also under section 203 for giving false information about the murder. He was also himself charged with the actual murder of his wife, but was acquitted on that. The facts of the case briefly were:—On the 12th August 1929 at about 10 a.m. the deceased woman took food to her husband. P.W. 4 saw her there. He next saw her being carried in an unconscious state by the accused and his brother towards her house. P.W. 5 saw people in her house applying restoratives to her, while the accused and his brother were giving out that the woman had been stung by a scorpion or bitten by a snake. She died at 4 p.m. The accused himself made the report to the Village Munsif (P.W. 6) saying that he suspected that she had been stung. The woman's father (P.W. 8) was suspicious and reported to the police who sent the body for *post mortem*. The medical officer, P.W. 1, found on the body four contusions, three of them on the skull, and on dissecting he found there had been cerebral haemorrhage. He was of opinion that that was the result of blows by sticks or stones on the head. He found no signs or symptoms of poisonous bite or sting.

The charge of murder was not pressed against the accused in the trial Court, and the learned Sessions Judge held that the evidence did not prove that it was the accused who inflicted the injuries on his wife. He held, however, that he must have known who inflicted them on his wife and that his story to the Village Munsif was a false one, intended to screen the real offender. He therefore, convicted him under sections 201 and 203, Indian Penal Code.

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The learned Counsel for the defence raises a point of fact and a point of law. The point of fact is that as the injuries on the woman were hidden under her hair the accused did not genuinely know that she had been assaulted. But we do not think that there is any substance in this. For, the woman having been assaulted, the accused's story that she cried out she had been stung cannot be true. She must have cried out that she was being beaten and accused must have known that.

The point of law is that, unless the Court is satisfied beyond reasonable doubt that accused was not himself the murderer, he cannot be convicted under sections 201 and 203. This rests upon a proposition, affirmed in several rulings of various High Courts, that sections 201 to 203, Indian Penal Code, have no application to the person who actually committed the main offence mentioned in the sections, and that the person who committed the main offence cannot be himself found guilty of causing evidence of that offence to disappear or of giving false information about it. The earliest pronouncement on this point was in 1871 in *Reg. v. Kashinath Dinkar et al*(1) and this ruling has been followed, mostly without discussion or comment as if the proposition were self-evident, in various other cases [cf. *Empress of India v. Krishna*(2), *Queen-Empress v. Dungar*(3), *Torap Ali v. Queen-Empress*(4) and *Emperor v. Ghanasham*(5)]. The only pronouncement of this High Court on this subject which has been traced, is in a parenthesis and *obiter dictum* at page 277 of *Ramaswami Gounden v. Emperor*(6). Nowhere is the *ratio decidendi* of *Reg. v. Kashinath Dinkar et al*(1),

(1) (1871) 8 B.H. C.R. 126.
(3) (1886) I.L.R. 8 All. 252.
(5) (1906) 8 Bom. L.R. 538.

(2) (1880) I.L.R. 2 All. 713.
(4) (1895) I.L.R. 22 Calo. 638.
(6) (1903) I.L.R. 27 Mad. 271.

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examined. It seems to us to rest on a *petitio principii*. The reason given is that "as there is no law now which obliges a criminal to give information which would convict himself, it is evident that sections 201 and 203 could not apply to a person who committed that offence, that is, the offence which he knew had been committed." Obviously, if there is no law to that effect, then sections 202 and 203 will not apply. The question rather is whether sections 201 to 203 do not embody such a law. On the face of them there is nothing to show that they do not apply to the main offender himself. Section 44 of the Code of Criminal Procedure, which is the generic section relating to the duty of persons to give information about grave offences including murder, and section 45 (d) of that Code which lays on any owner or occupier of land the duty of giving information regarding the occurrence in his village of any sudden or unnatural death, do not in terms exclude the offender himself. These sections of the Code of Criminal Procedure would be relevant in a case under section 202, Indian Penal Code, where it is necessary that the accused should be legally bound to give information regarding the offence; but even this qualification does not appear under section 201 or section 203. What is required there is merely that there should have been an offence and that the accused has given false information about it, with the added intention in the case of section 201, Indian Penal Code, of screening the offender. We cannot, therefore, see wherefrom comes the proposition which is the foundation of *Reg. v. Kashinath Dinkar et al*(1) that there is no law which obliges a criminal to give information which would convict himself. There is such a law in the case of grave offences and sudden

(1) (1871) 8 B.H.C.R. 126.

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deaths, and in theory the offender himself could be convicted for breach of that law under sections 201 to 203, Indian Penal Code. In practice, no doubt, if he has been convicted of the offence itself, no Court will think it worth while to convict him also under sections 201 to 203, Indian Penal Code. If the proposition laid down in *Reg. v. Kashinath Dinkar et al*(1) is carried to its logical conclusion, it would appear that it is improper to try an accused person, as the present accused has been tried, in the same trial under both sections 302 and 201, Indian Penal Code, because a perfect defence to section 201 would be a plea and proof that he himself was the murderer, and an accused would be entitled to say that the plea he proposes to make to the charge under section 201 will depend on whether he is acquitted or convicted of the principal offence; and that to call upon him to plead to the charge under section 201, before and until he knows what the verdict on the murder charge is, would be to deprive him of his legitimate defence. It would also in a case where the Court regards proof of his complicity in the actual offence as insufficient to establish his guilt compel the Court to let him go free, even though it is satisfied that he gained his acquittal on the main offence by his own concealment of the traces of the crime. This was exactly what happened in *Reg. v. Kashinath Dinkar et al*(1) and it is hardly compatible with justice that the actual offender should escape conviction under sections 201 to 203, because he is the actual offender in the main crime, while those who merely witnessed it but gave false information about it are punishable under sections 201 and 203. This means that the more successful a criminal is in concealing his own offence, the more the

(1) (1871) 8 B.H.C.R. 126.

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law will assist him in escaping justice altogether, and, unless the Court holds without reasonable doubt that the accused did not take part in the murder, the Court is bound to give him the benefit of the doubt and acquit him of offences under sections 201 to 203. The case reported in *Torap Ali v. Queen-Empress*(1) is another practical example of how justice is defeated by such a theory of the law.

The true principle seems to be that there is no law preventing the main offender being convicted under sections 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. But, if the commission of the main offence is not brought home to him, then he can be convicted under sections 201 to 203. Therefore, there is no misjoinder in charging an accused in the alternative with the main offence and under sections 201 and 203, Indian Penal Code, nor is there anything irregular or improper in a Judge holding, as the learned Sessions Judge has done in this case, that, while the accused is himself not free from the suspicion of being the actual murderer, he can be none the less convicted under sections 201 or 203. This position is not without authority, though as noted above most of the reported cases have followed *Reg. v. Kashinath Dinkar et al*(2). Most of these rulings have been considered in a judgment of the Punjab Chief Court in 1903, in *Bucha and another v. King-Emperor of India*(3) wherein it was held that an accused acquitted of the charge of committing a crime can be convicted under section 201 in respect of the offence "of the commission of which he is no longer himself charged or liable to be charged"; and the mere suspicion that an individual is the actual

(1) (1895) I.L.R. 22 Cal. 638.

(2) (1871) 8 B.H.C.R. 126.

(3) (1903) 89 P.R.J.C.J. 1.

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murderer or the facts that he has even had his trial and been acquitted of the offence of murder will not prevent his conviction under section 201. A mere suspect or an acquitted accused is not in the eyes of the law an offender within the meaning of section 201. The reported ruling in *Teprinessa v. Emperor*(1) is practically to the same effect, and also the ruling of a Bench of the Bombay High Court in *Hanmappa Rudrappa v. Emperor*(2). Therefore, there is no illegality in the conviction under sections 201 and 203.

This does not, however, conclude the case. It is clear that for the purpose of calculating the punishment to be awarded under section 201, it is necessary for the Court to decide, not so much what offence—the evidence of which has been concealed—has been committed, as what offence the accused knew or had reason to believe had been committed. So it was necessary to decide, on the assumption that the accused did not commit the main offence because he has not been convicted of that, what offence he believed or knew to have been committed. The Court must treat him as a stranger to the crime, as one who had merely witnessed it.

From that point of view we cannot on the evidence say that more is proved than that the accused knew that some one had hit his wife and that she had died in consequence. We are unable to conclude that he knew that the person who struck her had the criminal intention of killing her. It must have been clear however to the accused that his wife had died as a result of the blows given and that she at least suffered grievous hurt, and that is punishable under section 325, Indian Penal Code, with imprisonment for seven years. Under section 201 the accused is then liable to be sentenced

(1) (1918) I.L.R. 46 Cal. 427.

(2) (1923) 82 I.O. 709.

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to a maximum of one-fourth of that seven years. The learned Sessions Judge has sentenced the accused to rigorous imprisonment for five years. At the most he can be sentenced to one year and three-fourths. We think that it will be sufficient if he undergoes rigorous imprisonment for one year and we reduce the sentence accordingly.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Waller and Mr. Justice Reilly.

In re PERIYASWAMI MOOPAN AND ANOTHER (PRISONERS)
APPELLANTS.*1930,
July 14.Indian Evidence Act (I of 1872)—Sec. 30—Confession—
Meaning of.

“Confession” in section 30 of the Indian Evidence Act means confession of the very offence for which the accused persons are being tried—“offence” always including under the explanation to the section abetments of and attempts to commit the offence: *Shivabhai v. Emperor*, (1926) I.L.R. 50 Bom. 683, dissented from.

TRIAL referred by the Court of Session of the Madura Division for confirmation of the sentences of death passed upon the said prisoners in Case No. 17 of the Calendar for 1930.

The facts necessary for this report appear in the judgment of REILLY J.

E. Antony Lobo for first accused.

K. W. Rama Rao for second accused.

Ag. Public Prosecutor (K. N. Ganpati) for the Crown.

* Referred Trial No. 62 of 1930 and Criminal Appeal No. 232 of 1930.

JUDGMENT.

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WALLER J.

WALLER J.—I agree that Exhibit G is a statement that should not have been taken into consideration against the first accused. He and the maker of the statement were being jointly tried for murder and Exhibit G was not a confession of murder jointly affecting them both. The law on the point was correctly laid down by STRAIGHT J. many years ago in the Allahabad case, *Empress of India v. Ganraj*(1), cited by my learned brother. As regards *Shivabhai v. Emperor*(2) a statement by one of the accused that he *by himself* had burnt the clothes of a murdered man and would show the place was treated as a confession of participation in the murder and admissible under section 27 of the Evidence Act against him. To that extent, the decision seems to be correct, but when it goes on to put forward some circumstantial grounds on which the Judges held that the confession “indirectly affected” another accused not named in it and could therefore be used against him under section 30 of the Evidence Act, I find myself wholly unable to follow it.

[His Lordship then dealt with the evidence and concluded as follows:—] I agree in the order proposed by my learned brother.

REILLY J.

REILLY J.—In this case the appellants, accused 1 and 2, have been convicted by the Sessions Judge of Madura of murdering one Ramaswami Moopan, with whom it has been found they were dealing in sheep as partners.

The learned Sessions Judge has taken into consideration against accused 1 a statement, Exhibit G, made by accused 2 before the Sub-Magistrate of Dindigul. In that statement accused 2 does not admit that he took

any part in the murder of Ramaswami; he says that accused 1 killed Ramaswami and then compelled accused 2 by a threat to assist in disposing of the body. The learned Public Prosecutor has contended that Exhibit G is a statement which the Sessions Judge was at liberty to take into consideration against accused 1 under section 30 of the Evidence Act because it was a confession, not indeed of murder, but of causing the evidence of murder to disappear, which is an offence punishable under section 201, Indian Penal Code. In my opinion that contention is mistaken. Section 30 of the Evidence Act is a very exceptional, indeed, an extraordinary provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention. It is true that the section provides only that the confession of one accused person may be “taken into consideration” against his fellow-accused. As I understand the section, the confession cannot take the place of evidence against the co-accused; nor can it be added to supplement evidence otherwise insufficient. As I understand the matter, the provision goes no further than this—where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in section 30 may be thrown into the scale as an additional reason for believing that evidence. But even for that limited purpose the confession must be of the kind intended by the Legislature when enacting section 30. What kind of confession is intended? The words of the section are “when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is

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(1) (1879) I.L.R. 2 All. 444.

(2) (1926) I.L.R. 50 Bom. 688.

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proved". In my opinion "confession" in that collocation of words cannot reasonably be interpreted to mean a confession of any offence in the world, nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of the very offence for which they are being tried, "offence" always including under the explanation to the section abetments and attempts. That appears to me to be the plain meaning of the words. To interpret the word "confession" in the section in any wider sense is to accuse the Legislature of using loose language in a matter of great importance. In my opinion we must read the word "confession" as if it were followed immediately by the words "of that offence"; and that appears to me to be the plain meaning of the section as read by a reasonable man. And indeed, if that were not the meaning, why should the use of the confession be confined to cases where the accused persons are being tried for the same offence? But, keeping our attention for the moment on the words themselves, if we speak of persons being tried for the same offence and in the same sentence speak of one of them making a confession, how can we mean by "confession" a confession of any other offence unless we are most careless in the use of language? To my mind the words of section 30 of the Evidence Act leave no doubt that the confession mentioned is a confession of the offence for which the accused persons are being tried. If the words left us in any doubt, the nature and effect of the provision might be called in to help us. The provision allows a statement of an accused person, not made on oath, not tested by cross-examination, to be used against a person tried with him. What can be the justification of a provision

at first sight so startling? If, while confessing some minor offence, a man could implicate his fellow-accused in a far more serious offence for which they were being tried and the confession could then be used against his fellow-accused, would not that be offering to the confessing accused a plain temptation to make himself useful by throwing the serious blame on his fellow-accused while saving his own skin or exposing himself only to a minor penalty? To my mind it is inconceivable that the Legislature had any idea of offering to any accused person a temptation to such mean and immoral conduct. But, if the confession which may be used is confined to a confession of the very offence for which the accused persons are being tried, the position is different. Then at least the confessing accused has nothing to gain by his confession; on the contrary he exposes himself to the very penalty which he helps to bring down on his fellow-accused. To such a confession it is not entirely unreasonable to allow some weight, and the danger that it may be untrue is at least very greatly reduced. If we examine the effect and nature of the provision, we arrive again at the same result, that it is only such a confession which the Legislature can have allowed by section 30 to be taken into consideration. Lastly, if in this respect two interpretations of the section were grammatically possible, the ordinary canons of interpretation would compel us to adopt in the interest of accused persons the stricter and narrower construction, the construction which gives the less scope to this very exceptional extension of what may be used against an accused person at his trial. Examining the section in any or all these ways, in my opinion we must arrive at the same conclusion, namely that "confession" in section 30 of the Evidence Act means confession of the offence for which the accused persons are being tried.

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It appears to me surprising that any other interpretation of the section should now be put forward. The interpretation I have indicated as proper was adopted by STRAIGHT J. in *Empress of India v. Ganraj*(1), and his view has been followed in a great many later cases. The learned Public Prosecutor quoted in his favour *Shivabhai v. Emperor*(2). So far as that case deals with this point, I must say with very great respect that I neither agree with it nor understand it.

In Exhibit G, as I have mentioned, accused 2 does not admit that he took any part in the murder of Ramaswami Mooppan: he admits only that he helped to dispose of the corpse. That is not a confession of the offence of murder for which accused 1 and 2 were tried, and therefore in my opinion the learned Sessions Judge in dealing with accused 1 should have excluded Exhibit G entirely from consideration. If that is done, what is the evidence against accused 1?

[His Lordship then discussed the evidence and concluded as follows:—]

In my opinion the convictions and sentences of both the accused should be confirmed and their appeals should be dismissed.

B.C.S.

(1) (1879) I.L.R. 2 All. 444.

(2) (1926) I.L.R. 50 Bom. 683.

APPELLATE CIVIL—FULL BENCH.

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

ABDUL SAC (PETITIONER, SECOND DEFENDANT), APPELLANT,

v.

SUNDARA MUDALIAR AND ANOTHER (RESPONDENTS—
PLAINTIFF AND SIXTH DEFENDANT), RESPONDENTS.*

*Civil Procedure Code (V of 1908), sec. 47, and O. I, r. 10 (2)—
Dismissal of a suit on a mortgage against a defendant claiming paramount title—Whether he is a party to the suit within the meaning of sec. 47—Proper order in such case—
Right of executing Court to ascertain reason for dismissal.*

In a suit to enforce a mortgage, one of the defendants who was in possession pleaded that he did not derive his title from the mortgagor but independently of him, and the Court held that he was not a necessary party and dismissed the suit as against him. The plaintiff who got a decree on the mortgage evicted that defendant in execution, and on application by the evicted defendant, the executing Court put him in possession. Plaintiff preferred an appeal to the District Court.

Held, by the Full Bench—

(1) that the proper order to pass in a case where a Court holds that a defendant had been wrongly impleaded as a party was not to dismiss the suit as against him but to strike out his name from the record as provided by Order I, rule 10 (2), Civil Procedure Code,

(2) that such a defendant was not a 'party to the suit' within the meaning of section 47, Civil Procedure Code, and the appeal to the District Court was therefore incompetent,

and (3) that an executing Court was not confined to the terms of the decree in the suit but was entitled to look into the pleadings and the judgment in the case and find out the real cause of the dismissal of the suit as against that defendant. *Krishnappa v. Periaswami*, (1916) I.L.R. 40 Mad. 964 approved.

* Appeal against Appellate Order No. 102 of 1923.

1930,
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APPEAL against the order of the District Court of Madura in Appeal Suit No. 208 of 1927 preferred against the order of the Court of the District Munsif of Madura Taluk at Madura, in Miscellaneous Petition No. 280 of 1927, in Original Suit No. 348 of 1917, on the file of the Second Additional Munsif's Court, Madura.

This case coming on for hearing before JACKSON J. his Lordship directed the case to be placed before his Lordship the Chief Justice, observing that as the relevant rulings, viz., *Krishnappa v. Periaswami*(1), and *Sethu Konar v. Ramaswami Konar*(2), were conflicting, the case might be placed before a Full Bench. His Lordship the Chief Justice accordingly ordered the case to be posted before a Full Bench.

T. L. Venkatarama Ayyar for appellant.—“Dismissal” within the meaning of section 47, Civil Procedure Code, may be (1) on the merits and (2) on the ground of misjoinder. The proper order to pass in the second case is to strike out from the record the name of the defendant who had been improperly made a party. It is only when a suit is dismissed against a defendant on the merits he can be deemed to be a “party” to the suit, and not when the dismissal is on the ground of misjoinder. For, if the paramount title set up by a defendant cannot be enquired into in the suit, it is wrong to enquire in execution proceedings into that title by keeping that defendant on record. The executing Court can see on what grounds a defendant was exonerated or got the suit “dismissed” against him; *Krishnappa v. Periaswami*(1), *Sannamma v. Radhabhai*(3), *Linga Aiyar v. Lakshumanan Chettiar*(4), *Nallaperumal Pillai v. Sakul Hamed Maracayar*(5) and *U. Kala v. Ma Hnin U.*(6). In *Ramaswami Sastrulu v. Kameswaramma*(7) the dismissal was on the merits. In *Lakshmana Dola Behara v. Jujisti Panda*(8) there is no discussion of the question. *Sethu Konar v. Ramaswami Konar*(2) is wrong.

- (1) (1916) I.L.R. 40 Mad. 964. (2) (1925) I.L.R. 49 Mad. 494.
(3) (1917) I.L.R. 41 Mad. 418 (F.B.).
(4) (1925) 50 M.L.J. 387. (5) (1927) 54 M.L.J. 721.
(6) (1927) I.L.R. 5 Rang. 110. (7) (1900) I.L.R. 23 Mad. 361 (F.B.).
(8) (1928) M.W.N. 601.

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S. T. Srinivasa Gopala Chari for respondents.—The actual wording of section 47 must be given effect to. The executing Court is neither bound nor entitled to enquire into the reasons for dismissal or exoneration, so long as the particular party's name is not taken off the file. An executing Court cannot go behind the decree and look into the judgment unless the decree is ambiguous; see *Abdul Kasim v. Thambusami Pillai*(1), *Venkatasamy v. Chitambaram*(2), printed as a footnote at page 420 of *Sannamma v. Radhabhai*(3), *Kuthala Mudali v. Venkata Reddi*(4), *Ramaswami Sastrulu v. Kameswaramma*(5), and *Lakshmana Dola Behara v. Jujisti Panda*(6). Such a person claiming a paramount title may be a party; *Doraiswami Ayyangar v. Varadarajulu Nayudu*(7).

JUDGMENT.

BEASLEY C.J.—This case has been referred to us by BEASLEY C.J. our brother JACKSON J., because the question for decision by us has been the subject of conflicting decisions in *Krishnappa v. Periaswami*(8) and *Sethu Konar v. Ramaswami Konar*(9).

The question before us arises out of proceedings in execution. The second defendant in Original Suit No. 348 of 1917 on the file of the Second Additional District Munsif's Court of Madura is the appellant here. The facts of the case may be briefly stated as follows:—One Kaliappa Pillai was the original owner of the properties, the subject-matter of the suit. He left a widow and an adopted son Ramaswami Pillai. In 1889 the latter released the suit properties in favour of his adoptive mother. She sold the property in 1894 and between that date and 1909 there were different purchasers. In 1909 the appellant became the purchaser of the property and created a usufructuary mortgage in 1910 in favour of the sixth defendant. In 1906 Ramaswami

- (1) (1916) 5 L.W. 701. (2) (1917) 23 M.L.T. 206.
(3) (1917) I.L.R. 41 Mad. 418 (F.B.). (4) A.J.R. (1927) Mad. 253.
(5) (1900) I.L.R. 23 Mad. 361 (F.B.). (6) (1928) M.W.N. 601.
(7) (1927) 53 M.L.J. 647. (8) (1916) I.L.R. 40 Mad. 964.
(9) (1925) I.L.R. 49 Mad. 494.

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Pillai executed a mortgage of some of the properties which mortgage was assigned to the present first respondent. In 1917 the first respondent filed a suit to enforce the mortgage and bring the properties to sale. Ramaswami's son was the first defendant, and defendants 2 to 5 were impleaded in that suit and also the sixth defendant, the usufructuary mortgagee. In that suit the first defendant was *ex parte*. The second defendant claimed a title paramount by purchase and pleaded that he was not a necessary party to the suit. The District Munsif dismissed the suit as against defendants 2 to 6 but gave a decree against the first defendant. In his judgment he states as follows:—

"Second defendant claims an independent title. He has endorsed on the plaint that he does not derive his title from the mortgagor but quite independently of him. Therefore he is not a necessary party to the suit. The suit must be therefore dismissed with costs against defendants 2 to 6. Plaintiffs will get a decree against the other defendants in the suit."

In the decree also the suit was dismissed as against defendants 2 to 6. An execution petition was then presented by the plaintiff to bring the property to sale. No notice was given to the other defendants. He dispossessed the sixth defendant who was then in possession of the property. The appellant then presented an application to put the sixth defendant in possession of the property. The first respondent disputed the appellant's title on the merits and put him to proof of all the sales and purchases. The District Munsif held that the plaintiff (first respondent) was not entitled to evict the defendants. In his order the District Munsif stated—

"The plaintiff is not entitled in execution of this decree to evict the sixth defendant or defendants 2 to 5."

The first respondent appealed to the District Judge at Madura who held that the questions of title as between the first respondent and defendants 2 to 6

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should have been investigated and that, since the Defendants 2 to 6 were parties to the suit, the first respondent was barred by section 47, Civil Procedure Code, from instituting a separate suit, but that the application under section 47 of the Civil Procedure Code could have been treated as a suit if the learned District Munsif considered it sufficiently complicated. The appellant's contention here is that the question of his title and the sixth defendant's title was not a matter which could be gone into in the execution proceedings.

The question is whether defendants 2 to 6 in the suit are, under the provisions of section 47 of the Civil Procedure Code, defendants against whom a suit has been dismissed and therefore parties to the suit. The contention of the appellant is that, as the defendants were held not to have been properly impleaded in the suit and the suit on that ground was dismissed as against them, they are not defendants against whom a suit has been dismissed as is provided in section 47 of the Civil Procedure Code and that there is a distinction between the dismissal of a suit on its merits and a dismissal through misjoinder of parties. Two views upon this matter have been taken. There is the broad view of the section taken in *Krishnappa v. Periaswami*(1), and the narrow view of it in *Sethu Konar v. Ramaswami Konar*(2). Before proceeding to deal with the cases upon this point, reference must be made to Order I, rule 10 (2), Schedule I of the Civil Procedure Code, which provides that the Court may at any stage of the proceedings order the name of any party improperly joined to be struck out. The District Munsif having found that defendants 2 to 6 had been improperly impleaded in the suit should have ordered their names to be struck out instead of dismissing the suit as

(1) (1916) I.L.R. 40 Mad. 964.

(2) (1925) I.L.R. 49 Mad. 491.

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against them. The broad view of section 47 of the Civil Procedure Code is that it is proper for the Court in execution proceedings to consider not only the decree itself but the judgment and the pleadings and see whether upon the facts of the case the parties, although the suit was dismissed as against them, really remained parties to the suit. The narrow view of the section is that it is not appropriate to the executing Court to consider anything else but the fact that the suit was dismissed as against the defendants, no matter what the reasons were for such dismissal. That, of course, is placing the strictest and narrowest construction on section 47. In *Krishnappa v. Periaswami*(1), AYLING and KUMARASWAMI SASTRI JJ. held that where a party to a mortgage suit, who sets up a title adverse to both the mortgagor and the mortgagee, has been exonerated from the suit on the ground of misjoinder and his claim has not been adjudicated upon in the suit, he does not remain a party to the suit for the purposes of section 47 of the Civil Procedure Code. The order of the Judge in the trial Court was an order exonerating the defendant with costs as he was an unnecessary party to the suit. It was argued in the appeal that, notwithstanding this exoneration, he still continued to be a party to the suit, and that the lower Appellate Court should have gone into the question of his title. On page 966 in the judgment of the High Court it is stated—

“The exoneration in the present case having been on the ground of misjoinder we are of opinion that the party whose claim was not adjudicated upon does not remain a party to the suit for the purpose of section 47 of the Code of Civil Procedure. Exoneration from the suit may be due to various causes and the question whether a party remains on record for the purpose of section 47 in spite of such exoneration will

(1) (1916) I.L.R. 40 Mad. 864.

depend upon the nature and scope of the order having regard to the pleadings and the reason which led to such dismissal or exoneration. To hold that in cases of misjoinder (and consequent refusal of the Court to adjudicate upon the particular matters in contest) the party whose claim was not adjudicated upon and who was exonerated remains a party to the suit would lead to the anomaly that the Court would be bound in execution proceedings to decide the very questions which it refused to determine in the suit.”

And again at page 968—

“As pointed out in *Venkatapathi Naidu v. Subroya Mudali*(1), the mere fact that the name of the exonerated party is not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remains a party.”

This case was referred to in *Sannamma v. Radhabhai*(2), a decision of a Full Bench, which held that, where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is “a defendant against whom a suit has been dismissed” within section 47, Civil Procedure Code. On page 424 Sir JOHN WALLIS C.J. states—

“The case which came before the Court in *Krishnappa v. Periaswami*(3), of a misjoinder of causes of action and of the plaintiff being required to proceed with one cause of action only and the suit being dismissed as against the defendants who had been joined in respect of the other causes of action only, may possibly stand on a different footing, as to hold that the cause of action which the Court was prohibited from trying may be gone into in execution by virtue of section 47, goes far to defeat the prohibition of joinder, and such a construction of section 47 should therefore be avoided if it is possible to do so. As that question is not before us, I express no opinion upon it, and will only say that the proper course in these cases appears to be for the Court to exercise the power, which it now has under Order I, rule 10 (2), of ordering at any stage of the

(1) (1907) 17 M.L.J. 416.

(2) (1917) I.L.R. 41 Mad. 418 (F.B.).

(3) (1916) I.L.R. 40 Mad. 864.

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proceedings, the name of a defendant improperly joined to be struck out, instead of dismissing the suit as against him. That will, as held by the Full Bench in *Ramaswami Sastrulu v. Kameswaramma*(1), have the effect of taking him out of the operation of section 47 which ought not to apply to him seeing that he has no real concern with the suit."

Although Sir JOHN WALLIS does not definitely decide the point, it is obvious that he approved of the spirit of *Krishnappa v. Periaswami*(2), and he certainly has given very strong reasons for holding that the Bench in that case took the correct view.

I will now turn to *Sethu Konar v. Ramaswami Konar*(3), where a Bench of this Court took the opposite view to that taken in 40 Mad. 964. That was a suit for sale on a mortgage and a person claimed the property by a title paramount to that of the mortgagor and he was joined as a defendant. But the final decree merely stated that he was exonerated without removing his name from the record and it was held that he should be considered as continuing to be a party to the suit. The reason for deciding this case in that way was that the Bench considered that the ground on which a party is exonerated from the suit can never determine whether he continues or ceases to be a party but will depend entirely upon whether his name has been struck off from or retained on the record. This of course is applying section 47 in its strictest sense. Another case on this point is *Linga Aiyar v. Lakshumanan Chettiar*(4), a decision of ODGERS and VISWANATHA SASTRI JJ. The second defendant in that suit had his name by consent struck off by the District Munsif, but his name was retained in the cause-title in the decree which was finally drawn up, and it was held that, in spite of his name being struck off, he was a party to the suit within

(1) (1900) I.L.R. 23 Mad 361 (F.B.).
(3) (1925) I.L.R. 49 Mad. 494.

(2) (1916) I.L.R. 40 Mad. 964.
(4) (1925) 50 M.L.J. 387.

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the meaning of section 47 and the explanation thereto, but it was stated that striking out is the proper procedure to be employed in the case of misjoinder, that in any other case the proper course is dismissal, and that striking off of the name is not appropriate to the case of a party against whom the plaintiff does not wish to proceed further. In that case there was no question of a misjoinder of parties as the defendant was properly impleaded in the suit. Another case directly in point is *U. Kala v. Ma Hnin U.*(1), and there 40 Mad. 964 and 41 Mad. 418 were followed; and it was held that, where a suit is dismissed against a person on the ground that he was wrongly joined as a party having no real concern with the suit, such a person does not remain a party to the suit for the purpose of section 47 of the Civil Procedure Code and that a more appropriate way, in case of misjoinder, is to strike out the name of the party under Order I, rule 10 (2) of the Code so as to take him out of the operation of section 47. The contrary view was taken in *Abdul Kasim v. Thamhusami Pillai*(2). There a defendant was exonerated by the decree in the suit with the result that the suit was dismissed as against him, but his name was not actually removed from the record and it was held that he did not cease to be a party to the suit on that account. That was a decision of a Bench consisting of OLDFIELD and KRISHNAN JJ. This case was referred to in 40 Mad. 964. No reason for the exoneration of the defendant is given either in the statement of the facts of the case or in the judgment which is a very short one. In *Venkatasaami v. Chitambaram*(3), it was held that a defendant whose name appears in the decree without having been struck off previously from the record is a party within the

(1) (1927) I.L.R. 5 Rang. 110.

(2) (1916) 5 L.W. 701.

(3) (1917) 23 M.L.T. 206.

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provisions of section 47 of the Civil Procedure Code. There the fourth defendant set up a title adverse to both the mortgagor and the mortgagee and was held not to be a necessary party and ordered to be struck out of the suit. The order was—

“Fourth defendant is not a necessary party and is exonerated with costs.”

The Bench consisting of SADASIVA AYYAR and PHILLIPS JJ. thought that section 47 was perfectly plain in its terms. In *Ramaswami Sastrulu v. Kameswaramma*(1), it was held that a party defendant exonerated from the suit, the suit being dismissed against him, is a party to the suit. This case also was referred to in 40 Mad. 964 but was held distinguishable because it did not appear to be a case of exoneration of a party by reason of misjoinder of causes of action.

Mr. Srinivasa Gopala Chari, in the course of his argument on behalf of the respondents, contended that the construction placed upon section 47 of the Civil Procedure Code in 40 Mad. 964 ought not to be placed upon it, because of the inconvenience it would cause to the litigant public and those who have to advise them, and because it would put an unreasonable burden upon the executing Court if that Court had to consider not only the decree but the judgment and the pleadings in the suit instead of merely taking the decree itself. I can see no force in this latter contention as it is the duty of a Court not only to refer to the decree but also to the judgment and the pleadings. In the case before us no inconvenience could have been occasioned by this procedure because the judgment of the District Munsif upon this point is contained in a very few lines. He further contended that there can be no distinction between the case of a defendant against whom the

(1) (1900) I.L.R. 23 Mad. 361 (F.B.).

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plaintiff abandons his claim and the suit is accordingly dismissed as against him and a person who has the suit dismissed against him on account of misjoinder. In my view, the two cases are quite different. In the former case, he may be a proper party to the suit, but yet the plaintiff either does not wish to take a decree against him or feels that he is unable to prove his claim and he is not a person to whom Order I, rule 10 (2) applies. In the latter case, on the other hand, he is a person who ought never to have been made a party to the suit at all, and not having been properly impleaded, the plain duty of the Court is to strike his name out. If the respondent's contention is correct, then it means that, although the appellant ought not to have been made a party to the suit and the District Munsif held that he had been improperly impleaded and instead of striking his name out adopted the wrong procedure in dismissing the suit as against him, he is to be placed in a worse position than a party in respect of whom the Court does adopt the correct procedure. It seems to me to be a contradiction to say that a person who is held at the trial of the suit not to be a proper party to the suit remains still a party to the suit. I am clearly of the opinion that *Krishnappa v. Periaswami*(1), was correctly decided and the appeal to the lower Appellate Court was incompetent. The appeal must accordingly be allowed with costs.

I cannot leave this case without pointing out that it is the duty of the trial Judge to strike out the name of a party improperly impleaded. It is quite wrong procedure to dismiss the suit as against him.

ANANTAKRISHNA AYYAR J.—I agree.

CURGENVEN J.—I agree.

N.R.

(1) (1916) I.L.R. 40 Mad. 964.

APPELLATE CIVIL.

Before Mr. Justice Ramesam.

[On Reference under Clause 36 of the Letters Patent.]

GUNEPALLY THAMMAYYA (DEFENDANT), APPELLANT,

v.

SRI RAJAH VISWANADA MALLAPURAJ (PLAINTIFF),
RESPONDENT.*

Madras Estates Land Act (I of 1908), sec. 191—Agency Rules (1924), r. 56—Period of limitation for an appeal to the Agent to the Governor from the decision of an Assistant Agent in a suit for rent under sec. 77 of the Act—Thirty days under sec. 191 or six weeks under r. 56—Scheduled Districts Act (XIV of 1874), sec. 6—R. 56, whether ultra vires.

Rule 56 of the Agency Rules of 1924, and not section 191 of the Madras Estates Land Act, applies to appeals preferred to the Agent to the Governor from the decisions of the Assistant Agent, in suits for rent filed before the latter under section 77 of the Madras Estates Land Act; consequently, the period of limitation for such appeals is six weeks as prescribed by rule 56.

The expression 'Civil Justice' in the heading of rule 2 onwards to the end of the Agency Rules of 1924 includes the administration of justice in Revenue Courts as well as in ordinary Civil Courts in the Agency tracts; hence rule 56 applies to appeals from decisions of Assistant Agents in rent suits.

A special Act is not generally repealed or affected by the passing of a later general Act; see *Seward v. "Vera Cruz"*, (1884) 10 App. Cas. 59; the Agency Rules of 1860 applied to the Agency tracts, when the Madras Estates Land Act was passed in 1908; the said rules were in the nature of a special Act, while the latter Act was a general Act. Hence the rule of limitation under rule 16 of the Rules of 1860 governed appeals in rent suits from 1908 to 1924; section 191 of the Act did not supersede rule 16; and the Agency Rules of 1924, which simply

continued the former rules of 1860, were not in conflict with section 191 and applied in the place of rule 16 of the former Agency Rules. [See *Unnoda Persaud Mookerjee v. Kristo Coomar Moitro*, (1872) 15 Beng. L.R. 60 (P.C.) note.]

Rule 56 of the Agency Rules of 1924 is not *ultra vires* of the local Government which made it, by reason of the provisions of section 6 of the Scheduled Districts Act (XIV of 1874).

SECOND APPEALS against the decrees of the Agent to the Governor of Vizagapatam, in Appeal Suits Nos. 8 to 19 of 1926 preferred against the decrees of the Court of the Special Assistant Agent at Koraput in Estates Land Act Suits Nos. 2 to 9 and 11 to 14 of 1926.

These Second Appeals originally came on for bearing before ANANTAKRISHNA AYYAR and CURGENVEN J.J., who delivered the following judgments:—

ANANTAKRISHNA AYYAR J.—The Zamindar of Pachipenta filed a batch of suits in the Court of the Special Assistant Agent at Koraput under section 77 of the Madras Estates Land Act against the defendants therein, who are ryots of Sanki village, to recover rent due for faslis 1332 to 1334. The defendants denied the plaintiff's right to rent, and alleged that there was no relation of landlord and tenant existing between the parties, that the land belonged to some Mokhasadars of Sanki to whom they have been paying rent. They further pleaded that the suit kadapa was not valid and binding on the defendants. The trial Court found against the contentions of the defendants and decreed the suits in plaintiff's favour. The defendants preferred appeals to the Court of the Agent to the Governor, Vizagapatam. The learned Agent to the Governor, Vizagapatam, dismissed the appeals on the preliminary ground that the appeals were filed after the expiry of 30 days prescribed by section 191 of the Madras Estates Land Act. He held that the time allowed for preferring an appeal under the Estates Land Act was thirty days, and not six weeks as provided for by Rule 56 of the (Vizagapatam) Agency Rules. The defendants have preferred these Second Appeals.

The learned Advocate for the appellants argued that the special period of limitation prescribed by the Agency Rules, which are in force in the Scheduled Districts, governs the case,

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and not the general period of limitation prescribed by section 191 of the Estates Land Act, which, he submitted, is the general law regulating the relationship between the landlord and tenant for the Presidency. He submitted that regard should be had to the well-known maxim of law that the general law must give way to the special law applicable, and he contended that, having regard to the local conditions (of which difficulty of communication is one), the Agency Rules have prescribed a special period of limitation for appeals to be preferred in the Agency tracts to the Government Agent. The learned Advocates are agreed that, if the period of limitation applicable to these appeals be six weeks, then the appeals were not barred by limitation, but that, if the period of limitation be only thirty days, then the appeals were barred.

During the argument, the learned Advocate for the respondent contended that under section 6 of the Scheduled Districts Act (XIV of 1874), the Local Government may from time to time regulate the procedure of the officers appointed under the Act to administer civil and criminal justice, etc., "but not so as to restrict the operation of any enactment for the time being in force in any of the said districts." He argued that rule 56 of the (Vizagapatam) Agency Rules prescribing six weeks for appeals, if taken to be applicable to appeals under the Estates Land Act, would restrict the operation of the Estates Land Act which is in force in the Scheduled Districts, and, as such, would be *ultra vires*.

I am unable to agree with that contention. The Local Government has got power under Act XIV of 1874 to regulate the "procedure" of the officers appointed under that Act; the statute of limitation is part of the law of "procedure." This proposition was, in fact, not contested before us, and it is only necessary to quote the following passage from the judgment of the Privy Council in *Her Highness Ruckmaboye v. Lulloobhoy Mottichund*(1). The Privy Council observed:

"In truth, it has become almost an axiom in jurisprudence, that a law of prescription, or law of limitation, which is meant by that denomination, is a law relating to procedure having reference only to the *Lex Fori*."

Therefore, the Local Government has got power to provide periods of limitation applicable to various proceedings before

(1) (1852) 5 M.L.A. 234 at 265.

such officers. The real question, therefore, is whether Rule 56 of the (Vizagapatam) Agency Rules "restricts the operation" of the Madras Estates Land Act. As far as I could see, the "operation" of the Act could be restricted either with reference to particular classes of people, or with reference to any local area, or with reference to the time from which the Act is to have operation. If the rule in question does not restrict the operation of the Act in any of those or similar respects, I think it should be taken that the rule does not "restrict the operation" of any enactment, within the meaning of section 6 of the Act. It may, of course, be said that any rule in any way (to however slight a degree) varying the substantive or the adjective law contained in the Estates Land Act "restricts" the Act, in one sense; but I do not think that that is the meaning to be attached to the expression "restrict the operation of any enactment" occurring in the section.

The learned Advocates who argued the case were able to trace a similar rule, prescribing six weeks for appeal, from the year 1840; it is well known that even now as regards facilities of communication people in the Agency tracts work under a very great disadvantage when compared with the people of other parts of the Presidency in general. One can, therefore, well understand why a comparatively long period of six weeks was fixed as the period for filing appeals by Rule 56, though in the other parts of the Presidency the period for preferring appeals has been for many years only thirty days, and is so even at present.

On the whole, I have come to the conclusion that the rule in question is not *ultra vires*.

As regards the further question, I have no doubt that the Estates Land Act which applies to the whole of the Presidency should, in this respect, when considered in connexion with the Agency Rules, be taken as a general law, whereas the Agency Rules should be taken as a special law applicable to the Agency tracts. The Agency Rules have been framed to provide for the exceptional circumstances existing in that part of the Presidency. If the rules be not *ultra vires*, I think it is clear from them that the Legislature considered the special case of the Agency tracts and provided a special period of limitation in respect of appeals to be presented to the Agent to the Governor. The maxim that the special rule must be applied in preference to the general rule should, in my opinion, govern the

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present case. Various passages from Maxwell on Interpretation of Statutes, Beal on Cardinal Rules of Legal Interpretation, and Craies on Statute Law were quoted before us. I do not think it necessary to refer to them in detail. At page 524, third edition of Beal's book, the rule is considered with reference to "prior general and subsequent special statutes." It is there stated—

"where there are provisions in a special statute which are clearly inconsistent with the provisions of a prior general statute, the provisions of the general statute must yield to those of the special statute. If the special statute gives in itself a complete rule on the subject, the expression of that rule will undoubtedly amount to an exception of the subject matter of the rule out of the general Act."

Various authorities are quoted in support of the proposition at page 524 of the third edition.

As, in my opinion, Agency Rule 56 is not *ultra vires*, I would allow these appeals, reverse the decrees of the Appellate Court and remand the appeals to the lower Appellate Court for fresh disposal according to law. Costs here and in the lower Appellate Court will abide the result. Court-fee paid on the Second Appeal Memoranda will be refunded to the appellants.

CORGENVEN J.—I regret that I find myself in disagreement with my learned brother as to the meaning to be attached to the words "so as to restrict the operation of any enactment" occurring in clause (b) of section 6 of the Scheduled Districts Act.

Section 5 empowers the Local Government to extend to any of the Scheduled Districts, or any part of any such district, any enactment which is in force in any part of British India at the date of such extension. Section 5A provides that in so extending an enactment to a Scheduled District or part thereof, the Local Government may declare the operation of the enactment to be "subject to such restrictions and modifications" as it thinks fit.

In construing the words "restrict the operation" in section 6 we may, I think, consider what meaning should be attached to the grammatical variant of the same phrase occurring in the next preceding section—"the operation to be subject to such restrictions". Does it mean, or mean only, that the Local Government may restrict the operation of the enactment as a

whole to a particular area, or a particular class or a particular time? Clearly not to a particular area, because the Act elsewhere provides for this by permitting the enactment to be extended to a Scheduled District "or part thereof". The extension of an enactment to a particular class, where, but for such a restriction, it would apply more generally, would be so rarely called for that I cannot believe that the Legislature had in view any such object in drafting the section; nor do I think, if the Act intended to confer upon the Local Government power to withdraw an enactment once extended, it would not have conferred it in more express terms. Let us then see what powers it was clearly expedient to give to the Local Government in extending an enactment to an area hitherto not "brought within . . . the operation of the general Acts and Regulations and the jurisdiction of the ordinary Courts of Judicature."

Among those powers it was surely advisable to include (a) a power to exclude certain provisions of the enactment, and (b) a power to substitute for any provision, a provision deemed more appropriate to the circumstances prevailing in the area. It appears to me that these two classes of power are intended to be conferred when it is said that the "Local Government may declare the operation of the enactment to be subject to such restrictions and modifications as that Government thinks fit." Deny to the word "restrictions" the meaning I seek to attach to it and it becomes very doubtful whether the Local Government by force merely of the word "modifications" would be competent to omit without replacement any provisions of an enactment which it was extending.

Turning now to the meaning of the same phrase in section 6, we must, I think, endeavour to give it a construction, if possible, in keeping with the circumstances likely to arise and therefore in contemplation when the section was framed. Of the two meanings which the phrase may bear, should we choose that which would provide that, by a regulation of procedure, the Local Government may not withdraw the operation of the enactment from any area or class or limit it to any period; or should we adopt the alternative construction which forbids the Government to override a statutory provision by prescribing a rule of procedure? I cannot myself easily conceive of any circumstances in which a Local Government might be tempted to secure a result of the former sort by a regulation of procedure, nor do I think that any such misuse of rule-making power

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In the present case the conflict has arisen with regard to two rules of limitation, one laid down by statute, the other prescribed by rule. Something has been said before us as to the superior appropriateness of the period fixed by the latter means to the special conditions of Agency tracts; but the answer may perhaps be that it was open to the Local Government by virtue of section 5A to exclude statutory provisions relating to limitation if it wished to apply a six weeks' rule to all cases.

My view accordingly is that the rule of limitation contained in rule 56 of the Agency Rules would, if applied to the appeals before us, offend against the terms of section 191 of the Madras Estates Land Act and, if deemed to prevail over that section, would *pro tanto* "restrict the operation of the Act." It is, therefore, *ultra vires*. I would, therefore, confirm the decrees of the lower Appellate Court and dismiss the second appeals with costs.

Result.—As we are divided in opinion as to the decision to be given on the question "whether the period of limitation applicable to appeals preferred to the Agent to the Governor of Vizagapatam from decrees passed by the Special Assistant Agent (Vizagapatam Agency) in suits for rent instituted under section 77 of the Estates Land Act is six weeks as provided for by rule 56 of the (Vizagapatam) Agency Rules, or thirty days as provided for by section 191 of the Madras Estates Land Act," the matter will be placed before the learned Chief Justice, so that the case may be heard by one or more of the other Judges of this Court as his Lordship may direct.

These second appeals came on for hearing under clause 36 of the Letters Patent before RAMESAM J.

ON THIS REFERENCE :—

V. Govindarajachari for appellant.—The Agency Rules are a special enactment, whereas the Madras Estates Land

Act is a general enactment; the former applies within special local limits. The provisions of sections 189, 191 and other sections of the Estates Land Act are general provisions. The period of thirty days prescribed in the Estates Land Act is a general provision for all appeals under the Act, and does not affect the special provision of six weeks prescribed by the Agency Rule 56 for appeals in the Agency tracts. The rule of limitation in the Estates Land Act is not a special provision because it reproduced the periods of limitation contained in the general Limitation Act. Article 110 of the Limitation Acts (of 1871, 1877 and 1908) gives three years for rent suits when they could be filed in Civil Courts under the old Rent Recovery Act, 1865. When the Estates Land Act repealed the Rent Recovery Act, and gave jurisdiction to Revenue Courts to entertain suits for rent, etc., the same period of limitation was reproduced as regards Revenue Courts; under the later Act.

Section 6 of the Scheduled Districts Act (XIV of 1874) does not apply, because section 191 of the Estates Land Act itself does not apply to Agency tracts. The Agency Rules of 1860 were in force before the Estates Land Act was passed in 1908; consequently, the Act, being a general law, did not affect the previously existing special law as to limitation; and the Agency Rules of 1924 simply consolidated and continued the previous rules. Even if the Act be deemed to be a special Act, the Agency Rules of 1924 are also special and being a later enactment, prevails over the Act of 1908. Reference was made to *Khan Gul v. Lakha Singh* (1) and *Seward v. "Vera Cruz"* (2).

Y. Suryanarayana for respondent.—Rules 2 to 56 of the Agency Rules (1924) relate to civil suits only. "Civil Justice" in the rules excludes judicial matters in revenue Courts. The Madras Estates Land Act deals with revenue suits specially and section 191 alone applies to appeals under the Act. In this view there is no conflict between the two provisions.

The Madras Estates Land Act is a special enactment; every portion of it is a special provision as regards landlord and tenant. The Agency Rules are general provisions of law as to all legal rights in Agency tracts. The test as to whether an Act is special or general is not the local extent of an Act but the subject-matter of the Act. Agency Rules are general

(1) (1928) 10 Lah. L.J. 413.

(2) (1884) 10 App. Cas. 59.

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provisions of law as regards all civil rights of all persons, whereas the Estates Land Act relates specially to the relationship of landlord and tenant; hence the Act is a special law and the Agency rules are general law. Compare the Indian Contract Act, as to minor's rights, which is a special enactment with the rule of estoppel in section 115 of the Indian Evidence Act, though both the Acts are general as to local extent.

Section 6 of the Scheduled Districts Act (XIV of 1874) authorized the Government to make rules for the Agency tracts so as not to restrict the operation of any enactment in force. The restriction applies to the operation of a chapter or a portion of it or a section therein; hence if the Agency Rule 56 abrogates section 191 of the Estates Land Act as regards the Agency tract, it is *ultra vires* under section 6 of the Scheduled Districts Act.

"Modification" is more than "restriction." If Government had no power to repeal section 191 of the Estates Land Act, it cannot substitute rule 56 in its place. The omission of "modification" in the prohibition under section 6 of the Scheduled Districts Act does not show that a power of substitution exists in the Government.

V. Govindarajachari in reply.—The Agency Rules apply to revenue as well as civil suits; see rule 1 (2) of the Agency Rules. Courts cannot imply a repeal of an earlier special enactment, if it is not so expressed; see *Kutner v. Phillips* (1). Section 6 of the Scheduled Districts Act allows modification in any event; rule 56 is only a modification.

JUDGMENT.

These second appeals have been referred to me by my Lord the Chief Justice on account of the difference of opinion between my brothers ANANTAKRISHNA AYYAR and CURGENVEN JJ., who first heard them. They are filed under the Agency Rules applying to the Scheduled Districts.

The Zamindar of Pachipenta filed suits for rents under section 77 of the Madras Estates Land Act

against his ryots and they were decreed by the Assistant Agent. The ryot filed appeals to the Agent to the Governor at Vizagapatam. These appeals were filed more than thirty days but within six weeks after the decrees. The time prescribed for appealing against a decree for rent to the District Collector is thirty days under section 191 of the Madras Estates Land Act, and six weeks under rule 56 of the Agency Rules. The Collector dismissed the appeals on the ground that they were barred by limitation applying section 191 of the Madras Estates Land Act. The ryots filed these second appeals against those decrees. The question is which rule ought to be applied.

The first point argued by the learned Advocate for the respondent is that rule 56 of the Agency Rules does not apply at all to appeals under the Estates Land Act, and only section 191 of the Act applies, and that there is no question of conflict between the two sections. This argument does not seem to have been addressed before the learned Judges, or at any rate, if it was, they apparently have not agreed with the contention. The contention is based on the fact that rule 1 defines the powers of the Agents and Assistant Agents followed by the heading "Civil Justice" which is the heading of the rules from rule 2 onwards. The learned Advocate contends that "Civil Justice" excludes judicial matters in Revenue Courts, that is, he takes the words "Civil Justice" in a narrow sense, namely, administration of justice before ordinary civil Courts of the land, such as those of the District Munsif, Subordinate Judge, District Judge, and the High Court and Courts corresponding to them. But of course the word "Civil" has two senses,—the narrow sense contended for by the Advocate and a larger sense, that is, as opposed to criminal only. In the Agency Rules of 1860, which were

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superseded by the present Agency Rules which were passed in 1924, the first six rules related to criminal justice and from rule 7 onwards they related to civil justice including Revenue Courts (vide rule 10). When the Criminal Procedure Code of 1862 was passed, the first six rules were repealed as the Code applied to the Agency tracts. But the rules from rule 7 onwards remained in force up to 1924 when they were superseded by the present rules; and a perusal of the present rules shows that they were based on the former rules from rule 7 onwards. This comparison leads one to the view that the heading "Civil Justice" is used in the larger sense. But the same conclusion can be reached without an examination of the former Agency Rules. Rule 1, sub-clause (2) says that the Agent to the Governor will have the same powers as are vested in the District and Revenue Courts in the ordinary districts and Agency Divisional Officers will have the same powers as the Subordinate and Revenue Courts for the trial and determination of suits. That means that, for revenue suits also, the Agents and the Agency Divisional Officers were constituted Courts under whatever enactment the revenue litigation may arise. This paragraph is not confined to the Estates Land Act. Then the section says that these powers are vested "subject to the modifications contained in these rules", that is, the powers conferred upon the District, Subordinate and Revenue Courts under the enactment under which the litigation may arise are conferred upon the Agents and Agency Divisional Officers, but subject to the modifications contained in the Agency Rules, that is, rules from rule 2 onwards to the end. By the express language of these rules, therefore, rules 2 to 56 apply to the Agents and Agency Divisional Officers exercising the powers of Revenue Courts. Whether

this provision is valid or is *ultra vires* is of course another matter. But on the face of the rules, rule 56 applies to the Revenue Courts.

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The next question is whether rule 56 prevails over or otherwise stands in the place of section 191 of the the Estates Land Act; and this question was considered by the learned Judges who first heard the second appeals from the point of view whether the rule is *ultra vires*. Before I address myself to this point of view, I wish to approach the question from another point of view, namely, that perhaps such a question, viz., whether rule 56 is *ultra vires*, does not arise at all. For this purpose I proceed to refer to the old Agency Rules which were passed in 1860. In 1898 there was a notification of the Government extending the Rent Recovery Act (the Act repealed by the Madras Estates Land Act) to the Agency tracts. But under that Act there were no suits for rent, but suits to cancel distraints lay before a Collector and appeals against the decrees of the Collector lay to the District Collector, instead of whom, we have got the Agent to the Governor in the Agency tracts. The question might have arisen whether the time for appeal is the thirty days provided in the Rent Recovery Act or the six weeks provided by the then Agency Rules. I am not aware of any case in which the point has actually arisen and to discuss it now is unnecessary. Matters continued like this up to 1908 when the Rent Recovery Act was repealed and the Estates Land Act was passed and it applied also to the Agency tracts. Section 208 of that Act contains a provision somewhat similar to rule 1, sub-clause (2) of the present Agency Rules, that is, the Agent would be the District Collector or the District Judge and the Agency Divisional Officer would be the Collector for the purpose of the Estates Land

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Act. Under rule 16 of the old Agency Rules, the time allowed for an appeal to the Agent was six weeks.

I now proceed to discuss the question whether in 1908 when the Estates Land Act was passed, section 191 of the Estates Land Act superseded rule 16 of the old Agency Rules for the purpose of appeals to the Agent under that Act or whether rule 16 continued to be in force unaffected by section 191.

At first sight it may appear as if it is the same question as the question whether rule 56 of the present Agency Rules should prevail over section 191 of the Estates Land Act. But it is not the same question. In 1908 when the Estates Land Act was passed, it came after the Agency Rules. In 1924 when the new Agency Rules were made, they came after the Estates Land Act, and from the point of view of the question whether the Agency Rules are *ultra vires*, this makes a considerable difference. So it is not the same question; and as, if it can be answered in a particular way with reference to the old Agency Rules, the other question does not arise at all, I proceed to discuss it.

Both rule 16 and section 191 have got statutory force. One is an actual section of an Act and the other is a rule passed under statutory powers. The general rule is, the later statute repeals the earlier statute if both are equally general. But this rule is subject to an exception that, if the later Act is a general Act but the earlier Act is a special Act, the earlier Act is generally not repealed by the later Act. *Vide* Craies on Statute Law, page 316, citing *Seward v. "Vera Cruz"*(1). In the present case, undoubtedly, from one point of view the Agency Rules are special and the Estates Land Act is general. The Agency Rules apply only to a small area,

(1) (1884) 10 App. Cas. 59.

Ganjam, Vizagapatam and Godavari, i.e., they are similar to a local Act, whereas the Estates Land Act applies to the whole Presidency. But it is suggested by the learned Advocate for the respondent that the Estates Land Act is special and the Agency Rules are general from another point of view, that is, the Estates Land Act relates to the relationship between landlords and tenants, but the Agency Rules do not relate to any particular class of suits but generally to all suits within the Agency tracts of whatever nature they may be. In this sense, no doubt the Agency Rules are general and the Estates Land Act is special. But in this sense, unless all the statute law of a country is contained only in one Code, most Acts are special even if they refer to a very large area; for instance, the Contract Act, the Specific Relief Act and the Transfer of Property Act, though they apply to the whole of India, are all special Acts because they relate only to certain branches of the law of the country.

The question then arises, when there is a conflict between two such special Acts each of which may be described as special in some particular sense, how far the later Act should prevail over the earlier Act. In such cases, it would seem that the rule is that the Court should lean against a repeal of the earlier Act by implication and, unless it is absolutely clear that the operation of the first Act has to be curtailed by the later Act, the previous Act should be held to continue in force, even though the later Act may be regarded as special in some other sense. Illustrations of this are afforded by the decisions cited by the learned Advocate for the respondent. For instance, in *Seward v. "Vera Cruz"*(1), first, we had Lord Campbell's Act relating to claims for damages for loss of life by reason of a tort,

(1) (1884) 10 App. Cas. 59.

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and, later on, the Admiralty Court Act of 1861 was passed giving jurisdiction over any claim for damage done by any ship. In this case it may be said that each Act is a special Act from one point of view but general from the other point of view. It was held that the jurisdiction under Lord Campbell's Act was not affected and the Admiralty Court Act had no jurisdiction under the second Act. At page 68 Lord SELBORNE says—

“Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.”

And he refers to the case of *Hawkins v. Gathercole*(1). I may observe that he starts by saying: “Where there are general words in a later Act”. He does not refer to the nature of the later Act, general or special. As I will presently show, though the Estates Land Act may be regarded as a special Act from one point of view, the provision in section 191 providing thirty days for first appeals is really a very general provision and not in the nature of a special provision. In *Kutner v. Phillips*(2), first, we had the City of London Court Act giving jurisdiction over defendants who had employment within the City, though they did not dwell or carry on business there, and then came the County Courts Act of 1888. It was held that the first Act was unaffected by the second one. In *In re Smith's Estate. Clements v. Ward*(3), an earlier Act, 43 Geo. 3, c. 108, giving power to all persons to settle or devise lands or goods for any church, provided it was three months before death, was held not to

(1) (1855) 6 D. G.M. & G. 1. (2) [1891] 2 Q.B.D. 267.
(3) (1887) 35 Ch. D. 539.

be affected by the Married Women's Property Act, 1882, which gave absolute power to married women to dispose of property by will. Here the later Act is a special Act in the sense that it applied to married women and not to all persons, but the first Act is special in the sense that it dealt with property given to a church, whereas the Married Women's Property Act dealt with all kinds of settlements and devises.

The general principle of a special Act not being repealed by a later Act was recognized by the Privy Council in a case from India in *Unnoda Persaud Mookerjee v. Kristo Coomar Moitro*(1). There their Lordships held that the rule of limitation under the Bengal Tenancy Act (X of 1859), was not affected by the rule of limitation in Act XIV of 1859 which is a general Limitation Act. Now in that case, the first Act, of course, was a special Act as it related to the relation between the landholders and tenants in the Bengal Presidency but from another point of view it may be said that the second Act is also a special Act because it relates only to one particular question of procedure, viz., limitation of actions, and does not deal with any substantive rights, whereas the earlier Bengal Tenancy Act deals not only with a question of procedure but with questions of substantive rights also relating to landlords and tenants. But, from the point of view of the area to which the Acts applied, undoubtedly, the first was special and the second was not; their Lordships after relying on the general rule as laid down in *Fitzgerald v. Champneys*(2) refer with approval to the Full Bench decision in *John Poulson v. Madhusudan Pal Chowdhry*(3). In that case the learned Judges laid stress on the fact that the earlier Act was an Act applying to a smaller area and

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(1) (1872) 15 Beng. L.R. 60 (P.C.) (Note). (2) (1881) 30 L.J. Ch. 777.
(3) (1865) B.L.R. (Sup. Vol.) (F.B.), 101

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the later Act applied to a larger area. In *Thorpe v. Adams*(1) WILLES J. said—

“The good sense of the law as laid down by my Lord is quite obvious; because, if a bill had been brought into parliament to repeal the local Act, it never would have been allowed to pass into a law, etc. . . . ; whereas, a general provision in a public Act is discussed with reference to general policy”

Thus it looks as if speciality in respect of locality is given greater importance rather than speciality in respect of the subject matter; otherwise it would be impossible to compare the degree of speciality. *Khan Gul v. Lakha Singh*(2) discusses a question of conflict between the Contract Act and the Evidence Act with reference to applying the rule of estoppel against a minor, and it was said that that construction which avoids repugnancy and if possible gives effect to both enactments should be adopted. It seems to me, therefore, that section 191 of the Estates Land Act, unless it expressly says so, ought not to be held to have affected rule 16 of the old Agency Rules.

The same matter may also be put in another way. The thirty day's rule of limitation in section 191 is not a special provision. It is really a general provision. That is the rule under the Limitation Act for all first appeals, and the whole of the Limitation Act was adopted in the Estates Land Act except a few sections with which we are not concerned. *Vide* section 211. Clause (2) of section 211 brought in the whole of the Limitation Act relating to appeals. So it looks as if the Estates Land Act has adopted wholesale the general provisions of the Limitation Act. But because the articles relating to appeals apply only to appeals under the Civil Procedure Code and therefore these articles

(1) (1871) 6 C.P. 125, 138.

(2) (1923) 10 Lah. L.J. 413.

in terms will not apply to some appeals under the Estates Land Act because there is a change of Courts, it enacted section 191 so as to make the thirty days' rule applicable also to appeals from Collectors to District Collectors as well as to District Judges. So that we have a very general provision simply adopted and repeated for the purpose of the Estates Land Act and not a special provision modifying a general provision, being specially adopted in a special law. So that, even if the Estates Land Act is regarded as a special law, what we have is the general provision for first appeals adopted and repeated in it and not specially modified for its purposes. So that, when we look at the specific provision now under discussion, the Estates Land Act contains a general provision, whereas the Agency Rules contain special provisions for the tract or area to which they apply. From this point of view also, I hold that section 191 did not affect rule 16 of the old Agency Rules. So that, from 1908 up to 1924, section 191 of the Estates Land Act never applied to the Agency tracts and rule 16 continued to be in force, that is, six weeks was the period for first appeals to the Agent. Now in 1924 the new Agency Rules were promulgated. They are merely rules consolidating and repeating the old rules in the Agency tracts. Section 191 never having been in force in the Agency tracts, the notification issuing the Agency Rules did not seek to restrict the Estates Land Act as it had been prevailing in the Agency tracts. From this point of view the question discussed by the learned Judges, viz., whether rule 56 of the Agency Rules is *ultra vires* of the Madras Government because of section 6 (b) of the Scheduled Districts Act, does not arise, and I hold that rule 56 is the only rule that applies to appeals.

Assuming I am wrong in the above conclusion, I have to discuss the question on the footing that section 191

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applied to the Agency tracts up to 1924. The question will then arise whether the new Agency Rules are *ultra vires* or not. ANANTAKRISHNA AYYAR J. held that they are not, because rule 56 is not a rule restricting the operation of the Estates Land Act. CURGENVEN J. held to the contrary. The phrase "subject to such restrictions and modifications" occurs in section 5A of the Scheduled Districts Act. The suggestion of ANANTAKRISHNA AYYAR J. is that the word "restriction" occurring in sections 5A and 6 is properly applicable to restriction in relation to areas or classes of persons and things of that kind. With reference to this suggestion CURGENVEN J. observed that it could not mean restriction as to area because

"the Act elsewhere provides for this by permitting the enactment to be extended to a Scheduled District or part thereof."

He repeats the same idea lower down where he says—

"Let us then see what powers it was clearly expedient to give to the Local Government in extending an enactment to an area 'hitherto not brought within . . . the operation of the general Acts and regulations' . . ."

Section 5 refers to the extension to the Scheduled Districts or part thereof of an enactment which up to the extension did not apply to the Scheduled Districts. But where we are dealing with an Act which from the inception applied to the Agency tracts and it is desired to limit the operation of the Act to a particular area, section 5 has nothing to do with such a case; and such limitation to one area and the omission of another area cannot be done under section 5. The power to do so must be conferred or refused by some other section. But the Legislature thought it fit not to confer such power on the Local Government to make such restrictions and the word "restriction" in section 6 is necessary to cover the case of an area. I therefore do not agree with the

reason given by my brother CURGENVEN J. that "restriction" in section 6 cannot apply to area.

Then again, as to whether the restriction may refer to a particular class, CURGENVEN J. observes that such a thing would be rarely called for. This is true. But that such a thing may be called for in the Agency tracts is clear from rule 9 of the old rules relating to the Zamindars, Bissoyees and other feudal chiefs, and from rule 10 referring to succession to Hill Zamindaris. He then points out that the restriction was intended for the case of a power to exclude a certain provision in an enactment. I agree that the restriction may include such cases. But I do not agree that it is confined to this particular class. It may include also the cases of areas and persons. No doubt the word "modification" will not cover a case where it is intended to modify certain provisions of an enactment and the word "restriction" would be necessary. But where it is a question of substituting one provision by another provision which would be more appropriate, certainly the word "modification" will do. CURGENVEN J. seems to be of that opinion in the particular paragraph where he deals with this question. But if so, rule 56 on the footing that it is sought to change the period in section 191 of the Estates Land Act is really a provision substituting one period, namely six weeks, which was thought to be more proper for another period and therefore a modification. After all, some meaning must be given to the word "modification" which is mentioned in section 5A but omitted in section 6. I am of opinion that the particular case with which we are dealing is a case of modification and not restriction. If the whole section is omitted one would perhaps say that it was restriction; but, where it was a case of not omitting a section but substituting something for some other thing in it, I am of opinion that it is a modification. I therefore think that, even from the

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second point of view, rule 56 of the Agency Rules is not *ultra vires*. I therefore hold that rule 56 applied to the appeals before the Agent and they were not out of time. I therefore reverse the judgment of the lower Court and remand the appeals to be disposed of according to law. The respondent will pay the costs of the Second Appeal No. 2107 to the appellant. No order as to costs in the other second appeals. The Court fees in all the second appeals will be refunded.

I may add that, if it were necessary, I would excuse the delay committed by the appellants before the Agent's Court under section 4 of the Limitation Act which certainly applies to the Estates Land Act. But, of course, it is desirable to decide the point, as excusing delay may not be available hereafter.

APPELLATE CIVIL.

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

1930,
March 28.

T. R. APPASWAMI AYYANGAR (SECOND PLAINTIFF),
APPELLANT,

v.

NARAYANASWAMI AYYAR AND THREE OTHERS
(DEFENDANTS 1 TO 3 AND FIRST PLAINTIFF), RESPONDENTS.*

Contract Act (Indian) (IX of 1872), sec. 65—Minor—Sale by, receiving price—Suit by minor on attaining majority to set aside the sale—Specific Relief Act (I of 1877), sec. 41—Fraudulent misrepresentation by minor as to his age—Innocent purchaser—Relief to minor, only on returning purchase money.

If A falsely represents to B that he is a major, when in fact he is a minor and thus induces B to buy his land, and B believing in the representation pays for the land,

* Appeals Nos. 183 and 184 of 1925.

Held that, in a suit by A, after attaining majority, to set aside the sale and to recover possession of the land, on the ground of his minority at the time of the sale, under section 65 of the Contract Act and under section 41 of the Specific Relief Act, a decree should be given in his favour only on condition that he repays the purchase-money. *Harnath Kunwar v. Indar Bahadur Singh*, (1922) I.L.R. 45 All. 179 (P.C.) followed; *Mohori Bibee v. Dharmodas Ghose*, (1903) I.L.R. 30 Cal. 539 (P.C.) discussed.

Per REILLY J.—The same result is reached by applying the general principle that no plaintiff can be allowed to make the Court an instrument of fraud.

APPEALS against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 5 of 1924.

The first plaintiff, a major, sued to set aside a sale-deed executed by her on 13th August 1913 in favour of the first defendant in respect of her lands, alleging that she was a minor at the date of the sale, that she was not then aware that she was executing a sale of her lands, that the first defendant fraudulently got her to execute the sale-deed and that she had not received any price for the same. She prayed that, in case the Court did not set aside the sale and give her possession of the lands, she might be given the value thereof, viz., Rs. 16,250, the price mentioned in the sale-deed. The first plaintiff assigned her rights to the second plaintiff in the course of the suit. The first defendant and his sons, defendants 2 and 3, pleaded *inter alia* that the first plaintiff was not a minor at the time of the sale, that she was well aware of the nature of the transaction, that it was brought about by her husband and other relations who acted as her advisers and negotiated the sale, that the first plaintiff and all her relations represented to him and to the Sub-Registrar who registered the sale-deed that she was then 19 years of age, that he believed her representation and paid the price, that she received the purchase-money in full and

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that, in case the Court held her to be a minor, the plaintiff could be given a decree only on her returning the purchase-money. The Subordinate Judge found that the plaintiff was a minor of about 16 years of age at the time of the sale, that she and her relations made a fraudulent representation to the first defendant and the Sub-Registrar that she was then 19 years of age on the faith of which alone both of them acted, that the first defendant did not know she was then a minor and that the first plaintiff received all the purchase-money. He held that under those circumstances the sale was void, that the plaintiff was entitled to get back possession of the lands but that before getting possession she must refund the purchase-money to the defendants. Both parties appealed.

K. Bashyam (with him *C. A. Seshagiri Sastri* and *B. R. Vijiaraghavachariar*) for appellant.—A contract with a minor is absolutely void. It creates no estoppel against the minor and creates no obligations on her part. She is not bound to return the price received. Section 65 of the Contract Act applies only to persons who are competent to contract; *Mohori Bibee v. Dharmodas Ghose*(1), *Nottingham Permanent Benefit Building Society v. Thurstan*(2), *Thurstan v. Nottingham Permanent Benefit Building Society*(3), *Leslie, Limited v. Sheill*(4), and *Fuli Bibi v. Khokzi Mondal*(5). Section 41 of the Specific Relief Act has no application to a case of this kind where the plaintiff need not resort to it at all; for she was a minor at the time of the sale and her contract being void, she could have ignored it altogether without making any prayer for setting it aside. That section applies only to cases where the plaintiff in asking for possession is obliged to pray for setting an instrument aside. Moreover, the above cases show that, if a minor has to return anything at all as a condition precedent to her getting possession, it could be only what she had received in kind and not any money which she might have spent.

(1) (1903) I.L.R. 30 Cal. 539 (P.C.).

(2) [1908] A.C. 6.

(3) [1902] 1 Ch. 1.

(4) [1914] 3 K.B. 607.

(5) (1927) I.L.R. 55 Cal. 712.

S. Varadachari (with him *M. S. Venkatarama Ayyar* and *A. Narasimha Ayyar*) for respondents—Section 65 of the Contract Act and section 41 of the Specific Relief Act apply to cases of this kind. This is a contract discovered later on to be void and unlike the case in *Mohori Bibee v. Dharmodas Ghose*(1) in which the mortgagee knew from the beginning that he was contracting with a minor and the Privy Council had to deal with the second part of section 65. Where the minor wants the assistance of the Court as plaintiff, she is bound according to both the above sections and according to the English decisions and *Harnath Kunwar v. Indar Bahadur Singh*(2) to restore all advantages which she had received (i.e., whether in kind or in money) or to make compensation, i.e., in cases where she cannot so restore owing to her having spent what she had received. See also *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(3), *Koduri Venkataramayya v. Thumubiri Ramayya*(4), *Khan Gul v. Lakha Singh*(5), *Golam Abidin Sarkar v. Hemchendra Majumdar*(6), and *Lila Dhar v. Piarey Lal*(7). The Bombay High Court has held that such a transaction is valid and that the minor making a fraudulent representation is estopped from pleading her minority. He who seeks equity must do equity. A Court should not allow a plaintiff to use it as an instrument of fraud.

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JUDGMENT.

KUMARASWAMI SASTRI J.—[After dealing with the facts and agreeing with the findings of the lower Court, his Lordship proceeded as follows:—]

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On these facts the question is whether the Subordinate Judge was right in making the plaintiff pay back the money which she received; and in this connexion we have to see what the rights of the parties are. The suit itself is not a suit by the first defendant to recover possession of the property, in which case, it may be said that the plaintiff was protecting the title which she had. It is a case where a fraudulent plaintiff, being a minor at

(1) (1903) I.L.R. 30 Cal. 539 (P.C.).

(2) (1922) I.L.R. 45 All. 179 (P.C.).

(3) (1917) 7 L.W. 124.

(4) (1925) 23 L.W. 521.

(5) (1928) I.L.R. 9 Lah. 701 (F.B.).

(6) (1915) 20 C.W.N. 418.

(7) (1921) 19 A.L.J. 578.

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the time of the transaction, wishes to set aside the transaction merely on the ground of minority. According to the law as it now stands, the contract of a minor is void and there can be no estoppel. But I can see no reason why on these facts a plaintiff who comes to the Court seeking equity being done to her may not also do equity, that is, give back what she got. Otherwise it would enable the fraudulent plaintiff to get an advantage by getting not only the money but also the property itself. The relevant sections are section 65 of the Contract Act and section 41 of the Specific Relief Act. Section 65 of the Contract Act enacts—

“When an agreement is discovered to be void, or when a contract becomes 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.”

In this case the contract is void. The plaintiff comes to Court saying that she understands that the contract is void and she wants to set it aside. Section 65 of the Contract Act, in my opinion, refers to cases where a contract is *ab initio* void as in the case of a minor's contract or becomes subsequently void for some reason. Section 39 of the Specific Relief Act runs as follows:—

“Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable, and the Court may in its discretion so adjudge it and order it to be delivered up and cancelled.”

Then section 41 runs as follows:—

“On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.”

On section 65 of the Contract Act we have the latest pronouncement of their Lordships of the Privy

Council in cases where the contract is void from its inception. In *Harnath Kunwar v. Indar Bahadur Singh*(1) there was a sale of a *spes successionis*—the right of a reversioner—which is void under the Transfer of Property Act. The Subordinate Judge held that the vendor had merely a right of expectancy in the estate at the date of the deed and that no property passed under it. As regards the claim to recover money, he held that it was barred by limitation. Then there was an appeal which was also dismissed. The matter was taken to the Privy Council and their Lordships directed that the sale should be set aside on payment of Rs. 25,000 which was found by the Courts to have been paid by the purchaser. They also gave interest on the sum. As regards the plea that the contract being void there can be no re-payment, this is what their Lordships say at page 184—

“Before this Board, the claim has been based on section 65 of the Contract Act.”

Then they set out that section. They then proceed to state as follows:—

“So framed, the plaintiff's claim to compensation rests, not on any principle or formula of English law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope. The section deals with (a) agreements and (b) contracts. The distinction between them is apparent from section 2. By clause (e) every promise and every set of promises forming the consideration for each other is an agreement; and by clause (h) an agreement enforceable by law is a contract. Section 65 therefore deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By clause (g) an agreement not enforceable by law is said to be void. An agreement therefore discovered to be void 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

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becomes void. The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated. Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the Lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of 2nd January 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation. It was thus that the agreement was discovered to be void, and the discovery, in their Lordship's view, was one within the words and the meaning of section 65 of the Contract Act. The plaintiff therefore, though not entitled to recover possession of the villages, is entitled to recover compensation, and in assessing that compensation their Lordships consider it should include the sum of Rs. 25,000 found by both Courts to have been paid to Indar Singh and also in the circumstances of this case, interest, not at the rate or for the period claimed by the plaintiff, but at 6 per cent from the date of the institution of this suit."

I set out the judgment in detail because the argument was sought to be founded by Mr. Bashyam Ayyangar on the decision of their Lordships of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*(1). This was a case where a minor sued to set aside a deed of mortgage and it was found that the mortgagee had notice of the minority of the plaintiff. The question arose as to whether there was an estoppel by reason of the representation of the minor and their Lordships held that section 115 of the Evidence Act did not apply where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. They held that a false

representation made to a person who knows it to be false is not such a fraud as to take away the privilege of infancy. Then arose the question of the construction of section 65 of the Contract Act. There is an observation of their Lordships of the Privy Council that section 65 of the Contract Act being based on the footing of an agreement or contract between competent parties could not apply to a contract by a minor which is void. Dealing with section 41 of the Specific Relief Act their Lordships observed as follows:—

"Another enactment relied upon as a reason why the mortgage money should be returned, is section 41 of the Specific Relief Act 1 of 1877."

Referring to section 38 their Lordships observed—

"Section 38 provides in similar terms for a case of rescission of a contract. These sections no doubt do give a discretion to the Court, but the Court of first instance and subsequently the appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy and their Lordships see no reason for interfering with the discretion so exercised."

Pausing here for a moment, it may be said that this passage shows that their Lordships were of opinion that if the mortgagee had not notice of the minority, a case would arise under section 41 for relief. Their Lordships, after dealing with the general argument that one who seeks equity must do equity, observed as follows:—

"But this is the last point over again and does not require further notice except by referring to a recent decision of the Court of Appeal in *Thurstan v. Nottingham Permanent Benefit Building Society*(1).

Then they cite the passage in ROMER L.J.'s judgment to the effect that a Court of Equity cannot say that it is

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equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature had declared to be void. They therefore refused to give relief for the return of the money. In this case the finding accepted by their Lordships of the Privy Council was that the mortgagee had notice of the minority. But if he had no notice I do not think that this is an authority for the view that under section 41 he can get no relief. This case has been referred to by COUTTS TROTTER J. (as he then was) in *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya*(1). It was held in that case that a minor is entitled to have a sale executed by him during his minority set aside without repayment in the absence of proof that he deliberately misled the purchaser into buying by a false representation that he was of age. It was also held that in case of false representation section 41 of the Specific Relief Act gives the Court power to direct the refund of the consideration received by the minor before the Court grants the cancellation of the deed. COUTTS TROTTER J., in referring to *Nottingham Permanent Benefit Building Society v. Thurstan*(2) and *Mohori Bibee v. Dharmodas Ghose*(3), observed thus—

“It is clear that in this country we have a statutory right to impose conditions by section 41 of the Specific Relief Act and that right is clearly recognized in *Mohori Bibee v. Dharmodas Ghose*(3).”

Having regard to the pronouncement of their Lordships of the Privy Council in *Harnath Kunwar v. Indar Bahadur Singh*(4) already referred to, I do not think that *Mohori Bibee v. Dharmodas Ghose*(3) is authority for holding that, where a contract or an agreement is void from its inception, we cannot order restitution. *Harnath Kunwar v. Indar Bahadur Singh*(4) is a case

(1) (1917) 7 L.W. 124.

(2) [1903] A.C. 6.

(3) (1903) I.L.B. 80 Cal. 589 (P.C.). (4) (1922) I.L.B. 45 All. 179 (P.C.)

where a transfer was void from its inception and their Lordships of the Privy Council deal with the various clauses of section 65 of the Contract Act and make the buyer get back the purchase-money. As far as English cases are concerned, the question as to whether a fraudulent minor plaintiff who induced another person to enter into a transaction and received consideration therefor is protected has been dealt with by LAWRENCE J. in *Leslie, Limited v. Sheill*(1), where at page 626 he observes as follows :—

“There are no doubt many cases in which equity will give relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But I think that it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud.”

Then he refers to various authorities on the subject. I have not been referred to any case where it has been held that in spite of fraudulent representation by a minor he is still entitled to protection. All the cases in India are the other way. I have already referred to (1917) 7 L.W. 124. I may refer to the decision in *Koduri Venkataramayya v. Thumuhuri Punnayya*(2) where (1917) 7 L.W. 124 was followed and in that case there was misrepresentation by the minor. Reference was made to *Fuli Bibi v. Khokai Mondal*(3), where the question as to repayment of the money was considered. In that case, the Judge expressly states that the defendant did not allege any fraudulent misrepresentation. That case, therefore, proceeded on

(1) [1914] 3 K.B. 607.

(2) (1925) 28 L.W. 521.

(3) (1927) I.L.B. 55 Cal. 712.

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the ground that there being no proof of fraudulent misrepresentation there can be no equity to direct the money to be repaid. It is, therefore, no authority for the view that, even if there is fraudulent misrepresentation by a minor, he can still retain both the proceeds as also the property which he seeks to recover. In *Khan Gul v. Lakha Singh*(1), the same question was decided by a Full Bench of the Lahore High Court. It was there held—

“A minor, who by falsely representing himself to be a major has induced a person to enter into a contract, is not estopped from pleading his minority to avoid the contract but that he may in equity be required to return the benefit he has received by making a false representation as to his age, whether he be a defendant or plaintiff.”

It is clear from the authorities that, if he is a plaintiff, he is bound to give back the money. In this case all the authorities are discussed in detail by the learned Judges. The Bombay High Court thinks that there is an estoppel in the case of a minor who seeks relief on a false representation and on that ground they treat the whole transaction as valid. In Calcutta, the view is taken that though there may be no estoppel, misrepresentation by a minor may give a right to restitution; *Golam Abdin Sarkar v. Hemchandra Majumdar* (2). Having regard to the current of authority in India which is one way, at least in cases where a minor who sues as a plaintiff makes a fraudulent misrepresentation and induces an innocent person to enter into a transaction otherwise legal and validly enforceable, I am of opinion that the first plaintiff is bound to restore the benefit she has received. I think the Subordinate Judge was perfectly right in passing a decree for plaintiff for recovery of possession of the suit

(1) (1928) I.L.R. 9 Lah. 701 (F.B.).

(2) (1915) 20 C.W.N. 418.

properties after depositing into Court the consideration for the sale-deed (Exhibit III). In my opinion the appeal fails and is dismissed. The amount should be paid by the 15th of July. As each party has succeeded and failed, each party will bear his own costs in both the appeals.

REILLY J.—I agree that we should not be justified in this case in differing from the learned Subordinate Judge's finding that plaintiff 1 was a minor at the date of her sale-deed, Exhibit III, and that the sale is therefore void. I agree also in the findings that defendant 1 paid the full purchase-money and that plaintiff 1 represented herself to be a major in the transaction, though she must have known that that representation was false; and I also agree that it is not shown that defendant 1 knew that plaintiff 1 was a minor. On these facts it is clear that plaintiff 1 is entitled to a decree for recovery of the property. The question remains whether that decree should be made conditional on repayment of the purchase-money, as the learned Subordinate Judge has made it.

On the face of it section 65 of the Contract Act appears to cover the case. That section runs—

“When an agreement is discovered to be void or when a contract becomes 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.”

It will be seen that that section provides for two distinct classes of cases. It first provides for agreements which are discovered to be void, that is agreements which, when they were made, were supposed to be valid—which were supposed by one at least of the parties to be valid—but which are afterwards discovered to have been always unenforceable or void. The second class of cases provided for are contracts which become void,

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that is contracts which were quite good and valid when they were made but become void through some subsequent event. Now on the facts which we have found this is a case which falls within the first class. We have found that defendant 1 did not know that plaintiff 1 was a minor at the time of the sale-deed; so far as he was aware, it was a valid sale-deed. But it has been established and discovered in these proceedings that at the time of that deed she was a minor, and therefore the sale was void. On the face of it therefore this case comes within the first class of cases provided for by section 65 of the Contract Act. But Mr. Bashyam Ayyangar for the appellant here has strongly urged before us that section 65 must not be taken in its plain meaning but that, because it has been so interpreted by their Lordships of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*(1), it must be understood as restricted in a way not mentioned in the section—that is the agreements and the contracts referred to in the section must be understood to be agreements and contracts made by persons competent to contract and by no others. In that case a minor had mortgaged some property. The mortgagee knew that the mortgagor was a minor. After executing the mortgage-deed and receiving the money, the minor by his next friend sued for the cancellation of the mortgage-deed under section 41 of the Specific Relief Act. When that case came before the Privy Council, it was urged that section 65 of the Contract Act applied to it. Their Lordships dismissed that contention very summarily. In their words

“It is sufficient to say that this section (Section 65 of the Contract Act), like section 64, starts from the basis of there being an agreement or contract between competent parties and

has no application to a case in which there never was, and never could have been, any contract.”

Now from the facts I have mentioned it will be seen that it was not necessary for their Lordships for the purpose of that case to make a statement so wide as to apply to the whole of section 65. The first part of section 65 was clearly inapplicable to that case. There was no agreement discovered to be void by any one, because on the facts found the mortgage in that case was known to be a minor's mortgage, so known to both parties, at the time the mortgage-deed was executed. So their Lordships had not to consider the first part of the section at all. What they had to consider must have been an argument that the second part of the section applied, and what they said was that it was inapplicable. That was clearly so. But the words which their Lordships used were, it must be admitted, so wide as in their grammatical sense to cover the whole section, the first part as well as the second part. However, as has been pointed out, that section has been considered by the Privy Council again in a later case, *Harnath Kunwar v. Indar Bahadur Singh*(1). That was a suit brought by a purchaser for possession of an estate sold by a Hindu widow's reversioner before the reversion fell in or for the return of the purchase-money. It was found that the sale was void; but it was also found that through misapprehension the parties did not know that at the time of the sale but discovered it afterwards. In that case the Privy Council decided that the vendor must give compensation to the purchaser. They directed that he must pay the purchase-money with interest. They arrived at that result by applying section 65 of the Contract Act to the case. There it will be seen the sale was void from its inception, but it was only

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(1) (1922) I.L.R. 45 All. 179 (P.C.).

(1) (1908) I.L.R. 30 Cal. 539 (P.C.).

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discovered to be so subsequently. That was clearly a case to which the first part of section 65 of the Contract Act applied. But it will be noticed, in the words of their Lordships of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*(1), that was also clearly a case where there never was, and never could have been, a contract; and yet, in spite of those words in *Mohori Bibee v. Dharmodas Ghose*(1), their Lordships said that section 65 of the Contract Act was applicable. I think that clearly shows that in *Mohori Bibee v. Dharmodas Ghose*(1) their Lordships' remarks were confined to the second part of section 65. That was the only part which I gather the appellant asked should be applied in that case. If we understand the remarks of their Lordships in *Mohori Bibee v. Dharmodas Ghose*(1) otherwise, there is an obvious contradiction between the two cases; and in disposing of the later case their Lordships do not appear to have had any idea that they were saying anything contradictory to what had been said in the earlier case. In my opinion it is clear that in no part of what they said in *Mohori Bibee v. Dharmodas Ghose*(1) were their Lordships considering the first part of section 65 of the Contract Act. They were not in that case laying down what would have been a very surprising doctrine, and certainly unnecessary for the case before them, that agreements discovered to be void under section 65 meant only agreements made by persons competent to contract. In fact their words, "the section has no application to a case in which there never was, and never could have been, any contract", would, if I may say so with respect, not be an interpretation of the first part of section 65 of the Contract Act but in direct conflict with it. So, when we examine those two cases,

(1) (1908) I.L.R. 30 Cal. 539 (P.C.).

I think it is clear that section 65 of the Contract Act is applicable to a case like this and has been applied by their Lordships to a similar case in *Harnath Kunwar v. Indar Bahadur Singh*(1). On that basis it is clear that plaintiff 1 in this case, if she is to get back the property, must repay the purchase-money.

But quite apart from that we have section 41 of the Specific Relief Act. In *Mohori Bibee v. Dharmodas Ghose*(2) the Privy Council indicated that that section was applicable to the minor in that suit, who there sued for cancellation of the mortgage-deed. They said that the lower Courts had discretion to make relief conditional on compensation under section 41 of the Specific Relief Act in that case, though as a matter of fact the Courts did not make such an order. In this case plaintiff 1 has prayed that her sale-deed Exhibit III may be declared void and for recovery of possession of the property. Section 41 of the Specific Relief Act appears to me to be applicable to such a case. That that section can be applied in such a case was decided in *Mallacheruvu Raghavayya v. Mallacheruvu Subbayya* (3), which I myself followed in *Koduri Venkataramayya v. Thumuluri Punnayya*(4), and it was also so decided in *Lila Dhar v. Piarey Lal*(5). In *Khan Gul v. Lakha Singh*(6) a purchaser sued a minor vendor, who had misrepresented his age, for possession of the property sold or for return of the purchase-money. A Full Bench of the Lahore High Court were of the opinion that in such circumstances the minor must return the benefit received, whether he was a plaintiff or defendant. Mr. Bashyam Ayyangar has suggested that in this case section 41 of the Specific Relief Act cannot be applied,

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(1) (1922) I.L.R. 45 All. 179 (P.C.). (2) (1908) I.L.R. 30 Cal. 539 (P.C.).
 (3) (1917) 7 L.W. 124. (4) (1925) 23 L.W. 521.
 (5) (1921) 19 A.L.J. 578. (6) (1928) I.L.R. 9 Lah. 701 (F.B.).

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because plaintiff 1 need not have included any prayer for a declaration that her sale-deed was void in the plaint. As he puts it, she could have ignored the sale-deed and could have brought the suit solely for recovery of possession : in that way section 41 might have been avoided. But I do not think that manoeuvre would really alter the position. If plaintiff 1 had simply brought her suit for possession, defendant 1 would have met her with her sale-deed. Then the Court would have had to consider the very same question, whether that was a valid sale-deed, whether it was a sale-deed which the Court should declare void, as has been declared here, and, when the Court considered the matter in that way it would have been proper to apply the principles of section 41 of the Specific Relief Act.

Mr. Bashyam Ayyangar referred to *Thurstan v. Nottingham Permanent Benefit Building Society*(1), a case which was decided by the Court of Appeal, the decision being confirmed by the House of Lords(2). That was an interesting case in which a minor, Mrs. Thurstan, had mortgaged some land. She had made no misrepresentation about her age ; but the mortgagee-society had supposed that she was a major. On attaining majority the ex-minor sued to set the mortgage aside and to recover possession of the property. The Court of Appeal found that she was entitled to succeed without repaying the mortgage-money. ROMER L.J. in that case said—

“A Court of Equity cannot say that it is equitable to compel a person to pay any monies in respect of a transaction which, as against that person, the Legislature has declared to be void.”

Now, so far as that goes, it appears to be of assistance to plaintiff 1. As I understand it, ROMER L.J. was

(1) [1902] 1 Ch. 1.

(2) [1903] A.C. 6.

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stating a limitation, a qualification, to the general rule that he who seeks equity must do equity. But we must remember that that does not affect the statutory provisions of section 41 of the Specific Relief Act in this country. In *Mohori Bibee v. Dharmodas Ghose*(1) the Privy Council draws that distinction, I think, very clearly. They quote ROMER L.J.'s remark and say that it was applicable to that case and that the general rule that he who seeks equity must do equity did not apply in that case. But they had already said that section 41 of the Specific Relief Act did apply. So it is clear that, although the general principle of equity may be limited in that particular way, that limitation has no effect on the principle of section 41 of the Specific Relief Act, by which we have to be guided in this country. I may mention also that ROMER L.J. in that case also said that different considerations would arise if the infant had been guilty of fraud. In this case we have the fact that plaintiff 1 was guilty of fraudulent misrepresentation of her age.

Mr. Bashyam Ayyangar also referred to *Leslie Limited v. Sheill*(2). There the plaintiff had lent money to the defendant, a minor, who had represented himself to be a major. The lender sued for relief against the minor. But the defendant's plea of infancy was found good, and it was held that the defendant was under no legal or equitable liability at all to the plaintiff. It will be seen that the plaintiff in that case could not sue upon his contract. That was admitted. The question was whether he could get any relief in law or equity against the defendant. The answer of the Court was that no decree could be made against the minor or ex-minor at all in that matter. But that appears to me

(1) (1903) 1 L.B. 30 Cal. 539.

(2) [1914] 3 K.B. 607.

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to have no application to this case, where an ex-minor is suing for relief. There is however an interesting passage in that case, which has already been quoted, in the judgment of LAWRENCE J., who was sitting in the Court of Appeal on that occasion. He said—

“Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud, he will be made to restore it to its former owner.”

The first of these sentences expresses a principle which we have to remember in this case. Mr. Bashyam Ayyangar drew our attention to the succeeding sentence—

“But I think that it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud.”

Mr. Bashyam Ayyangar contended that the learned Judge meant that restitution might be required in the shape of property or perhaps in the shape of a fund which could be traced, but that no order for repayment of money could be made. I think that is to misunderstand the learned Judge's statement. What he was referring to in the last sentence quoted, I think, was the impossibility of making a decree against the minor for repayment, a decree which could be executed against him. Where the minor or ex-minor is the plaintiff there is no reason why restitution should not be in money as well as in kind. The contrast between ordering restitution when the minor or ex-minor is the plaintiff and making an executable decree for repayment against him as defendant is not a question of coin or money. The contrast is between making a decree against him for re-payment of money and making an order in his favour conditional on restitution in money or otherwise. There is a very important difference between enforcing,

in any way, direct or indirect, a minor's void agreement and giving a minor conditional relief when he applies for relief in respect of a void agreement.

And, I think, we must remember that apart from the special provisions of law, to which I have referred, there is a general principle that we must never allow the Court to be made by a plaintiff an instrument of fraud. That applies just as much to a minor plaintiff as to any other plaintiff. We have no right to be tender to a minor in that matter. If a minor were allowed to misrepresent his age to a purchaser, to sell property to the purchaser so deceived, to deliver the property to him, to collect the purchase-money and then to come to Court at once and recover the property without being made to give up the purchase-money, that would be making the Court an instrument of very gross fraud, which we could never tolerate. In my opinion under the provisions of section 65 of the Contract Act, under the provisions of section 41 of the Specific Relief Act and on the general principle which I have mentioned we cannot make the decree to which the plaintiffs are entitled for the recovery of the property except on condition that they refund the purchase-money.

I agree that both these appeals should be dismissed without costs.

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APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Anantakrishna Ayyar.

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(PLAINTIFF), APPELLANT,

v.

NARRA VENKATASUBBAMMA AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

1930,
April 11.

Transfer of Property Act (IV of 1882), sec. 52—Lis pendens—Suit by a Hindu widow for maintenance—Plaint, praying for a decree charging maintenance on specific immovable property mentioned therein—Decree creating the charge on property specified—Sale of such property in execution of decree for a debt binding on the joint Hindu family pending the suit for maintenance—Lis pendens, if applicable to sales in Court-auction—Date from which lis pendens operates, date of plaint or date of decree in suit for maintenance—Civil Procedure Code (Act V of 1908), O. XLI, rr. 27 (1) (b) and 27 (2).

Section 52 of the Transfer of Property Act, 1882, applies to suits for maintenance in which a charge was claimed on certain immovable properties specified in the plaint, and a decree was passed creating a charge on such properties.

The principle of the doctrine of *lis pendens* applies to sales in Court-auction.

A maintenance decree, creating a charge on specific immovable properties mentioned in the plaint, operates to give a charge to the plaintiff from the date of the plaint and not merely from the date of the decree.

An auction-purchaser of certain items of joint family property in execution of a money decree for a debt binding on a joint Hindu family, during the pendency of a suit for maintenance claiming a charge on such items, has no preferential right to the items purchased by him, over a subsequent auction-purchaser of the same items in execution of the maintenance decree in which a charge was given over such property.

* Second Appeal No. 992 of 1925.

Per ODGERS J. (at the original hearing).—Where an Appellate Court, acting under Order XLI, rule 27 (1) (b) of the Civil Procedure Code, 1908, does not require a document to be produced before it, it must be satisfied that there is some other substantial ground to allow such document to be produced; and where it has not recorded reasons for its admission under rule 27 (2) of the same order, the admission is illegal; *Kaki Mutyalu v. Siva Ragharayya*, (1915) 3 L.W. 163, followed.

SECOND APPEAL against the decree of the Court of the Subordinate Judge of Masulipatam in Appeal Suit No. 31 of 1925, preferred against the decree of the Court of the Additional District Munsif of Ellore in Original Suit No. 116 of 1923.

G. Lakshmanna for appellant.

K. Kameswara Rao for second respondent.

This second appeal came on for hearing originally before ODGERS J. who passed the following order calling for a finding:—

ORDER.

In this case an interesting question of law was opened, namely, as to whether the maintenance decree-holder with a charge (first defendant) was to be held to have a superior claim to the plaintiff who purchased from a Court-auction-purchaser. It is admitted by Mr. Lakshmanna for the appellant that, if the debt for which the property was brought to sale in execution of Small Cause Suit No. 1906 of 1916 was not a debt binding on the family, the claim of the second defendant must prevail. The District Munsif held that the decree debt in Small Cause Suit No. 1906 of 1916 was not a binding debt which could prevail against the claim of the maintenance of the first defendant. He gives various reasons which have induced him to come to this conclusion and they are set out in paragraph 6 of his judgment. He observed, *inter alia*, that "the extract from the suit register could have been produced to show the nature of

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the claim in Small Cause Suit No. 1906 of 1916." There are, however, various other circumstances which induced him to come to the conclusion that it has not been proved that the debt is a debt binding on the family. The Subordinate Judge, on the other hand, mainly or exclusively from the fact of the extract from the suit register, which he admitted and marked as Exhibit H, comes to the opposite conclusion. It is said that this Exhibit H supplies the missing link because it shows that the promissory note which is referred to in the endorsement of Exhibit B is the very note referred to in the suit register. The circumstances under which the admission of Exhibit H was applied for and allowed seem to be somewhat extraordinary. The plaint was filed on the 20th June 1922 and the decree in the first Court was not made until the 23rd November 1923. On the 29th January 1924 an appeal was filed in the lower Appellate Court and on the 4th December 1924 there was a petition to receive Exhibit H, that is to say, over a year after the learned District Munsif had commented on its absence and nearly two and a half years from the institution of the suit. No order was made on this petition which is extremely vague in its allegations, the affidavit in support saying "It is therefore very necessary that these two documents" (of which Exhibit H is one) "should be received", without stating any reasons why this document could not have been filed in the District Munsif's Court. The matter is governed by Order XLI, rule 27 (b), Civil Procedure Code. The Appellate Court did not require the document to be produced, so that the Court must be satisfied that there is some other substantial cause to allow such document to be produced. No substantial cause is alleged, and further, with regard to the provision in sub-rule (2), the Court has not recorded

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any reason for its admission. On the 16th April 1925, two days before the judgment in appeal was delivered, the Judge ordered this extract from the suit register to be received and marked Exhibit H. Cases have gone to the length of saying that such reception of additional evidence under those circumstances is totally without jurisdiction. In *Kaki Mutyalu v. Siva Raghavayya*(1), a Bench of this Court held that the admission of a document in evidence was illegal where no reasons were recorded. There was no application for the admission of the evidence and no reasons were shown for failure to produce the document in the Court of first instance. Apart from this irregularity or illegality in admitting Exhibit H in evidence, the learned Judge has, to my mind, failed to deal with some of the aspects of this question of fact that presented themselves to the District Munsif. It is important to have this question of fact settled and I must, therefore, send the case down for a finding to the Subordinate Judge as to whether or not the debt in question, i.e., the decree debt in Small Cause Suit No. 1906 of 1916, is a binding debt of the family. The Subordinate Judge need not again enter into the question as to whether it takes precedence or not of the claim for maintenance of the first defendant. That is a question of law which, if necessary, can be argued later on. As I have said, it seems to me that on the authority of *Kaki Mutyalu v. Siva Raghavayya*(1) the reception of Exhibit H was illegal. If the appellant here can persuade the Subordinate Judge that substantial reasons did exist for his failure to produce the document in evidence in the Court of the District Munsif, the Subordinate Judge may consider the same. Otherwise the finding is to be returned on the evidence on record; six weeks for finding and seven days for objections.

(1) (1915) 3 L.W. 163.

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[In compliance with the above order, the Court of the Subordinate Judge at Masulipatam submitted a finding to the effect that the debt in Small Cause Suit No. 1906 of 1916 was a debt binding on the family of the first defendant.]

The case came on for hearing after the return of the finding, and the Court (WALLACE and ANANTAKRISHNA AYYAR JJ.) delivered the following

JUDGMENT.

The first defendant (Venkatasubbamma) filed, on 11th January 1916, Original Suit No. 451 of 1916 on the file of the Temporary District Munsif's Court of Gannavaram against her deceased husband's brother Venkatappayya and the alienees from Venkatappayya of certain joint family properties, for maintenance due to her from the joint family. She prayed that the maintenance that might be decreed to her should be made a charge upon nine specific items of immovable property mentioned in her plaint. She alleged that items 1 to 8 had been alienated by Venkatappayya to the other defendants in Original Suit No. 451 of 1916, fraudulently and collusively with a view to defeat her right to maintenance. She also alleged that those alienations were not *bona fide* or supported by consideration. She obtained a decree for maintenance on 27th April 1913, and the same was charged by the decree on all the nine items of immovable property mentioned in her plaint. Before the decree was passed in Original Suit No. 451 of 1916, P.W. 1 (Narasayya) filed a plaint on the 27th January 1916, and obtained a decree for money in Small Cause Suit No. 1906 of 1916 on the file of the same Court against Venkatappayya on a promissory note, and in execution of that decree, P.W. 1 brought item 9, specified in Original Suit No. 451 of 1916 as one of the

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properties charged for the widow's maintenance, to sale, and, after purchasing the same himself on the 8th April 1918, sold the same to the plaintiff on the 2nd June 1919. In the meantime, the widow, Venkatasubbamma, executed the maintenance decree obtained by her (Original Suit No. 451 of 1916) and brought item No. 9 mentioned in that decree to sale, and the second defendant Veerayya became the purchaser in Court-auction on 5th April 1922. The second defendant attempted to obtain possession of the said property in pursuance of the sale certificate granted to him in Original Suit No. 451 of 1916, and therefore the plaintiff instituted the original suit, out of which this second appeal has arisen, for a declaration that the Court-sale of the property in suit (item No. 9 in Original Suit No. 451 of 1916) in favour of the second defendant is not valid and binding on him and for a permanent injunction restraining the second defendant from taking possession of the property in pursuance of the Court-sale to him.

The first defendant, the widow Venkatasubbamma, did not appear in this suit. The second defendant pleaded that the purchase by the plaintiff's vendor—P.W. 1—in execution of the Small Cause decree on 8th April 1918 was vitiated by the doctrine of *lis pendens*, since Original Suit No. 451 of 1916 instituted by the widow to have the suit item also made a charge in respect of her maintenance was pending at the time, and that consequently the purchase by P.W. 1 could not prevail over the widow's rights, that the second defendant being the auction-purchaser in execution of the maintenance decree, his rights to the property should prevail over the rights of P.W. 1, the plaintiff's assignor.

Three main questions were discussed in the lower Courts—(a) whether the doctrine of *lis pendens* applied to suits for maintenance where a charge is claimed on specified immovable property; (b) whether the doctrine

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applies to involuntary sales; and (c) whether debts binding on the joint family have priority over claims of widows of the joint family for maintenance, and if so, whether the Court-sale to P.W. 1 would have precedence and priority over the Court-sale to the second defendant in the circumstances.

The trial Court found that the decree debt in Small Cause Suit No. 1906 of 1916 was not under the circumstances a binding debt which could have prevailed against the claim for maintenance of the first defendant; and on the other two points the trial Court held that the doctrine of *lis pendens* applied. The suit was accordingly dismissed. On appeal by the plaintiff, the lower Appellate Court admitted a fresh document in evidence and found that the decree debt in Small Cause Suit No. 1906 of 1916 was a debt binding on the joint family. The lower Appellate Court further observed that the doctrine of *lis pendens* applied in the circumstances, and therefore confirmed the trial Court's decree.

When the second appeal first came on for hearing, ODGERS J. being of opinion that the finding of the lower Appellate Court on the question of the binding nature of the debt, which was the subject-matter of the Small Cause Suit No. 1906 of 1916, was not satisfactory, called for fresh findings and reserved the other questions of law arising in the case for further consideration. The finding submitted by the lower Appellate Court (another Subordinate Judge) is to the effect that the debt, which was the subject-matter of the Small Cause Suit, was one binding on the joint family. This finding is one of fact and has to be accepted for the purpose of this second appeal.

Mr. Lakshman, the learned Advocate for the appellant, argued two questions—(1) That the doctrine of *lis pendens* does not apply to the case; and (2) that

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debts binding on the family have priority over the claims of a Hindu widow for maintenance, and that on the finding of the lower Appellate Court that the debt which gave rise to the Small Cause decree was binding on the family, the purchase by P.W. 1 in Court-sale should prevail over the purchase made by the second defendant.

On the question of *lis pendens*, we are clearly of opinion that the doctrine applies to a suit for maintenance where the plaintiff claims to have maintenance specifically charged on specific items of immovable properties mentioned in the plaint. In such a case

“a right to immovable property is directly and specifically in question”

within the meaning of section 52 of the Transfer of Property Act, and therefore

“the property cannot be transferred or otherwise dealt with by any party to the suit so as to affect the rights of any other party to the suit under any decree which may be made therein.”

Dose Thimmanna Bhutta v. Krishna Tantri(1) is a clear and direct decision on this point. There, the learned Judges (BENSON and SANKARAN NAIR JJ.) held that

“a suit in which a widow claims to have her maintenance made a charge on specific immovable property is one in which a right to such immovable property is directly and specifically in question within the terms of section 52 of the Transfer of Property Act.”

See also *Jogendra Chunder Ghose v. Fulkumari Dassi*(2) and *Krishna Patter v. Sinnaponnai*(3). In fact the learned Advocate for the appellant did not seriously dispute this point, and we think it is clear that the doctrine of *lis pendens* applies to a suit for maintenance in which the plaintiff claims to have her maintenance

(1) (1906) I.L.R. 29 Mad. 508.

(2) (1899) I.L.R. 27 Cal. 77.

(3) (1914) 25 I.C. 759.

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made a charge on specific immovable property mentioned in the plaint and a decree is passed creating a charge on such property.

Mr. Lakshman, however, argued that the doctrine of *lis pendens* had no application to cases of involuntary sales. It is, however, clear to us that the principle of the doctrine of *lis pendens* applies equally to involuntary sales and is not confined to transfers *inter vivos*, if the other conditions are satisfied. In *Pethu Ayyar v. Sankaranarayana Pillai*(1), NAPIER J. observed at page 961 as follows:—

"It is now beyond dispute that involuntary sales by decree are covered by the mischief of the doctrine," though, having regard to the provisions of section 2, proviso (d), section 52 as such might not apply to such cases. See *Man Singh v. Amantzka Prasad*(2) and *Tinoodhan Chatterjee v. Trailokhya Charan Sanyal*(3). In *Tinoodhan Chatterjee v. Trailokhya Charan Sanyal*(3), the learned Judges held that the doctrine of *lis pendens* is applicable to a purchase at an execution-sale, and that the question may now be considered as set at rest by decisions of the Privy Council. In Ghose on The Law of Mortgage in India, 4th edition, Volume II, page 706, the learned author remarks that

"the weight of authority is decidedly in favour of the extension of the doctrine to alienations *in invitum*" and at page 707 it is stated that

"In *Nilakanti Banerji v. Suresh Chandra Mullick*(4), their Lordships of the Privy Council expressed strong doubts as to the correctness of confining the principle to voluntary alienations. And the question may now be taken to be practically concluded by their Lordships' judgment in *Radha Madhub Holdar v. Monohur Mukerji*(5), and *Moti Lal v. Karubuldin*(6)."

(1) (1918) I.L.R. 40 Mad. 955.

(3) (1912) 17 C.W.N. 413 at 415.

(5) (1888) I.L.R. 15 Calo. 756 (P.O.).

(2) (1914) 26 I.C. 879.

(4) (1885) I.L.R. 12 Calo. 414 (P.C.).

(6) (1897) I.L.R. 25 Calo. 179 (P.O.).

In *Vedachari v. Narasimha Mudali*(1) KRISHNAN and ODGERS JJ. held that the doctrine of *lis pendens* applies to Court-sales also.

The question is discussed in Hukm Chand's Treatise on the Law of *Res Judicata* at pages 713 and 714. The conclusion arrived at is that the weight of authority is in favour of the view that a purchaser at a sale in execution pending a suit is bound by the result in that suit. The inconvenience that would be caused by upholding the opposite view is forcibly pointed out in an elaborate judgment of Sir RICHARD COUCH C.J. in *Raj Kishen Mookerjee v. Radha Madhub Holdar*(2). See also Bennett on *Lis Pendens*, page 328, section 284.

We accordingly overrule the contention raised by the learned Advocate for the appellant, and hold that the principle of the doctrine of *lis pendens* applies to sales in Court-auction also.

The last point raised by the learned Advocate for the appellant is really the point that was strongly pressed by him in this second appeal. He argued that debts binding on a joint Hindu family have priority over maintenance of widows, and, as the finding of the lower Appellate Court that the decree in the Small Cause suit was in respect of a debt binding on the joint family has to be accepted, he argued that the claims of the widow, the first defendant, and of the second defendant, who is the auction-purchaser in execution of the maintenance decree, could not prevail over the rights of the auction-purchaser in execution of the Small Cause Court's decree. He strongly relied on the following observations in *Dose Thimmanna Bhutta v. Krishna Tantri*(3) of the learned Judges (BENSON and SANKARAN NAIR JJ.) that

(1) (1923) 45 M.L.J. 825.

(2) (1874) 21 W.R. 849.

(3) (1906) I.L.R. 29 Mad. 508.

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"it is not alleged that, so far as the property in dispute before us is concerned, the mortgage debt due to him was contracted for the purpose of paying off any debt entitled to any priority over the widow's claim for maintenance, or already due by the mortgagor."

He also relied on the observation of BENSON and BASHYAM AYYANGAR JJ. in *Jayanti Subbiah v. Alamelu Mangamma*(1) to the effect that the debts of a husband take precedence over the widow's claims for maintenance. Some other decisions were also referred to, to the same effect.

Turning to *Dose Thimmanna Bhutta v. Krishna Tantri*(2), it is clear that the observations relied on were only *obiter*. The Court, as a matter of fact, held in that case that the doctrine of *lis pendens* applied, and upheld the widow's claims. Further, it is not mentioned what debts are entitled to any priority over the widow's claim for maintenance and under what provisions of law. Mr. Lakshman admitted, and in our view, very properly, that *Dose Thimmanna Bhutta v. Krishna Tantri*(2) is not a *decision* on this point, and that the observations relied on at page 509 are only *obiter*. The decision in *Jayanti Subbiah v. Alamelu Mangamma*(1) does not lay down anything inconsistent with the view we are inclined to adopt.

In that case, there was no decree obtained by the widow creating a charge in respect of any specific immovable property of the family; nor was her general claim for maintenance against the joint family estate reduced by any contract between the parties to the form of a specific charge on any specific immovable properties of the family. In those circumstances, the learned Judges held that an auction-purchaser in execution of a

(1) (1902) I.L.R. 27 Mad. 45.

(2) (1906) I.L.R. 29 Mad. 508.

money decree binding on the family was entitled to the properties purchased by him, and that the general rights of a Hindu widow under Hindu Law could not be put forward to resist the claim of such auction-purchaser.

As observed by WEST J. in *Lakshman Ramachandra Joshi v. Satyabhamabai*(1)

"The widow's claim being strictly to maintenance only, without any defined share in the estate even on partition, and the kind of maintenance even that she can claim being dependent on the perhaps fluctuating circumstances of the joint family, it appears that although she may, at her will, get her claim recognized as chargeable on the estate in the hands of the co-parceners, reduced to certainty, and secured as a specific charge on the estate, or, as Katyayana says, by 'the allotment of a share for her life' yet if she should refrain from that course in the hope of sharing the improving circumstances of the family, or through mere carelessness, she leaves to the co-parceners an unlimited estate to deal with at their discretion, and must share their ill as well as their good fortune."

In the absence of fraud, the above passage describes the widow's rights in general, and before her rights are reduced to the form of a charge on any specified family property.

The other decisions cited do not take the case any further. In those cases also, there was no specific charge created, either by act of parties or by the decree of Court, over specific items of immovable property belonging to the family for the maintenance due to the widow. Our attention was also drawn to Trevelyan's Hindu Law, 3rd edition, page 99, where it is stated as follows:—

"A right of maintenance is not affected by a transfer made during the pendency of a suit for maintenance, unless such transfer be effected for the purpose of paying off a debt, which has priority over the claim for maintenance."

(1) (1877) I.L.R. 2 Bom. 404 at 515.

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Mulla's Hindu Law, 6th edition, section 570, at page 578, was also relied on, where it is mentioned that

"Debts contracted by a Hindu take precedence over the right of maintenance of his wife or infant child, or his widow after his death. The same is true of debts contracted by the manager of the joint family of which the husband was a member, provided the debts were incurred for the benefit of the family."

The only authority quoted by the learned author—Sir E. J. Trevelyan—is *Dose Thimmanma Bhutta v. Krishna Tantri*(1), about which we have already made our remarks. The passage quoted from Mr. Mulla's book refers, as we understand it, only to cases where the right of maintenance has not been reduced to the form of a specific charge either by private contract or by proceedings taken in Court. That is made clear by the concluding sentence in the same paragraph at page 579—

"But where maintenance has been made a charge upon the property, it takes precedence over the right of a subsequent purchaser of the same property in execution of a money-decree, though the decree was in respect of debts binding on the family."

No doubt in paragraph 572, the learned author quotes the observations already referred to—from 29 Mad. 508, to the effect that

"The transferee of immovable properties pending a suit by a Hindu widow to establish a charge on a specific immovable property for her maintenance must hold the property subject to such charge, unless the transfer be effected for the purpose of paying off a debt which has priority over the widow's claim for maintenance."

In *Somasundaram Chetty v. Unnamalai Ammal*(2), it was held by OLDFIELD and SESHAGIRI AYYAR JJ. that a charge on joint family properties created by a decree for maintenance payable to the widow of a member of

(1) (1906) I.L.R. 29 Mad. 508.

(2) (1920) I.L.R. 43 Mad. 800.

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a joint Hindu family takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family. No objection could be, nor in fact was, taken by the learned Advocate for the appellant to the decision in *Somasundaram Chetty v. Unnamalai Ammal*(1). See also *Lakshman Ramachandra Joshi v. Satyabhamabai*(2) per WEST J.; *Kuloda Prosad Chatterjee v. Jageshwar Koer*(3), *Muttia v. Virammal*(4), and *Jamna Bhai Ammal v. Balakrishnan Tawker*(5). In *Jamna Bhai Ammal v. Balakrishna Tawker*(5), VENKATASUBBA RAO J. held that

"Under Hindu Law a widow's claim to maintenance is not a charge upon the estate of her deceased husband until it is fixed and specifically charged upon that estate either by agreement or by decree of Court and does not take precedence over unsecured debts which are binding on the family of her deceased husband";

and observed—

"If the widow's claim has ripened into a specific charge it has priority over the claims of creditors whose rights have not been secured by alienation of property."

The decisions in *Sham Lal v. Banna*(6) and *Gur Dayal Kaunsila*(7) were relied on by the learned Advocate for the appellant. But in neither of them was there a specific charge created in respect of the maintenance claim. The observation that even if there is a charge it would be subordinated to the claims of the creditor is not (so far as we are aware) supported by any text of Hindu Law, and no such texts were cited to us. Section 2 of the Transfer of Property Act was also relied on to show that nothing in Chapter II of the Transfer of Property Act (and section 52 forms part of

(1) (1920) I.L.R. 43 Mad. 800.

(2) (1877) I.L.R. 2 Bom. 494 at 515.

(3) (1899) I.L.R. 27 Cal. 194.

(4) (1887) I.L.R. 10 Mad. 283 at 288.

(5) (1927) 53 M.L.J. 176, 178.

(6) (1882) I.L.R. 4 All. 296.

(7) (1883) I.L.R. 5 All. 367.

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Chapter II) shall be deemed to affect any rule of Hindu Law; but as no rule of Hindu Law has been brought to our notice supporting the appellant's contention, we are of opinion that the statement that the debts of a Hindu family take precedence over the claims of a Hindu widow for maintenance would apply only so long as the claim for maintenance is not made a charge on any specific property.

In the circumstances, the question arises whether any reason has been shown why the principle of the doctrine of *lis pendens* should not apply to such cases as the one before us. After a decree is passed charging specific items of immovable property of the joint Hindu family for the maintenance due to the widow, it is clear that the rights of a simple money-creditor of the joint family do not take priority over the charge created by the decree, fraud and collusion apart. Does it make any difference when such money-creditor seeks to proceed against the immovable property belonging to the family at a time when a suit by the widow claiming to charge that immovable property is pending in a Court, if such a decree in her favour is ultimately passed? The very principle of the doctrine of *lis pendens* is to prevent creation of fresh rights, with reference to immovable properties, which are the subject of adjudication in suits pending before Courts. After decree, the decree operates, and would protect the decree-holder against any subsequent transferees. One object of the doctrine of *lis pendens* is to prevent the plaintiff's rights and claims to property being prejudiced by delay of Courts in disposing of the suit, and to prevent dealings with the property by or at the instance of the defendant to the prejudice of the plaintiff.

The purpose of the rule is to keep the subject-matter of the litigation within the power of the Court until the

judgment or decree shall be entered, since otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. To give effect to the doctrine of *lis pendens*, two things seem to be indispensable:—

(1) That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and

(2) that the particular property involved in the suit must be so defined in the description that anyone reading it can learn thereby what property is intended to be made the subject of litigation.

If the conditions are fulfilled, the plea that the purchase was made *bona fide* and that the purchaser paid full consideration for it will not avail against such judgment or decree, nor will the purchaser be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of proceedings of Courts of Record. See Black on Judgments, 2nd Edn., Vol. II, section 550.

The principle of the doctrine of *lis pendens* is explained by the Privy Council in *Faiyaz Husain Khan v. Prag Narain*(1). Lord MACNAGHTEN, after referring to the observations of TURNER L.J. in *Bellamy v. Sabine*(2) to the effect that

“it would plainly be impossible that any action or suit could be brought to a successful termination if alienations *pendente lite* were permitted to prevail”,

observed that

“The correct mode of stating the doctrine, as CRANWORTH L.C. observed in the same case, is that *pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent.”

(1) (1907) I.L.R. 29 All. 339 (P.O.). (2) (1857) 1 D.C. G. and J. 566.

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It being clear, and in fact not disputed, that section 52 of the Transfer of Property Act applies to a suit for maintenance where a charge is claimed in respect of specific immovable property, we are not able to see how the principle of the doctrine of *lis pendens* ceases to be applicable during the period between the date of the plaint and the date of the decree. No specific rule of Hindu Law to the contrary has been quoted to us, and the principle of the doctrine of *lis pendens* must be held to apply, it not being pretended that the rights created in favour of the plaintiff's assignor P.W. 1 during the pendency of the maintenance suit were under the authority of the Court in which that suit was pending. Where reckless plaints are filed claiming charges upon all immovable properties belonging to the defendants without any justification whatsoever, and with a view to embarrass the management by the Kartha of the family, section 52 empowers the Court to sanction that the property which is the subject-matter of the suit might be transferred or otherwise dealt with by any party to the suit on such terms as the Court may impose. If the Court be satisfied that for paying off debts due by the family, the defendant, who is the manager of the family, should be authorized to sell any of the properties mentioned in the maintenance-plaint, then it is open to the Court, if it thinks fit, to sanction the sale or transfer of any such property. Filing of such plaints in Courts should be taken to constitute notice to all persons concerned, and unless the money-creditor of the family took steps to get the sanction of the Court under section 52 of the Transfer of Property Act, it would seem to logically follow that any transfer of the property mentioned in the maintenance-plaint could not affect the plaintiff, in case she got a decree charging that very property.

Our attention was not drawn to any direct decision on the point we have to decide. There is, however, an observation of PHILLIPS J. in *Rajah of Kalahasti v. Venkatappa Nayanim Bahadur*(1). At page 550, it is observed as follows:—

“Under her husband's will the widow obtained no specific charge on the estate and could only claim the allowance as a legatee or as a Hindu widow; but from the date of her suit, namely, 22nd March 1897, she became entitled to a charge for her allowance by virtue of the decree, dated 22nd August 1900, which must be deemed to refer back her right to the date of her plaint. As these appeals are concerned mainly with the relative priority of Lakshmikantamma's claim and the claims of the several appellants, it is important to remember that the widow's claim dates back to 22nd March 1897, and any mortgages or charges created after that would not affect her right.”

No doubt the question is not discussed by the learned Judge, but the observation of the learned Judge is in accordance with the view we are inclined to take for the reasons already mentioned by us.

Our attention was drawn to the decision of a learned Judge of this Court in *Rattamma v Seshachalam Sarma* (2), where he held that a charge takes effect only from the date of the decree. If the learned Judge intended to lay down that, even in cases where a plaint prays for a specific charge on specific immovable properties mentioned in it, a charge could take effect only from the date of the decree, and not from the date of the suit, then, with all respect, we are unable to agree with him. No doubt in cases where no charge is claimed on any specific immovable property, but only a general claim is made against the defendant (manager) and the joint family property generally, without specifying in the plaint any property, then, in such cases, a decree creating a charge on any specific immovable

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(1) (1927) 27 L.W. 544.

(2) (1926) 52 M.L.J. 520.

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property would take effect ordinarily only from the date of the decree; but the case would be different when the plaintiff claims a charge on specific immovable property and the decree also grants such a prayer and charges such specific property. See in this connection Mayne's Hindu Law, 9th Edn., paragraph 462, where the learned author states as follows:—

“Where a widow had sued for maintenance and had named specific pieces of property in order to show the amount she was entitled to, but had made no claim for a charge on the property, but such a charge was in fact created by the decree, the charge was held not to be binding as against a mortgage made pending suit, by virtue of the doctrine of *lis pendens*. It would have been different if the suit had been to obtain a charge.”

A somewhat similar question has arisen in England and America. The general principles of the doctrine of *lis pendens* being the same there as in India, we think it is perhaps permissible to refer to analogous cases decided in those countries. It has there been held that

“If in a suit for alimony, relief is sought in respect of specific property, either by making it chargeable with the payment of alimony, or setting it apart for the use of or as the property of one of the parties, or of partitioning or dividing it between them, the doctrine of *lis pendens* will apply. In *Ulrich v. Ulrich* (1), the suit was for alimony and maintenance, yet the Supreme Court held the rule of *lis pendens* to apply, as a certain lot was described in the bill, and it was alleged that the lot constituted the principal property of the defendant out of which the alimony should be decreed. In *Wilkinson v. Elliott* (2), the suit was for divorce and alimony from certain property specifically described, and it was contended that the doctrine had no application in such suits, . . . but JOHNSTON J., . . . said:

‘If a divorce is asked on account of the fault of the husband, the wife may ask not only that all her own land may be restored to her that has not been disposed of, but may describe particular property belonging to the husband, and ask

(1) (1926) 3 Mackay 290.

(2) (1926) 19 Am. St. Rep., 158.

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that the same may be set apart for her as permanent alimony. When this is done, the property is made the subject-matter of litigation, and is brought within the jurisdiction of the Court, and anyone who purchases the same should be bound by the judgment or decree thereafter rendered. If in such an action there was no specific property pointed out, but only a general prayer for alimony, the doctrine would not apply, for the reason that the alimony might be awarded out of either real or personal property; and as no particular property was described and made the subject-matter of the litigation, no one could have notice that any particular property was involved.’”

Again, in *Powell v. Campbell* (1), it was observed that

“In many cases where, in divorce proceedings, the application is for alimony proper,—that is, an allowance to be paid at regular periods for the wife's support,—. . . it has been held that the rule of *lis pendens* does not apply because such a suit is in *personam*, and does not apply to any specific part of the personal or real estate of the husband. . . . (If, however, the wife) in her complaint specifically describes property which she asks the Court to decree to her for her support, there seems to be no well-founded reason why the rule of *lis pendens* should not apply. . . . In such a case, a purchaser *pendente lite* with notice of the suit and its objects, knows that the property described may be decreed to the wife, and that one of the objects of the suit is to obtain a decree awarding such property to her.”

See section 284 of HUKIM CHAND'S Law of *Res Judicata*, 1894 Edn., pages 723 and 724, and BENNETT on *Lis Pendens*, 1887 Edn., page 267, section 219.

The conclusion would seem to be that if the prayer in the bill be for alimony out of her husband's general estate, then the doctrine of *lis pendens* would not apply; but if the prayer be for alimony to be assigned to the wife out of any specific property of the husband mentioned in the bill or petition, then the rule of *lis pendens* would apply. The discussion is interesting.

(1) (1926) 19 Am. St. Rep. 350.

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and throws light on the applicability of the doctrine of *lis pendens* to cases like the one before the Court.

For the above reasons, we hold that section 52 of the Transfer of Property Act applies to a suit by a Hindu widow in which she claims to have her maintenance charged on specific items of immovable property mentioned in the plaint; that the principle of the doctrine of *lis pendens* applies to sales *in invitum* that take place during the pendency of such suits; that a decree obtained by the plaintiff in such a suit, creating a specific charge over specific items of immovable property mentioned in the plaint, operates to give her a charge as from the date of the plaint, and not as from the date of the decree only, unless there be anything in the decree to the contrary; that, without the sanction of the Court, transfers *inter vivos* or sales *in invitum* during the pendency of such suit could not prevail over such charge claimed in the plaint and granted by the decree; that a simple money-creditor of a joint Hindu family has no priority over such charge granted by the decree, in the absence of fraud or collusion; and an auction-purchaser, during the pendency of such maintenance suit, of an item of property over which a charge was claimed in the plaint and was granted by the decree, who purchased in execution of a simple money-decree binding on the family, is not entitled to priority over another auction-purchaser of such property in proceedings taken to execute such maintenance decree.

We would accordingly dismiss the second appeal with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

V. NARASIMHA AYYANGAR, OFFICIAL LIQUIDATOR OF THE
CITY HYGIENIC MILK SUPPLY COMPANY, LIMITED,
(APPLICANT), APPELLANT,

1930,
January 17.

v.

OFFICIAL ASSIGNEE OF MADRAS, REPRESENTING
D. SADASIYA RAO, AN INSOLVENT, AND FOUR OTHERS
(PETITIONERS AND OTHERS), RESPONDENTS.*

Indian Limitation Act (IX of 1908), sec. 10—Directors of companies—Whether trustees for purposes of section—Indian Companies Act (VII of 1913), sec. 235—Application under, against directors for compensation for misfeasance—Commencement of limitation, whether from date of misfeasance or date of order for winding up.

Directors of companies under the Indian Companies Act (VII of 1913) are not trustees for the purposes of section 10 of the Indian Limitation Act (IX of 1908).

In respect of an application by a liquidator under section 235 of the Indian Companies Act against the directors of the company seeking to recover certain moneys by way of compensation for their acts of misfeasance, limitation begins to run from the date of the commission of the alleged acts of misfeasance and not from the date of the order directing the winding up of the company.

APPEAL from the judgment of BEASLEY J. (now Chief Justice), dated 11th December 1928, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 62 of 1922 (In the matter of the Indian Companies Act and In the matter of the City Hygienic Milk Supply Company, Limited).

The City Hygienic Milk Supply Company, Limited, was a company registered under the Indian Companies

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Act (VII of 1913) with its registered office in Madras. The company commenced business on 27th August 1920. Three of the directors of the company filed in the Original Side of the High Court on 30th March 1922 Original Petition No. 62 of 1922 praying that the company may be wound up by the Court. By an order, dated 13th September 1922, the Court directed the winding up of the company. On 29th March 1923 the then Official Liquidator made an application for the public examination of some of the directors and officers of the company regarding their management of its affairs, and by an order, dated 10th April 1923, the Official Referee was directed to conduct that examination, and as a result of it a misfeasance summons was taken out on 12th September 1928 against some of the directors and one of the officers of the company for payment by all or such of them as may be held liable or accountable of the sums mentioned against them or to contribute such sum as the Court thinks just to the assets of the company by way of compensation in respect of their acts of misapplication, retainer, misfeasance or breach of trust as set out in the affidavit of the Official Liquidator therewith filed. At the hearing of the application before BEASLEY J. (as he then was), a preliminary objection was taken on behalf of the respondents that the application was barred by limitation. His Lordship upheld the objection and dismissed the application. The Official Liquidator appealed.

V. Radhakrishnayya for appellant.

S. E. Sankara Ayyar for second respondent.

T. M. Krishnaswami Ayyar (*N. Sivaramakrishna Ayyar* with him) for fourth respondent.

K. Narasimha Ayyar (*S. Parthasarathi* and *V. K. Tiruvengkatachari* with him) for fifth respondent.

No one appeared for first and third respondents.

JUDGMENT.

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RAMESAM J.—This is an appeal against an order of our brother BEASLEY J., as he then was, dismissing an application of the Official Liquidator of the City Hygienic Milk Supply Co., Ltd., under section 235 of the Indian Companies Act for an order compelling the directors of the company to pay certain amounts by way of compensation in respect of their acts of misfeasance, etc. Two points were raised before the learned Judge and both were decided against the applicant. The Official Liquidator appeals.

In appeal the two points that arise are (1) whether directors of companies under the Indian Companies Act are trustees for the purpose of section 10 of the Limitation Act; and (2) if they are not trustees, from what date does limitation run?

Taking up the first point, it is now clear that, even in England in spite of occasional use of loose expressions to the contrary, it is now settled that directors of companies are not trustees. In *In re Forest of Dean Coal Mining Company*(1) JESSEL M.R. said at page 451 "Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners . . .", and at page 453 "They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company." In *Flitcroft's case*(2), BACON V.C. no doubt said, "That the relationship of trustee and *cestui que trust* subsists between the director of joint stock companies and the shareholders, I do not entertain the slightest doubt." But this statement is inconsistent with the remarks of the Lords Justices in the

(1) (1878) 10 Ch. D. 450.

(2) (1882) 21 Ch. D. 519.

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Court of Appeal and with later special judicial opinions. On appeal in the same case JESSEL M.R. said "if directors who are *quasi-trustees* for the company, etc." BRETT L.J. said "They are trustees for the company not for the individual shareholders." But even this statement is too wide. COTTON L.J. said "they have misapplied funds as to which they stood in the position of trustees." In *In re Faure Electric Accumulator Company*(1), KAY J. says "They certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or a will. One obvious distinction is that the property of the company is not legally vested in them, etc." In *In re Lands Allotment Company*(2), KAY L.J. says at page 639 "As directors they are not trustees at all. They are only trustees *qua* the particular property which is put into their hands or under their control, etc." LINDLEY L.J. says "Although directors are not properly speaking trustees, etc." In *City Equitable Fire Insurance Co., In re*(3), ROMER J. observes "To say that directors are trustees is a wholly misleading statement." It is unnecessary to refer to English decisions at greater length, for all that we are concerned with is whether they are trustees for the purpose of section 10 of the Limitation Act.

In *Kathiawar Trading Company v. Virchand Dipchand* (4), it was held by SARGENT C.J. and BAYLEY J. that directors of companies are not trustees in whom the property of the companies has become vested in trust for any specific purpose. I entirely agree with this decision. It is contended that the purposes of the Company are specific purposes within the meaning of the section. The purposes of the Company are too wide, and far from being specific, one would say they are very

(1) (1888) 40 Ch. D. 141 at 150 and 151.
(3) [1925] 1 Ch. 407.

(2) [1894] 1 Ch. D. 816.

(4) (1893) I.L.R., 18 Bom. 119.

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general purposes, and even then it is doubtful whether it can be said that the property of the Company is vested in the directors. Two decisions have been referred to by the learned Advocate for the appellant as somewhat weakening the decision in *Kathiawar Trading Company v. Virchand Dipchand*(1). These are *Kishtappa Chetty v. Lakshmi Ammal*(2) and *Pachaiyappa Chetty v. Sivakami Ammal*(3). I have nothing to say as to the actual decisions in these cases, but I think that the statement of SCHWABE C.J. in the former of these cases, namely, wherever there is control over money there is an express trust, a statement probably based upon the observations of Lord ESHER M.R. in *Soar v. Ashwell*(4), must be understood in the light of the other judgments of the Court of Appeal in that case which show that "control" (in Lord ESHER's judgment) must be regarded as synonymous with vesting. As to the decision in *Pachaiyappa Chetty v. Sivakami Ammal*(), the facts are very plain and there is an express trust. I do not think that the remarks in these decisions affect the decision in *Kathiawar Trading Company v. Virchand Dipchand*(1) with which I entirely agree. It follows therefore that directors can plead limitation.

Coming now to the second point, the question really turns upon whether entirely new rights with a new cause of action arise on the winding up of a company. That, for certain purposes, new rights may be conferred by the winding up of a company, there can be no doubt. One such well-known case is the liability to pay calls as a contributory. Both English and Indian authorities are very clear on this matter; but it does not follow from this that the right of a liquidator under section 235 is a case of a new right accruing by reason of the winding up. The corresponding section of the

(1) (1893) I.L.R., 18 Bom. 119.
(3) (1925) 49 M.L.J. 468.

(2) (1923) 44 M.L.J. 481.
(4) [1898] 2 Q.B. 390.

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English Act of 1862 is section 165, and it has been held by the House of Lords in *Cavendish Bentinck v. Penn*(1) that that section creates no new rights but only provides a summary and efficient remedy. So also in *City Equitable Fire Insurance Company, In re*(2), POLLOCK M.R. said "that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights; and I think that is abundantly shown by *Coventry and Dixon's case*(3) etc." In the last case JAMES L.J. observed "I am of opinion that that section does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts." So far as contributories are concerned, we have got a specific section fixing the time when the amount is payable. Section 159 says that a contributory shall pay at the time when calls are made for enforcing liability. Naturally limitation runs from the time when calls are so made. We have no corresponding section in the case of liability for misfeasance under section 235. On this matter two decisions of two Indian High Courts are in conflict—the decision in *In the matter of the Union Bank, Allahabad, Limited*(4) and the decision in *Bhim Singh v. Liquidator, Union Bank of India*(5) which follows an earlier decision of the Punjab High Court. Agreeing with the learned trial Judge, I think we should prefer to follow the decision of the Punjab High Court.

If the cause of action arises from the time when the misfeasance was committed, it is admitted that the application is barred whether Article 36 or 120 applies. It is unnecessary to consider that question in this case.

(1) (1887) 12 A.C. 652.

(2) [1925] 1 Ch. 407.

(3) (1880) 14 Ch. D. 680.

(4) (1925) I.L.R. 47 All. 689.

(5) (1926) I.L.R., 8 Lah. 167.

Mr. V. K. Thiruvenkatachari appearing for one of the directors argued that it is not all misfeasance for which directors may be liable under section 235. This might be so; but it is unnecessary to consider this point in this appeal.

The appeal fails and is dismissed with costs.

The learned Judge has given leave to the Official Liquidator to appeal and has authorized him to incur the expenses of the appeals from the assets of the company and we need not pass any further order as we agree with the discretion exercised by him. There will be one set of costs to the respondents.

CORNISH J.—Section 10 of the Limitation Act is founded upon the equitable doctrine explained by BOWEN L.J. in *Soar v. Ashwell*(1) that "time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust."

In my judgment it is settled by *Kathiawar Trading Company v. Virchand Dipchand*(2) and the English authorities there cited that a director of a joint stock company is not, in the language of section 10, "a person in whom property has become vested in trust for any specific purpose." And a series of later English authorities confirms this view of the position of a director. In *Flitcroft's case*(3) JESSEL M.R. described directors as *quasi-trustees*. In *Soar v. Ashwell*(1) KAY L.J. observed—

"Generally speaking a person who is not an appointed trustee and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were; which is commonly expressed by saying that he is not an express but a constructive trustee."

(1) [1893] 2 Q.B. 390.

(2) (1893) I.L.R., 18 Bom. 119.

(3) (1882) 21 Ch. D. 519.

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And in *In re Lands Allotment Co.*(1) LINDLEY L.J. said—

“Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint-stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees. . . .”

KAY L.J. in *In re Faure Electric Accumulator Company*(-) has pointed out an obvious distinction between directors and express trustees, viz., that the property of the company is not legally vested in the directors. That the property of the company does not become “vested” in the directors by reason of such property being under their control is also made clear by the authorities referred to in *Kathiawar Trading Company v. Virchand Dipchand*(3). The dictum of SCHWABE C.J. in *Kishtappa Chetty v. Lakshmi Ammal*(4) that the word “vested” in section 10 of the Limitation Act does not mean “anything more than properly having control of the property” is opposed to those authorities and appears to have been expressed without those authorities having been brought to his notice. Nor can it be said that the entrustment of the company’s moneys to the directors for the general purpose of carrying on the business of the company is an entrustment for a specific purpose within the section. In *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*(5) their Lordships of the Judicial Committee discussing a Limitation Ordinance similar in terms to the language of section 10 of the Indian Act stated: “A specific purpose within the meaning of section 10 must . . . be a purpose that is either actually and specifically

(1) [1894] 1 Ch. D. 616.

(3) (1893) 1 L.R. 18 Bom 119.

(2) (1888) 40 Ch. D. 141 at 150.

(4) (1923) 44 M.L.J. 451.

(5) [1922] 1 A.C. 120 at 126.

defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed.” It is clear upon these authorities that the directors in the matter before us cannot be regarded as express trustees, and, if they are not express trustees, section 10 of the Limitation Act does not operate to deprive them of their right to rely on any available provision or article in the Act as a bar to the liquidator’s claim.

The question then is whether a bar is furnished either by Article 36 or Article 120 of the Act, these being the only articles which are suggested as having any application to the case. Admittedly, if the starting point of limitation is the alleged acts of misfeasance or breach of trust by the directors, the remedy would be barred, whichever article governed it. But it has been contended by the learned Counsel for the liquidator that the winding-up order is the starting point of the liquidator’s right of applying to the Court under section 235 (1) of the Indian Companies Act (VII of 1913). Reliance for this proposition is placed on *In the Matter of the Union Bank, A. Lahabad, Limited*(1), where this view prevailed, and the reasons for it are given by MUKERJI J. at page 693 of the judgment as follows:—

“The claim is by the liquidator who had no existence at the dates on which the amounts claimed are alleged to have been mis-spent. If the liquidator is given permission by the law to claim these moneys, certainly it would be unfair and unjust to say that the claim became time-barred before he came into existence.”

But, with all respect, it may be pointed out that the right of application to the Court given by section 235 is not confined to the liquidator; it is given to a creditor and to contributories. And if creditors of a company or

(1) (1925) 1 L.R. 47 All. 669.

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the share-holders, who are expected to be alive to their interests, choose to allow remedies which might be open to them in respect of losses attributable to misfeasance by the directors to become time-barred, it seems to me that neither fairness nor justice requires that, after the company has been ordered to be wound up, the liquidator shall have the right to enforce those remedies against the directors for the benefit of the creditors and contributors. It is, however, unprofitable to speculate upon the reasonableness of this particular aspect of section 235, because it has been most authoritatively settled that the corresponding provision in section 215 of the English Act, the Companies Consolidation Act, 1908, is a procedure section only and gives no new rights: see *City Equitable Fire Insurance Co., In re*(1). POLLOCK M.R. says with reference to this section: "I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights. . . ." To the same effect is the judgment of SARGANT L.J. at page 527. This ruling is decisive of the question, and has been regarded as conclusive of it by a Bench of the Lahore Court in *Bhim Singh v. Liquidator, Union Bank of India*(2). In my opinion, therefore, it is impossible to hold that the liquidator acquired a new right from the winding-up order to enforce against the directors a claim which had already become time-barred whether under Article 36 or Article 120 of the Limitation Act. I think that the judgment of BEASLEY J. should be upheld and that this appeal fails.

I agree to the order of costs proposed by my learned brother.

B.C.S.

(1) [1925] 1 Ch. 407 at 507.

(2) (1926) 1 L.R. 8 Lah. 167.

APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Curgenvven.

RAJA KOCHERLAKOTA VENKATA JAGANNADA
RAO GARU, ZAMINDAR OF POLAVARAM
(FIRST DEFENDANT), APPELLANT,

1930.
May 1.

v.

MAHARAJA RAVU VENKATA KUMARA MAHIPATI
SURYA RAO BAHADUR GARU, MAHARAJA OF
PITTAPURAM, AND TWO OTHERS (PLAINTIFF AND
DEFENDANTS 2 AND 3), RESPONDENTS.*

Transfer of Property Act (IV of 1882), sec. 54—Sale of lands partly for money consideration and partly for forbearance to take proceedings, whether a sale—Transfer of Property (Amendment) Act (XXVII of 1926), sec. 2—Attestation, meaning of—Mortgage by minor's guardian, not properly attested, rights on—Charge, whether allowable—No plea of invalidity of mortgage or of the personal covenant given by guardian—Benefit retained by minor—Form of decree.

A sale of lands, partly for a sum of money and partly for some other consideration, such as, forbearance to take proceedings, is not a "sale" for a "price" within the meaning of section 54 of the Transfer of Property Act and hence there can be no vendor's lien in such a case.

If (a) the attestors to a mortgage did not see the executant sign the deed, or the executant did not acknowledge to them that she had signed it and (b) the attestors did not sign the deed in the presence of the executant, the deed is not "attested" within the meaning of section 2 of the Transfer of Property (Amendment) Act (XXVII of 1926).

If a guardian of a minor executes in favour of another, for a consideration which is eventually retained by the minor, a

* Appeals Nos. 409 and 452 of 1925.

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deed purporting to be a mortgage containing a covenant to pay out of the other assets of the minor any balance that might remain unrealized from the sale of the property thus mortgaged, and the deed turns out to be unenforceable as a mortgage for want of proper attestation, a decree can be given for the amount due to the other against the personal assets of the minor, even though there was no prayer to that effect in the plaint, on the principle that the minor cannot approbate and reprobate the transaction and thus be allowed to retain the consideration and at the same time deny his liability to be bound by the covenant, especially in the absence of a defence repudiating the binding nature of the covenant.

APPEALS against the decree of the Court of the Government Agent, East Gōdāvari at Cocanada in Original Suit No. 4 of 1924.

The Maharaja of Pittapuram filed the suit to recover a sum of money alleged to be due to him on a mortgage said to have been executed by the first defendant's mother and guardian on 14th December 1920 during the minority of the first defendant, the Zamindar of Polavaram. The circumstances under which the plaintiff alleged that the mortgage was executed were as follows: The first defendant's adoptive father, the late Zamindar of Polavaram, contracted debts and borrowed from the plaintiff, 3, 5 and 3 lakhs of rupees respectively on three mortgages, dated 1906, 1911 and 22nd October 1913, that the plaintiff brought Original Suit No. 1 of 1919 to recover the amount due on the third mortgage, obtained a decree thereon, purchased the property in the Court sale held in execution of the decree for six lakhs of rupees subject to his two prior mortgages, deposited the six lakhs of rupees in Court, and credited about four lakhs and sixty thousand rupees for his decree debt in respect of his third mortgage, that the balance of rupees one lakh and forty thousand was drawn out by defendants two and three, the subsequent mortgagees, in respect of their dues under their respective mortgages of

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November 1913 and April 1914, that the mother and guardian of the first defendant then entered into a compromise with the plaintiff by which the plaintiff agreed to reconvey a portion of the mortgaged property thus purchased by him, viz., the Polavaram village proper and its hamlets, for a sum of about Rs. 1,40,000, that as the first defendant had not the necessary funds she executed the suit mortgage for about Rs. 1,40,000 in 1920 and that his suit mortgage had priority over the mortgages of defendants two and three which were of November 1913 and April 1914, owing to their having been paid out of the deposit of one lakh and forty thousand rupees made by him as set out above. The first defendant pleaded, *inter alia*, that the original suit itself was not properly defended by his guardian, that the Court sale was vitiated by several irregularities and illegalities, that a petition was actually filed by his guardian to set aside the sale on that ground, that the guardian neglected to prosecute that petition, but entered into the above compromise with the plaintiff and that the mortgage by the guardian was not valid and binding upon him. The defendants 2 and 3 pleaded that, as there was no confirmation of the Court sale, the plaintiff never became the owner and thus had no title to convey to the first defendant in respect of the suit properties, that the suit mortgage was invalid, that the plaintiff could not claim for his suit mortgage any priority over their mortgages of November 1913 and April 1914 by virtue of any supposed right of subrogation arising out of the withdrawal of the money in Court deposit by the second and third defendants under the decree in Suit No. 1 of 1919 on his third mortgage, which in any event must be deemed to have been discharged and extinguished by the Court sale and the adjustment of rupees four lakhs and sixty thousand odd

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out of the sale-proceeds. The lower Court held the mortgage to be good and upholding the contentions of the plaintiff gave him a decree as prayed for. The first defendant preferred this appeal.

T. Rangachari (with him *V. Krishna Mohan*) for first defendant-appellant in Appeal No. 409 of 1925.—There has been a Court sale and there being no objections to it, it takes effect from the date of sale. See section 65, Civil Procedure Code. There need be no confirmation under Order XXI, rule 92, Civil Procedure Code. Moreover, the Civil Procedure Code does not apply to Courts like this which are in Agency Tracts. If an Agency Court applies the provisions of Order XXI, it will be legislating. The property has become the first defendant's under the compromise. The Transfer of Property Act is not exhaustive of all modes of transfer, e.g., it does not deal with releases, surrenders, compromises, etc. There can be no vendor's lien, as this is neither a sale nor an exchange; see sections 54 and 118. Here the property was sold not merely for money but also for a consideration in the shape of a forbearance to take proceedings; *Madam Pillai v. Badrakali Ammal*(1), *Queen-Empress v. Apparu*(2), *Volkart Brothers v. Vettivelu Nadan*(3), *Samratmal Uttamchand v. Govind*(4), *Rajjo v. Lajjo*(5), *Krishna Nair v. Kundu Nair*(6). Even if it be an exchange, section 55 cannot be applied to a case of exchange. There being no price in an exchange, there can be no vendor's lien. The evidence in the case establishes that the mortgage, is not properly attested. The plaintiff cannot have a charge on the property when the mortgage fails as such. He did not pray for a personal decree in his plaint. The guardian's personal covenant will not bind the minor; *Waghela Rajsanji v. Shekh Masludin*(7).

T. R. Venkatarama Sastri (with him *C. S. Venkatachari, P. Somasundaram* and *C. Rama Rao*) for second and third defendants-appellants in Appeal No. 452 of 1925.—The plaintiff's purchase in Court-auction not having been confirmed, he never became the owner; and hence he was

- (1) (1922) I.L.R. 45 Mad. 612 (F.B.). (2) (1885) I.L.R. 9 Mad. 141.
(3) (1888) I.L.R. 11 Mad. 459, 467. (4) (1901) I.L.R. 25 Bom. 696 (F.B.).
(5) (1927) 26 A.L.J. 169. (6) (1912) 16 L.O. 109.
(7) (1887) I.L.R. 11 Bom. 551 (P.C.).

incapable of selling the suit property to the first defendant. The compromise and the mortgage are hence invalid and do not bind the first defendant. Moreover, the mortgage, according to the evidence, is not properly attested. Hence no mortgage decree can be given. Confirmation of a Court sale is necessary; *Banke Lal v. Jagat Narain*(1), *Narasingerji Gyanagerji v. Panuganti Parthasaradhi*(2). See section 65, and Order XXI, rule 92, Civil Procedure Code. The transaction was not in law either a sale or an exchange; sections 54 and 118, Transfer of Property Act.

Advocate-General (*A. Krishnaswami Ayyar*) with him *S. Venkatesa Ayyangar* for plaintiff-respondent in both appeals.—On the evidence in the case, the compromise and the mortgage are valid and binding on the first defendant. The mortgage is properly attested. Even if it is invalid as a mortgage, there is a charge created by the words, such as, "subject to paying" or "on condition of paying", which are to be found in the compromise deed. The grant is burdened with the payment. A charge can be inferred from surrounding circumstances; see *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(3), on appeal from *Rajah of Ramnad v. Sundara Pandiyaswami Tevar*(4). Even if there is no charge, the plaintiff can claim a vendor's lien. A sale is not the less a sale because it is partly for money and partly also for a consideration in the shape of a collateral contract; *Heilbut Symons and Co. v. Buckleton*(5), *Ariyaputhira v. Muthukomaraswami*(6), *Madam Pillai v. Badrakali Ammal*(7) and *Jacobs v. Batavia and General Plantations Trust Ltd.*(8). This is not an exchange within the meaning of section 118 of the Transfer of Property Act. Even if there is no vendor's lien, plaintiff can have a decree as against the other assets of the first defendant, owing to the existence of the personal covenant in the mortgage deed which can be proved in spite of the invalidity of the mortgage; *Pulaka Veetil Muthalakulangara Kunhu Moidu v. Thiruthipalli Madhava Menon*(9), *Ramajogayya v. Jagannadham*(10) and *Biswanath Prasad v. Chandra Narayan Chowdhury*(11).

- (1) (1900) I.L.R. 22 All. 168. (2) (1921) M.W.N. 519.
(3) (1918) I.L.R. 43 Mad. 581 (P.C.). (4) (1914) 27 M.L.J. 694.
(5) [1918] A.C. 80, 47. (6) (1912) I.L.R. 37 Mad. 423.
(7) (1923) I.L.R. 45 Mad. 612 (F.B.). (8) [1924] 2 Ch. 329.
(9) (1909) I.L.R. 32 Mad. 410 (F.B.). (10) (1916) I.L.R. 42 Mad. 185 (F.B.).
(11) (1921) I.L.R. 48 Cal. 509 (P.C.).

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JUDGMENT.

BEASLEY C.J.—*Appeal No. 409 of 1925.*—The plaintiff's suit was for a mortgage decree for Rs. 1,88,487-15-6, representing principal and interest alleged to be due under a mortgage deed Exhibit A. This deed arose out of the compromise already dealt with in Appeal No. 446 of 1925. It will be remembered that under that compromise, dated the 29th of November 1920, one of the properties purchased in the Court sale, viz., Polavaram Village with its hamlets, was agreed to be retained by the Zamindar of Polavaram in consideration of the payment of the sum of Rs. 1,39,986-1-0 to the plaintiff. The compromise was entered into by the Zamindar's adoptive mother. This amount had been deposited in Court by the plaintiff, being the balance remaining after the Court sale of the defendant's properties by the plaintiff. Being unable to pay this sum in cash, the first defendant's adoptive mother, as his guardian, executed in favour of the plaintiff on the 14th of December 1920, a bond for that amount repayable with interest at 9 per cent per annum on the security of the Polavaram Village and its hamlets. This bond is Exhibit A. Alternatively, the plaintiff claims that he is entitled to a vendor's lien over these properties for the unpaid purchase-money and that there is a statutory charge in his favour.

The Judge in the Court below allowed the suit, finding that the suit bond Exhibit A was a valid one. The first defendant, however, contended that Exhibit A was not validly attested, because the attestors did not see the executant sign, nor did the executant acknowledge to them in their presence that she had signed it and that she was not present at the attestation. If (1) the attestors did not see the executant sign Exhibit A,

or the executant did not acknowledge to them that she had signed it and (2) the attestors did not sign the instrument in the presence of the executant, then the instrument has not been properly attested within the meaning of section 2 of the Transfer of Property (Amendment) Act (XXVII of 1926). Exhibit A on the face of it bears the signature of the adoptive mother and guardian of the first defendant. The witnesses are B. Venkata Rao and Chengalva Kondayya. The execution is admitted by Prakka Subrahmanyam, the agent of the first defendant's adoptive mother and guardian. This is witnessed by Kandukuri Subbayya and the beforementioned B. Venkata Rao. There is nothing on the face of the document to show that even the acknowledgment of the execution of the document by Venkata Buchayamma, the adoptive mother and guardian of the first defendant, was made in the presence of these witnesses; but there is a still greater defect because the signature of Venkata Buchayamma upon the evidence clearly was not affixed in the presence of the two attesting witnesses. It must be remembered that this lady was a gosha lady. The evidence of the attesting witnesses is as follows:—

[After discussing the evidence on this point his Lordship proceeded as follows:—]

This evidence is so improbable and is obviously for the purpose of getting within the provisions of the Transfer of Property (Amendment) Act, that it must be rejected. Exhibit A, therefore, must be held to be invalid for want of proper attestation.

Then the learned Advocate-General argues that the plaintiff has a vendor's lien on the property for the unpaid purchase price. In order to substantiate this claim, Exhibit A must be a sale by the plaintiff to the defendant. Two objections are taken to this claim:

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(1) that the Polavaram Village never passed to the plaintiff at the Court sale and he, therefore, had no ownership in the property to pass by conveyance to the first defendant and (2) that, even if he had, Exhibit A does not amount to a sale of that property at all. A sale is defined by section 54 of the Transfer of Property Act as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised", and it is contended by Mr. Rangachari on behalf of the first defendant that "price" means money only, and that, if the consideration for the transfer of immovable property is partly money and partly something else, then the transaction ceases to be a sale. In this connexion he relies upon *Madam Pillai v. Badrakali Ammal*(1), a Full Bench decision. In that case a husband orally transferred lands to his wife to be enjoyed by her during her lifetime in discharge of future maintenance, and it was held that this, not being a gift or a sale, might be made without writing. Dealing with section 54 of the Transfer of Property Act, Sir WALTER SCHWABE C.J. on page 617 states—

"In this case one has to consider whether there was a price paid or promised by the transferee. Now 'price' has a well defined meaning. It means money, but not necessarily money handed over in current coin at the time but includes money which might be already due, or might be payable in the future."

With this opinion COURTS TROTTER J. (as he then was) agreed. Another case referred to was *Queen-Empress v. Appavu*(2). That was a case under the Abkari Act, and it was held that the payment of wages in liquor does not amount to a sale of liquor within the meaning of section 2 of the Abkari Act. HUTCHINS J. in dealing with this question states at page 142—

(1) (1922) I.L.R. 45 Mad. 612 (F.B.).

(2) (1885) I.L.R. 9 Mad. 141.

"The question still remains whether a payment of wages by liquor is included in the general term 'selling'. It seems to us that it is not. Both in the Contract Act and the Transfer of Property Act a sale is defined to be an exchange of property for a price. Section 118 of the latter Act deals with exchange for other considerations than a money payment, and thereby indicates that a price included money only, and that is the ordinary meaning of the word 'price'."

In *Samratmal Uttamchand v. Govind*(1), the question for determination was whether agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under article 5, schedule I of the Indian Stamp Act (II of 1899) and are liable to stamp duty of eight annas each, as agreements "not otherwise provided for", and it was held that they were so liable. CHANDAVARKAR J., in delivering the judgment of the Full Bench, quotes from Chitty on Contracts, 12th Edition, page 430, as follows:—

"The difference between a sale and an exchange is this, that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter."

He then proceeds—

"The distinction has been observed by the legislature in this country, as will appear on a reference to section 118 relating to exchange and the sections relating to sales in the Transfer of Property Act."

Section 118 of the Transfer of Property Act is as follows:—

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange."

From Exhibit B, the compromise petition, it is obvious that the payment by the Zamindar of Polavaram of Rs. 1,39,986-1-0 was only part of the consideration for the transfer to him of the property in question, because it is there stated that it is out of regard for sixth

(1) (1901) I.L.R. 25 Bom. 696 (F.B.).

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defendant's family and in consideration of his not taking any proceedings to set aside the sale that the transfer is made. It is conceded that the value of the property is more than three lakhs of rupees and therefore the price agreed to be paid for it is less than half of its real value. This circumstance alone would not be sufficient to deprive the transaction of its nature of a sale because a vendor is perfectly entitled to sell his property, if he so desires, to another for less than its real value and it still remains a sale. But the facts are quite different here, because it is clear that one consideration for the transfer was something in addition to half of the value of the property. There was to be a forbearance on the side of the Polavaram family to take proceedings to set aside the sale and if "price" means money only, as clearly it does, then this transaction cannot be described as a sale. It was not, in my opinion, even an exchange, because section 118 of the Transfer of Property Act deals with mutual transfer of the ownership of one thing for the ownership of another. No doubt the ownership of the Rs. 1,39,000 odd was agreed to be exchanged for the ownership of the property. That by itself would be a sale; but it is coupled with the other consideration, namely, the forbearance to take proceedings. In my view there can be no such ownership as that. A right to sue or to take proceedings cannot, in my view, be the subject of ownership. In the view I have taken upon this point, it is not necessary to consider whether or not the plaintiff ever got such an ownership in the property as would enable him to transfer it to any one. The sale to him of this property was never confirmed by the Court and it is extremely doubtful whether under such circumstances he could claim to dispose of the property as its owner, although he might transfer such incomplete right to the property as he then had and I do not propose

under the circumstances to say anything more than to observe that it is a point about which I have considerable doubt.

Then the learned Advocate-General claims that he is at least entitled to a decree against the general assets of the Zamindar of Polavaram, ranking of course with the other claimants for a rateable distribution. His claim, therefore, is to fall back upon the personal covenant to pay, contained in the mortgage, on his failure to succeed on the footing of the mortgage. In this connexion he relies upon *Pulaka Veetil Muthalakulangara Kunhu Moidu v. Thiruthipalli Madhava Menon*(1), where it was held by a Full Bench that a document, which purports to be a mortgage but is not a mortgage owing to non-compliance with the provisions of section 59 of the Transfer of Property Act regarding attestation, is not a document which is required by law to be attested within the meaning of section 68 of the Evidence Act, and is admissible to prove the personal covenant to pay therein which is not required by law to be attested. This case of course does not deal with the position of a personal covenant by a minor or on a minor's behalf and the plaintiff has to go a step further. So another case relied upon by the Advocate-General and more directly in point is *Ramajogayya v. Jagannadhan*(2), a Full Bench case. There it was held by AYLING and SESHAGIRI AYYAR JJ. that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate, no decree can be passed against the minor on his attaining majority or against his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by

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(1) (1909) I L.R. 32 Mad. 410 (F.B.). (2) (1918) I.L.R. 42 Mad. 185 (F.B.).

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the guardian under the personal law to which he is subject and that a decree can be passed against the estate of a Hindu minor for a debt contracted by his guardian for the marriage of his sister. Sir JOHN WALLIS C.J., however, held that a decree cannot be passed against a minor on his attaining his majority or his estate on a covenant entered into on his behalf by a guardian for his benefit. In the view of the latter, the only cases where a minor's estate can be made liable are those under section 68 of the Indian Contract Act, namely, a liability to persons who have supplied him during his minority with necessaries suited to his condition in life. The only exceptions according to Sir JOHN WALLIS are those cases where a creditor may have his rights of subrogation, but not a right to direct recourse. SESHAGIRI AYYAR J. with whose opinion AYLING J. agreed, was of the opinion that a guardian can, on behalf of a minor, incur a liability which is, under the Hindu Law, binding upon him. This is not limited to a liability for necessaries only. But the true test is not whether the transaction is for the benefit of the minor. The question whether or not this obligation was one which was binding on the minor seems to me to be answered by the attitude adopted by him in the suit. It is quite true that in his written statement he pleads that he was a minor when the mortgage was executed and that it is not binding upon him and an issue was taken upon this plea, and it is quite clear that at the trial the first defendant did not adduce any argument or evidence in support of that plea. He was there attacking the mortgage, but, it is quite clear to me that if he was unable to attack the mortgage upon that ground, he is unable to attack the covenant on that ground. The defence open to him upon the mortgage was equally open to him as regards the covenant and he did not attempt

at the trial to substantiate his plea. If he had done so, he would have been met with the answer that he could not, whilst retaining the property, set up the plea that his guardian had no authority to enter into an obligation under which he came into possession of the property. He would have been met therefore with the answer that if his guardian had no authority to acquire the property on his behalf, he would be bound to restore the property to the plaintiff. As before mentioned, he did not put forward any such plea; and he must be taken to have waived the question as to whether or not the covenant entered into on his behalf by his guardian was binding upon him. The answer must be that it was and, being so, he is liable to have a decree passed against his personal assets. I do not think that it makes any difference upon this point whether the plaintiff actually got complete ownership of the property in question irrespective of the confirmation by the Court of the sale or not. He obviously got something and if it were necessary to complete the transaction and get the confirmation of the sale by the Court, obviously that confirmation could be got at any time by a request being made for it. Put at its highest against the plaintiff, he had a conditional ownership of the property in question and that he was entitled to transfer to the first defendant for a consideration. That he did. In return for that transfer, the guardian of the minor entered into a personal obligation on his part to pay for it and it is clear to me that the property of the minor may be proceeded against by the plaintiff in satisfaction of the debt owing under that personal covenant. A point was taken by Mr. Rangachari that the plaintiff did not claim in his plaint a personal decree against the first defendant. That is quite true. He did not do so in terms. He was in that suit claiming on the mortgage

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and it seems to me unreasonable to hold that claiming on what he considered to be a valid mortgage, he ought nevertheless to have based his claim in the alternative on the covenant and asked on it for a personal decree against the first defendant. In this connexion mention may be made of a decision of the Privy Council, viz., *Biswanath Prasad v. Chandra Narayan Chowdhury*(1). In that case a suit was instituted to enforce a mortgage bond. In the trial Court the learned District Judge made a decree in favour of the plaintiff. This decree was reversed upon appeal by the High Court of Calcutta on the ground that the mortgage was invalid for want of registration. On appeal to the Privy Council this judgment was affirmed. On page 517 their Lordships made the following observations:—

“As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to deal with such a claim. At the same time their Lordships think it desirable in this case that the plaintiffs should have an opportunity of bringing this matter before the High Court. If any such application is made, it will be for the High Court to consider whether any such claim is open upon the present pleadings and, if not, whether any amendment raising it should be made; and further, whether under all the circumstances the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of this claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs.”

In that case no argument was presented to the High Court in support of the alternative claim. Here we have had that claim fully argued. It is obvious from the decision above referred to that the High Court can

(1) (1921) I.L.R. 48 Cal. 509 (P.C.).

entertain such an application even if it has not been in terms put forward in the plaint. There is discretion in the Court to amend the pleadings if such an amendment should appear to be necessary. In my view, no such amendment is necessary because I am of opinion that the greater claim, namely, that on the footing of the mortgage includes the lesser claim, namely, that on the corresponding covenant, and I am satisfied that we have had before us all the materials necessary to decide this point. If it were a question of an amendment of the pleadings, I should most certainly have acceded to any request for such an amendment but I do not think any question of the amendment of the pleadings now arises. Nothing prejudicial to the case of the first defendant is caused by this action because, as I have already stated, no defences other than those which were open to the first defendant in the mortgage suit are open to him on a claim under the covenant. He had full opportunity for putting forward his defence to the mortgage, namely, that it was not binding on him. For good reasons he did not choose to do so and, as before stated, that plea has been waived. I cannot imagine that any other plea can possibly be open to him here. Under these circumstances, therefore, the appeal must be dismissed and there must be a decree for the amount claimed payable out of the property in the hands of the first defendant. The first defendant is directed to pay the plaintiff's costs of this appeal and in the Court below.

CURGENVEN J.—The evidence that the mortgage bond was duly attested is almost beneath criticism. According to the amended definition of “attested” inserted in the Transfer of Property (Amendment) Act (XXVII of 1926), it has to be shewn in the circumstances of the present case (a) that each of the two witnesses saw

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the executant sign, or received from her a personal acknowledgement of her signature, (b) that each witness signed the instrument in the presence of the executant.

The evidence shows that the document was taken in to the executant, who was gosha, by a dasi. She signed it inside a room. Neither the writer nor the attestors entered the room. The writer (P.W. 1) says that neither the attestors nor himself saw her sign. Only one attestor is examined. He says that he did see the executant sign, because two slits of the venetian shutter to the window were broken and he was able to look through. His co-attestor did the same thing. Evidently it was purely by chance that they did this, and not by arrangement and in order to fulfil some legal requirement. It can hardly be doubted that the evidence has been got up to afford formal proof that the bond was duly executed. The second condition, too, that the executant should be present when the witnesses sign, does not seem to have been complied with. The only conclusion is that the suit, as a mortgage suit, must fail.

It is urged that, nevertheless, the plaintiff is entitled to a charge upon the property mortgaged or, what is the same thing, upon the property conveyed to the first defendant under the compromise of 29th November 1920. It is agreed that the plaintiff may have a charge (1) in the form of a vendor's lien for the unpaid purchase money, if the conveyance was a sale; or, if not, (2) if it appears to have been the intention of the parties to create a charge for that money.

It appears to me impossible to sustain the latter alternative. Paragraph 7 of the compromise petition seems to show that, when it was entered into, the intention was that a cash consideration should be paid for the Polavaram Village and its appurtenances, and no

question of a charge, if the money remained unpaid, seems to have arisen. It was found impossible to raise the money, so on 14th December 1920, the plaintiff took the mortgage bond from first defendant's guardian. Since that bond, had it been validly executed, would in itself have created a security superior to a charge, it is not to be supposed that any separate charge could have been in contemplation. Thus at no stage does any such intention appear to have existed. I think that in each of the cases cited to us where a charge has been deemed to have existed, circumstances from which such an intention may be inferred have been found. They are cases in which allowance has been payable by the holder of an estate to some person, such as a relative, with a claim to be maintained out of estate funds. An example is the Privy Council case *Narayana Ananga v. Madhawa Deo*(1), followed by SESHAGIRI AYYAR J. (from whom WALLIS Offg. C.J. differed on the question of charge) in *Rajah of Ramnad v. Sundara Pandiaswami Thevar*(2). The latter case went up to the Privy Council as *Rajah of Ramnad v. Sundara Pandiyasami Tevar*(3), and their Lordships agreed with the former learned Judge that upon a proper construction of the transaction a charge was established. Cases of this type bear no resemblance to the present one, where nothing has been proved to suggest an implied intention to create a charge.

The plaintiff must then fall back to the position that the conveyance embodied in paragraph 7 of the compromise was a "sale" as defined in section 54 of the Transfer of Property Act; that is to say a transfer of property for a price. The expression "price" refers to

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(1) (1892) I.L.R. 16 Mad. 268 (F.C.). (2) (1914) 27 M.L.J. 694.
(3) (1918) I.L.R. 42 Mad. 581 (F.C.).

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money and money alone, as has been held by a Full Bench of this Court in *Madam Pillai v. Badrakali Ammal*(1); if any part of the consideration consists in something other than money it may be an exchange as defined in section 118 of the Act, or it may be a transfer not within the terms of the Act, but it cannot be a sale.

Now it is clear that, under the terms of paragraph 7 of the compromise, the first defendant undertook to do something else besides paying money; the conveyance was to be "in consideration of his not taking any proceedings to set aside the sale" of the whole property, i.e., the Polavaram Zamindari. If this formed part of the consideration for the transfer, then the consideration was something not wholly money, and the transaction was not a sale. The learned Advocate-General argues that it was a sale with a collateral contract, and would compare it to a sale with an option to repurchase. The comparison, I think, is not very close, because in the latter case the accompanying contract relates only to the subject-matter of the sale, whereas here the vendee's undertaking applies to the whole of the property included in the Court sale.

I think it is clear that the plaintiff must very substantially have reduced the price of the property in view of obtaining this undertaking—indeed it is said that for 1.40 lakhs was conveyed property worth 3.25 lakhs. If so, the money value to the plaintiff of the undertaking was not less than the sum in cash which he asked for. It seems impossible to hold accordingly that the undertaking itself was not part of the valuable consideration for the transfer, and if that be so, it was not a sale, and the vendor has no statutory lien upon the property. This disposes of the claim to a charge.

(1) (1922) I.L.R. 45 Mad. 612 (F.B.).

There remains a further contention, that a decree may be given against the first defendant's assets. Although the mortgage bond may as such be invalid, it includes an agreement signed by the guardian of the then minor to pay the purchase money to the vendor, and this will be enforceable, it is said, in the same way, as, in the case of an adult, such an agreement may be enforced personally against him. The first objection raised to the grant of this remedy is that it was not asked for in the plaint. But the plaintiff, I think, can scarcely be expected to have contemplated the rejection of his mortgage bond as invalid, and so to have made an alternative request of this nature. The suit was upon a mortgage, and the plaint concluded with the prayer that if the proceeds of the sale were insufficient to meet the debt, the plaintiff should be at liberty to apply for a decree for the balance against the other properties of the first defendant. It appears to me that, if in other respects the claim is admissible, it should not be rejected merely because the liability of the assets for the debt was not asserted in the circumstances which have actually arisen. In so far at least as the property which the first defendant's guardian purported to mortgage is concerned, it is surely a case of the less being included in the greater. Can then a claim of this kind be enforced? The undertaking to pay being embodied in a registered bond, admittedly the plaintiff's suit was within the six years allowed. The further question is whether the guardian's promise to pay binds the minor's estate. It has been decided by a Full Bench in *Pulaka Veetil Muthalakulangara Kunhu Moidu v. Thiruthipalli Madhava Menon*(1), that a mortgage deed not duly attested may be used as evidence of a personal covenant

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(1) (1909) I.L.R. 32 Mad. 410 (F.B.).

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to pay. How the matter stands when the person on whose behalf the covenant has been made is a minor has been considered by another Full Bench in *Ramajogayya v. Jagannadhan*(1). That too was a case of a mortgage, which was found to be invalid for want of Government sanction. The debt was contracted by the mother as guardian to discharge minor debts incurred for maintenance, and for the marriage expenses of a sister of the minor. It had to be decided how far the Privy Council decision in *Waghela Rajsanji v. Shekh Masludin*(2), which was (to quote the head note) that "a guardian cannot contract in the name of a ward, so as to impose on him a personal liability" must be construed as an absolute bar to the enforcement of such contracts. Sir JOHN WALLIS C.J. while recognizing that the ruling does not affect the liability of a minor's estate under section 68 of the Contract Act—which indeed does not require the intervention of a guardian—thought that "a decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit." Of the other two learned Judges, AYLING J. agreed with SESHAGIRI AYYAR J. and the latter put his opinion into these words:—

"No decree should be passed against the minor or his estate on a contract entered into on his behalf by a guardian, under which covenant no charge is created on the estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject."

The learned Judge goes on to say that the answer given by the learned Chief Justice "read with his opinion" would cover the above opinion also, an observation which does not make it very easy to understand what precisely he means. One thing seems clear, that

(1) (1918) I.L.R. 42 Mad. 185 (F.B.). (2) (1887) I.L.R. 11 Bom. 551 (P.C.).

the mere test of a benefit secured for the minor by means of the debt will not suffice. If that were all that was meant, the view of the two learned Judges who formed the majority would have been, not in virtual agreement with, but in direct opposition to, the view of the learned Chief Justice. The opinion seems rather to have been that, while benefit is not the test, any liability to which the minor would be subject under the Hindu Law is not the less a liability because it was incurred by his guardian on his behalf. This is an intelligible and indeed almost an indisputable proposition, and it probably sufficed to dispose of the particular case out of which it arose.

It seems to me that, if the circumstances of the present case are considered, a solution of the question is almost self-evident. In his written statement the first defendant pleads that he was a minor when the mortgage bond was executed, and that it is not binding upon him. The second issue inquired whether the bond was not binding upon him but the judgment shows that at the trial this issue was not disputed. If he waived this plea in the case of the mortgage, *a fortiori* he waived the plea that the debt, as an unsecured debt, was not binding upon him. The explanation of this attitude is clear enough. The first defendant cannot at once approbate the bargain by retaining the property, which he obviously desires to do, and reprobate it by the plea that his guardian had no authority to acquire it on his behalf. I do not think that we can now allow him to say that the promise made by his guardian on his behalf to pay the cash consideration is not binding upon him. In other words, his property may be proceeded against by the plaintiff in satisfaction of the debt. I agree therefore that the main appeal (Appeal No. 409 of 1925) must be allowed in part by substituting a decree of this kind

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for the mortgage decree, and in other respects dismissed with the order as to costs proposed by my Lord.

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In view of our judgment in Appeal No. 409 of 1925 no orders are necessary on this appeal. No order as to costs.

G.R.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Pakenham Walsh.*

1930,
August 26.

BUTCHIAH CHETTI (FIRST DEFENDANT), APPELLANT,

v.

TAYAR RAO NAIDU (RESPONDENT), RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), O. XXI, r. 2—
Agreement after suit and before decree having effect of
nullifying the decree but not embodied in it—Plea of, in
bar of execution of decree—Not maintainable.*

An arrangement between parties to a suit after its commencement and before decree, which has the effect of rendering the decree inexecutable, wholly or in part, but which has not been embodied in the decree, attacks the decree itself and cannot be pleaded in bar of execution. *Chidambaram Chettiar v. Krishna Vathiyar*, (1916) I.L.R. 40 Mad. 233 (F.B.), distinguished.

Order XXI, rule 2 of the Code of Civil Procedure does not apply to agreements before decree.

APPEALS against the orders of the District Court of Ganjām at Berhampur in Execution Application No. 38 of 1928 in Original Suit No. 65 of 1927 and in Execution

Petition Nos. 23, 25, and 26 of 1928 in Original Suit No. 30 of 1922.

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B. Sitarama Rao (with *B. Jagannadha Doss*) for appellant.

P. Somasundaram for *C. Sambasiva Rao*, *B. Srinivasa Rao* and *D. Ramaswami Ayyangar* for *C. S. Venkatachari* for respondent.

The JUDGMENT of the Court was delivered by

PAKENHAM WALSH J.—The facts which have given rise to these appeals are as follows:—

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The plaintiff, whom we may call Appanna, and the first defendant, whom we may call Butchiah, were brothers. Original Suit No. 30 of 1922 was instituted in the Court of the District Judge of Ganjām for partition of the family property worth three or four lakhs. Defendants two to four in the suit were minors represented by their guardian, the first defendant. In 1923 there was a compromise with reference to certain outstandings due to the family and certain decree debts whereby the first defendant was to take over the plaintiff's share in the outstandings and the plaintiff was to be paid Rs. 17,000. This compromise is dated the 23rd of October 1923 and was filed into Court on the 29th of October. It was signed by the plaintiff's pleader on the 27th of October and by the defendants' pleader on the 29th of October. It only related to some of the family properties and it was sanctioned by the Court so far as the minor members were concerned as it was in their interests on the 1st of November; and on the next day the Court passed the following order:—

“This compromise of part of the matters in dispute in the suit is recorded; so far as the minor defendants are concerned it has been sanctioned (Interlocutory Application No. 380 of 1928).”

* Civil Miscellaneous Appeal Nos. 253, 264 to 266 of 1925.

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As regards the immovable property, there was a disposal by a preliminary decree on the 21st of February 1924 and a commissioner was appointed to make a division; and as regards the rest of the property there was a reference to arbitration and an award was passed on the 20th of December 1926. This was remitted back and another award was made on the 20th of September 1927. Under this award the first defendant had to pay about Rs. 11,000 to the plaintiff. The final decree was passed on the 27th of September 1927 incorporating all the matters in one decree. This decree recites the compromise recorded between the parties on the 23rd of October 1923. The plaintiff had several creditors who attached the decree so obtained by him. When execution was sought, the defendants took two objections, (1) that, with regard to the compromise of 1923, Rs. 15,000 had already been paid before the decree was passed and a receipt, Exhibit XV, signed by the plaintiff on the 27th of October had been filed into Court on the 29th of October, and therefore credit must be given for this sum, and (2) that, with regard to the sum of Rs. 11,448 which the defendants had to pay under the award dated the 20th of September 1927, the plaintiff, being in need of money to conduct the suit, had money advanced to him by the first defendant up to Rs. 7,000 and credit for this should be given. The learned District Judge refused to go into either of these questions on the ground that he could not go behind the decree which was sought to be executed. The present appeals are against this order and similar orders which he passed on execution petitions by other creditors.

It may be mentioned that this receipt Exhibit XV seems to have been filed into Court on the 29th of October 1923 as it bears the judge's initials on that date. There are no indications of who filed it and it is

not alluded to at all in the compromise petition dated the 23rd of October 1923 and filed into Court which the pleaders for both the parties have signed. The plaintiff when examined in Original Suit No. 30 of 1922, in the course of his statement about Exhibit XV, said, "I signed the receipt Exhibit XV. Defendant 1 (Butchiah) must have done as directed in Exhibit XV." The learned District Judge rightly says that this evasive statement cannot be regarded as an admission by Appanna that he had actually received Rs. 15,000 under Exhibit XV.

In arguing against the order of the learned District Judge, the learned Advocate for the appellant takes up the position (1) that Order XXI, rule 2, is not applicable to the case as it applies only to payments made after the decree and the parties must be in the position of judgment-debtor and decree-holder, and (2) that, even if it does fall under Order XXI, rule 2, there is sufficient intimation to Court by the plaintiff and no further certification is needed. His main contention is that this pre-decree arrangement can be pleaded as a bar in execution of the decree. On the first point that the matter does not fall under Order XXI, rule 2, we have no hesitation in agreeing with him. If authority were needed for the position, *Rama Ayyan v. Sreenivasa Pattar*(1) might be quoted. The present case is even stronger, for that was a case of adjustment after decree but not between the judgment-debtor and decree-holder. But even if we were to hold that Order XXI, rule 2, can possibly apply on a strained view that this receipt Exhibit XV was to come into effect after the decree, we are of opinion that the provisions of the rule would not have been complied with. No doubt, as remarked

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by the Privy Council in *Raja Shri Prakash Singh v. Allahabad Bank, Ltd.*(1), a mere intimation by the decree-holder of payment is sufficient; and special application is not necessary. But in this case there is nothing to show that the plaintiff ever intimated the receipt of this sum to the Court. As noted above, his statement with regard to the amount having been paid is evasive. The document was one which should have been in the custody of the defendants and presumably therefore it was filed into Court by the defendants. Under Order XXI, rule 2 (2), a judgment-debtor has got considerably more to do in order to get such payments recognized than merely to put the document into Court. The provisions of Order XXI, rule 2 (2), have to be complied with and notice sent to the decree-holder as to why the Court should not record the payment. It is unnecessary to pursue this matter further in our view that Order XXI, rule 2, does not apply to the present case.

There remains the further question whether an arrangement by the parties after the commencement of the suit but before the decree which has not been embodied in the decree can be set up or gone into in execution. The central point in this discussion is the ruling of the Full Bench in *Chidambaram Chettiar v. Krishna Vathiyar*(2) [ABDUR RAHIM Offg. C.J., SESHAGIRI AYYAR and PHILLIPS J.J., the latter dissenting.] What was actually decided in that case was that an arrangement for stay of execution of the decree entered into in the course of the suit can be gone into in execution. The High Court of Calcutta has always taken the view that it cannot, *vide Benode Lal Pakrashi v. Brajendra Kumar Saha*(3) and *Hassan Ali v. Gauzi Ali*

(1) (1928) I.L.R. 3 Luck. 684; 56 I.A. 31.
(2) (1916) I.L.R. 40 Mad. 233 (F.B.). (3) (1902) I.L.R. 29 Calo. 810.

Mir(1). In the other direction there are *Laldas v. Kishordas*(2) (a Full Bench case) and *Gauri Singh v. Gajadhar Das*(3). The previous Madras decision and those subsequent to it up to *Venkatasubba Mudali v. Manickammal*(4) have been clearly set out by WALLACE J. in his judgment in the latter case. He points out that *Rama Ayyan v. Sreenivasa Pattar*(5) is not in point. The other two decisions, *Krishnamachariar v. Rukmani Ammal*(6) and *Subramania Pillai v. Kumaravelu Ambalam*(7), lay down in general terms that a pre-decree arrangement that a decree when obtained should not be executed can be pleaded in bar of execution. Subsequent to the Full Bench case, *Chidambaram Chettiar v. Krishna Vathiyar*(8), as observed by WALLACE J., there have been two divergent lines of decisions, one following this general principle and the other limiting the application of the Full Bench case. Amongst the former, he quotes *Sambasiva Aiyar v. Thirumalai Ramanuja Thathachariar*(9) and *Velu Thevan v. Krishnasami Reddi*(10). Two cases not quoted by him which had been decided in this direction at that time are *Pedda Veeranna v. Gondimalla Veeranna*(11) and *Arunachala Goundan v. Swaminatha Iyer*(12). On the other side he quotes *Mallayya v. China Kotayya*(13), which he distinguishes as an agreement before suit, *Ramanathan Chettiar v. Venkatachalam*(14), *Arunugam Pillai v. Krishnasami Naidu*(15) and *Singa Raja v. Pethu Raja*(16) which last case he says is not in point as it turns on the interpretation of Order XXXIV, rules 2 (c)

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(1) (1903) I.L.R. 31 Calo. 179 at 181. (2) (1896) I.L.R. 22 Bom. 463 (F.B.).
(3) (1909) 6 A.L.J. 403. (4) (1925) I.L.R. 49 Mad. 513.
(5) (1895) I.L.R. 19 Mad. 230. (6) (1904) 15 M.L.J. 870.
(7) (1915) I.L.R. 39 Mad. 541. (8) (1916) I.L.R. 40 Mad. 233 (F.B.).
(9) (1918) 37 M.L.J. 356. (10) (1924) 48 M.L.J. 277.
(11) (1916) 5 L.W. 718. (12) (1923) 46 M.L.J. 240.
(13) (1921) 14 L.W. 317. (14) (1928) 17 L.W. 635.
(15) (1920) I.L.R. 43 Mad. 725. (16) (1918) 35 M.L.J. 579.

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and 5, and makes no reference either to *Chidambaram Chettiar v. Krishna Vathiyar*(1) or *Arunugam Pillai v. Krishnasami Naidu*(2). He does not however quote *Doraisami Moopan v. Subbalakshmi Palayee Ammal*(3). This was a decision given on 17th December 1917 shortly after the Full Bench case, *Chidambaram Chettiar v. Krishna Vathiyar*(1), which was in August 1916. It held that the Full Bench case was not applicable to an agreement between the parties to a suit that no decree should be obtained therein. Since the decision in *Venkatasubba Mudali v. Manickammal*(4), there is a decision of a single Judge in *Mulla Ramzan v. Maung Po Kaing*(5), which considers the Calcutta, Madras and Bombay cases.

The learned Advocate for the respondent argues that the present case does not fall under the Full Bench decision in *Chidambaram Chettiar v. Krishna Vathiyar*(1). He says that the principle really laid down in that case is that, if there was any pre-decree arrangement by way of stay or non-execution of the decree, then such an arrangement relates to execution and can be pleaded as a bar in execution proceedings. But he urges that the cases subsequent to the Full Bench case have also emphasised another principle that the decree itself cannot be challenged in execution owing to an arrangement made during the suit. We think that there is a clear distinction between the two things; and if the cases are analysed it will be found that those which conflict with each other are almost all border line cases where, though in substance the effect of the agreement may be to alter the decree, in form it only

(1) (1916) I.L.R. 40 Mad. 233 (F.B.).

(3) (1917) 8 I.W. 205.

(2) (1920) I.L.R. 43 Mad. 725.

(4) (1925) I.L.R. 49 Mad. 513.

(5) (1928) I.L.R. 4 Rang. 118.

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affects its execution. Bearing this principle in mind, if we take the cases decided prior to the Full Bench case, we find that *Subramania Pillai v. Kumaravelu Ambalam*(1) was a case of an arrangement prior to the decree to enter up satisfaction of the decree. It was held that this could be gone into in execution. Here, in form, the matter was one of execution of the decree, though, in fact, the effect may have been to annul the decree. *Laldas v. Kishordas*(2) was a case of an agreement that as between two defendants costs should only be recovered from one of them. Here, in form, the matter may be held to be one of execution, though, in fact, the result may have been to alter the decree with regard to the costs recoverable from the defendants.

Turning to the cases subsequent to *Chidambaram Chettiar v. Krishna Vathiyar*(3), the remarks about the Full Bench case in *Sambasiva Aiyar v. Thirumalai Ramamuja Thathachariar*(4) are really *obiter*, as that case was decided under Order XXI, rule 2, and it was held that there had been no certification. *Velu Thevan v. Krishnasami Reddi*(5) was a case of an agreement prior to the decree not to execute the decree that might be passed against one judgment-debtor and to realize the whole amount from the other. Here it was held that this could be pleaded in execution. Here again, in form, the matter arises in execution though the effect of the arrangement may be to alter the decree as against one of the defendants. In *Arunachala Goundan v. Swaminatha Iyer*(6), it was decided that the judgment-debtor can raise in bar of an application for execution presented by the legal representative of the decree-holder any defence such as that of estoppel which is personal to

(1) (1915) I.L.R. 39 Mad. 541.

(3) (1916) I.L.R. 40 Mad. 233 (F.B.).

(5) (1924) 48 M.L.J. 277.

(2) (1896) I.L.R. 22 Bom. 463 (F.B.).

(4) (1918) 37 M.L.J. 356.

(6) (1928) 46 M.L.J. 240.

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the legal representative. It is not clear from the report what the precise nature of the agreement between the decree-holder and the judgment-debtor was, and the matter turned on whether the legal representative was estopped from disputing it.

As regards the cases which are adverse to the appellant since the Full Bench case and which turn on questions of this sort, the first is *Doraisami Moopan v. Subbalakshmi Palayee Ammal*(1). This, as pointed out above, was soon after the Full Bench decision. The next, *Arumugam Pillai v. Krishnasami Naidu*(2), is an important case. One of the Judges was SESHAGIRI AYYAR J. who was a member of the Full Bench in *Chidambaram Chettiar v. Krishna Vathiyar*(3). Here the arrangement was that the decree which might be passed should be inexecutable in part. It was held that such an agreement could not be enforced in execution. SESHAGIRI AYYAR J. says:

"In *Chidambaram Chettiar v. Krishna Vathiyar*(3), I rested my conclusion on the theory of *stare decisis*. It is argued before us by Mr. Jayarama Ayyar that it follows from my judgment in that case that all the cases referred to therein as supporting the theory of *stare decisis* must be taken to have been accepted by me as correct. I do not think this suggestion is well founded. The course of decisions was referred to for the general proposition that pre-decree arrangements are within the language of section 47. I did not intend to accept as correct every one of the decisions I quoted for that purpose. On the other hand I want to make it clear that *Chidambaram Chettiar v. Krishna Vathiyar*(3) should not, in my opinion, be applied to what are termed cognate cases. Further, I am clear that an attack against the decree as having been obtained by fraud by one of the parties thereto is not within the principle of *Chidambaram Chettiar v. Krishna Vathiyar*(3)."

This is a very important observation coming from one of the learned Judges who decided *Chidambaram*

(1) (1917) 8 L.W. 205.

(2) (1920) I.L.R. 48 Mad. 725.
(3) (1916) I.L.R. 40 Mad. 233 (F.B.).

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Chettiar v. Krishna Vathiyar(1), and it is especially valuable because the only case directly on all fours with the present case which has been quoted to us, namely, the decision in *Pedda Veeranna v. Gondimalla Veeranna*(2), was a decision passed by the same Judge with AYLING J. between the Full Bench case and this decision. It is the only case which has been quoted to us of an agreement sought to be set up in execution, which seeks to attack the decree itself as in the present case, and was allowed to be pleaded in execution. There, in pursuance of an award made by arbitrators, the debtor tendered the amount payable on the due date, but the creditor refused to accept it and contested the validity of the award. The debtor filed a suit to enforce the award and it was made a decree of Court. In execution of the decree, the decree-holder claimed interest on the sums mentioned in the award. It was held that as there was a tender prior to suit and as the tender was refused the decree-holder was not entitled to interest. This decision was rested on *Chidambaram Chettiar v. Krishna Vathiyar*(1), and it is important to note that, as observed above, SESHAGIRI AYYAR J., who was a party to that decision, expressly in the later case, *Arumugam Pillai v. Krishnasami Naidu*(3), restricted the principles which he meant to lay down in the Full Bench case. On the other side, there are several authorities both of this Court and other Courts that an agreement which directly strikes at the decree itself cannot be pleaded in execution. The first as noted above is *Doraisami Moopan v. Subbalakshmi Palayee Ammal*(4), in which it was held that an agreement between the parties to a suit that no decree should be

(1) (1916) I.L.R. 40 Mad. 233 (F.B.).
(3) (1920) I.L.R. 43 Mad. 725.

(2) (1916) 5 L.W. 718.
(4) (1917) 8 L.W. 205.

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obtained therein could not be pleaded in execution and that the Full Bench decision *Chidambaram Chettiar v. Krishna Vathiyar*(1) did not apply to such a case. We have quoted *Arumugam Pillai v. Krishnasami Naidu*(2). In *Mallayya v. China Kotayya*(3), the respondents obtained a decree on their mortgage and sought the execution of the decree. The appellants set up an agreement entered into before the suit by which the respondents agreed to accept Rs. 1,500 and release certain items. It was held that this agreement could not be pleaded as a defence in execution of the decree. SPENCER J. remarked :—

“The conduct of a party who collusively allows a Court to pass a decree at the same time privately agreeing with the plaintiff that such a decree should not be enforced is, in my opinion, committing a fraud on the Court, which should not be countenanced by permitting him to put forward such a plea in execution.”

That case no doubt is distinguished by WALLACE J. in *Venkatasubba Mudali v. Manickammal*(4), by saying that it was a case of a pre-suit and not of a pre-decree arrangement. But we doubt whether this would make any great difference. In *Ramanathan Chettiar v. Venkatachalam*(5), the decree amount was Rs. 36,000 and a pre-decree arrangement was alleged by which only Rs. 33,750 was to be recovered from defendants 2 and 3 and there was to be no recovery from defendants 1 and 4. The Court thought that the case resembled *Arumugam Pillai v. Krishnasami Naidu*(2) and not *Chidambaram Chettiar v. Krishna Vathiyar*(1). They followed the decision in *Arumugam Pillai v. Krishnasami Naidu*(2), and held that this agreement could not be gone into in execution.

(1) (1916) I.L.R. 40 Mad. 283 (F.B.).

(8) (1921) 14 L.W. 317.

(2) (1920) I.L.R. 43 Mad. 725.

(4) (1925) I.L.R. 40 Mad. 513.

(5) (1923) 17 L.W. 685.

Finally, the recent case of *Mulla Ramzan v. Maung Po Kaing*(1) is very similar to the present case, and the authorities of Calcutta, Bombay and Madras have been considered. In that case, in execution proceedings it was pleaded by the judgment-debtor that prior to the passing of the decree he had entered into an agreement with the decree-holder, whereby in consideration of his confessing judgment for the full decretal amount of Rs. 2,000 the decree-holder agreed to accept Rs. 1,000 only and that accordingly the decree could be executed to that extent only; and it was held that a decree which on the face of it is enforceable to the fullest extent cannot in execution proceedings be challenged as being inexecutable, wholly or in part, on account of an agreement between the parties entered into prior to the decree, and that section 47 of the Civil Procedure Code had no application in that case. The learned Judge says :—

“Putting the most liberal construction on the words (of section 47), I fail to see how a question like the one involved in the present case can be said to relate ‘to the execution of the decree.’ The words ‘the decree’ refer to the decree passed by the Court and of which the decree-holder is seeking execution. It is only questions relating to the execution or executability of this decree, which the executing Court is directed to determine. When a judgment-debtor sets up an agreement of this kind, that, prior to the decree, there was an arrangement between the parties that though the decree was to be passed for Rs. 2,000 it should only be executed to the extent of Rs. 1,000 and not for the whole, he is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court, but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties. Without going to the extent of saying, as Mr. Justice SPENCER of the Madras High Court does in one of the cases reported

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(1) (1926) I.L.R. 4 Bang. 118.

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in the unauthorized reports *Mallayya v. China Kotayya*(1), that parties, who collusively allow a Court to pass a decree having privately agreed that the decree should not be enforced, are committing a fraud on the Court, I can at least say that parties who, having agreed that a decree should not be executable wholly or in part, pray the Court to pass an unconditional decree, are thereby inviting the Court merely to take part in a solemn farce."

In *Benode Lal Pakrashi v. Brajendra Kumar Saha*(2), it was laid down that payment during the suit must be set up in the suit itself and this part of the judgment has not been dissented from in any of the Madras decisions.

On a review of the authorities it appears to us that the Full Bench case, *Chidambaram Chettiar v. Krishna Vathiyar*(3), only covers agreements which relate to execution and not to agreements which attack the decree itself. There may be, as noted above, certain pre-decree arrangements which, though in form they relate to execution, do in substance modify or totally nullify the decree; and in regard to these cases we find different decisions owing probably to the angle from which the matter is regarded. But the only case quoted to us in which the agreement directly alters the decree by something which does not relate to execution at all but means that the decree shall be executed for a sum different from what has been stated in the decree is *Pedda Veeranna v. Gondimalla Veeranna*(4) and the effect of this decision is discounted by the subsequent remarks of SESHAGIRI AYYAR J. in *Arumugam Pillai v. Krishnasami Naidu*(5). In all other cases of both this and other Courts, it seems to be quite clear that an agreement which does not relate to execution but directly

attacks the decree itself cannot be pleaded in execution. We do not think it is necessary to express any opinion as to whether the defendants can file a separate suit on the basis of the alleged agreement. Nor do we wish to go into the question of *res judicata* in which connection *Mahabir Pershad Singh v. Macnaghten*(1) has been quoted, for there is a difference between decrees passed on contest and those which are passed on compromise between the parties—*Raja Kumara Venkata Perumal Raja Bahadur v. Thatha Rimasamy Chetty*(2). We think it would be most dangerous to allow a decree itself to be attacked in execution. In our opinion, the decision of the learned District Judge is correct and these appeals must be dismissed with costs.

A revision petition has been put in against an order refusing to amend the decree. For the reasons stated above, it is clear that the decree cannot be amended. Apart from this, only the attaching parties in one appeal suit are parties to this application, and, in any case, once third parties intervene, an amendment should not be allowed so as to affect such third parties—*Hutton v. Harris*(3).

The petition is dismissed with costs.

One set of costs in Civil Miscellaneous Appeal No. 253; one set of costs in Civil Miscellaneous Appeals Nos. 264, 265 and 266.

Costs in the Civil Miscellaneous Appeals to be proportionate to the amounts claimed in execution by the various decree-holders.

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(1) (1889) I.L.R. 16 Cal. 882 at 891 (P.C.). (2) (1911) I.L.R. 35 Mad. 75 at 83.
(3) [1892] A.C. 547.

(1) (1921) 14 L.W. 317. (2) (1902) I.L.R. 29 Cal. 810.
(3) (1916) I.L.R. 40 Mad. 233 (F.B.). (4) (1918) 5 L.W. 718.
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APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Cornish.

1930,
April 22.

KUNTHI AMMAL AND ANOTHER (DEFENDANTS—
PETITIONERS), APPELLANTS,

v.

SARANGAPANI CHETTI (PLAINTIFF), RESPONDENT.*

Indian Arbitration Act (IX of 1899), ss. 2, 3, 4, 8, 9 and 19—Civil Procedure Code (Act V of 1908), sec. 89, cl. (1) and Sch. II, paras. 17, 19 and 20—Agreement to refer to arbitration of five arbitrators—Subject-matter of arbitration, suit in respect of, maintainable in the Presidency Town of Madras—Suit filed in the City Civil Court, Madras, to appoint an arbitrator in place of one who refused to act—Jurisdiction, City Civil Court or High Court—Ss. 8 and 9 of Indian Arbitration Act, if applicable—Act, applicability of, even though ss. 8 and 9 are inapplicable—Power of High Court to appoint an arbitrator in a case of reference to more than two arbitrators.

Where a submission to arbitration as to division of joint family property was made by the parties to five named arbitrators, one of whom refused to act, and the subject-matter of the submission did not exceed Rs. 2,500 in value and could be sued upon in a Court in the Presidency Town of Madras, and one of the parties instituted a suit in the City Civil Court, Madras, to have the agreement submitting the case for arbitration filed in Court and to provide for the arbitration in accordance with law but the other parties thereto objected that the Indian Arbitration Act applied to the case and that the High Court on its Original Side, and not the City Civil Court, had jurisdiction to entertain the suit, and that no relief could be given to the plaintiff in the case,

Held that the Indian Arbitration Act, 1899, applied to the case, even though the submission was to more than two arbitrators, but the powers conferred by the provisions of sections 8 and 9 of the Act were not available to a party in such a case; *Gopalji*

* Civil Miscellaneous Appeal No. 139 of 1928, and Civil Revision Petition No. 1048 of 1928.

Kuverji v. Morarji Jeram, (1919) I.L.R. 43 Bom. 809; and *In re Smith & Service and Nelson & Sons*, (1890) 25 Q.B.D. 545, relied on;

that the High Court on its Original Side had exclusive jurisdiction to deal with the present reference under section 2 read with section 4 of the Indian Arbitration Act; and the provisions of the Civil Procedure Code did not apply by reason of section 3 of the Act and section 89 of the Code;

that, as the specific provisions of sections 8 and 9 of the Act did not apply to the case of a submission to more than two arbitrators, even the High Court, if the suit had been instituted therein, could not give the relief prayed for in the suit under those sections; and that, consequently, the City Civil Court also, assuming it had jurisdiction to entertain the suit, could not give such relief and the suit should have been dismissed.

[Their Lordships did not decide the question whether the City Civil Court had jurisdiction to entertain the suit.]

APPEAL against the order of the City Civil Court, Madras, in Original Suit No. 580 of 1926 and Civil Revision Petition under section 115, Civil Procedure Code, to revise the same order.

K. V. Sesa Ayyangar for appellants.—Under section 89 of the Civil Procedure Code (Act V of 1908) and sections 2 and 3 of the Indian Arbitration Act, 1899, the latter Act applies to the present case. Only the High Court has jurisdiction to entertain the present application arising out of this agreement to refer to arbitration. Section 3(24) of the General Clauses Act (X of 1897) says that the "High Court" used in reference to civil proceedings means the highest Court of original civil jurisdiction. Even though the City Civil Court may take cognizance of this application, the subject-matter being below Rs. 2,500, still by virtue of section 89, Civil Procedure Code, and section 3 of the Arbitration Act, only the latter Act applies. The City Civil Court does not become the High Court by reason of section 3 of the Madras City Civil Court Act, 1892; the special jurisdiction conferred on the High Court by the Arbitration Act is not conferred on the City Civil Court.

P. V. Venugopala Ayyar for respondent.—The Indian Arbitration Act, 1899, applies only to private arbitrations and not to agreements to refer to arbitration as in this case. There is no provision in the Indian Arbitration Act for filing an

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agreement to refer to arbitration and having the arbitration carried out. Section 89, Civil Procedure Code, says that the Code will apply in the absence of provisions in the Indian Arbitration Act. There are provisions in respect of the present application in Schedule II, paragraphs 17, 18 and 19 of the Civil Procedure Code but there is no provision in the Arbitration Act, and hence the Code applies to this case.

The Indian Arbitration Act does not apply to cases of agreements to refer to arbitration made to more than two arbitrators. Sections 8 and 9 of the Act contemplate only cases of one or two arbitrators: see *Gopalji Kuverji v. Morarji Jeram*(1). The rules made under the Arbitration Act do not cover this class of cases of reference to more than two arbitrators. There is no provision in the Act for filing an agreement to refer to arbitration and making it a rule of Court, as in the Civil Procedure Code. There is no provision in the Act for more than two arbitrators; hence the Act does not apply to such cases but only the provisions of the Code. *In re Smith & Service and Nelson & Sons*(2). The English Act was amended by the Administration of Justice Act, 1920 (10 and 11 Geo. V, c. 11). Even if the Arbitration Act applies, the City Civil Court has jurisdiction.

K. V. Sessa Ayyangar in reply.—The Indian Arbitration Act, 1899, is not confined to cases of one or two arbitrators: see *Abdul Shakur v. Muhammad Yusuf*(3). An "appointed arbitrator" in sections 8 or 9 of the Act means also one of several appointed arbitrators. Even though the special provisions of the Act in its sections 8 and 9 do not apply to a particular case, the Act as a whole will still apply. See *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(4). The application of an Act cannot be denied, because some of the provisions of the Act cannot apply to a particular contingency or circumstance. The decisions in *Gopalji Kuverji v. Morarji Jeram*(1) and *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(4) only hold that some special sections do not apply to certain classes of arbitration, and not that the Act does not apply as a whole.

Under section 4 of the Indian Arbitration Act, and section 3, clause 24 of the General Clauses Act, the Court meant is only the High Court, and does not make the City Civil Court,

(1) (1919) I.L.R. 43 Bom. 809.

(3) (1921) I.L.R. 43 All. 456.

(2) (1890) 25 Q.B.D. 545.

(4) (1922) I.L.R. 47 Bom. 250.

which may take cognizance in certain cases, a High Court even in such cases.

Even if the City Civil Court had jurisdiction, it can administer only the provisions of the Arbitration Act, which applies as a whole to all cases of arbitration under section 2 of the Act.

JUDGMENT.

MADHAVAN NAIR J.—This Civil Miscellaneous Appeal arises out of an order passed by the City Civil Judge in a suit to have an agreement submitting a case for arbitration filed in Court and to provide for the arbitration in accordance with law. The agreement sought to be enforced was entered into between the plaintiff and the defendants referring disputes about their joint family property to five panchayatdars, asking them to divide it among the signatories to the document. One of the panchayatdars refused to act as an arbitrator. For this and other reasons the defendants contended that the agreement could not be enforced. They also contended that the City Civil Court had no jurisdiction to entertain the suit as it fell within the scope of the Indian Arbitration Act (IX of 1899) which vests the High Court with exclusive jurisdiction to try suits of this nature. The learned City Civil Judge overruled these contentions and passed the following order:—

"I, therefore, direct that Bhagirathi Pillai be appointed arbitrator in place of the person who has resigned and remit this case to the original arbitrators who have not resigned and this additional person newly appointed to dispose of the case according to law and submit a finding within one month."

This appeal has been filed by the defendants against this order.

It is urged on behalf of the appellants that the Indian Arbitration Act gives exclusive jurisdiction to the Original Side of the High Court to determine this matter, as, if it were the subject-matter of a suit, the

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suit could be instituted only in a Presidency Town, and that the Code of Civil Procedure, Second Schedule, provides that the Second Schedule of that Code shall not apply to any case falling within the purview of the Indian Arbitration Act. On behalf of the respondents it is contended that the Indian Arbitration Act will not apply to submissions or arbitrations where there are five arbitrators as in the present case, i.e., more arbitrators than one contemplated by sections 8 and 9 of the Act and that, even if the Act applies, the City Civil Court has jurisdiction as it is directed under the Madras City Civil Court Act (VII of 1892), to take cognizance of all suits triable on the Original Side of the High Court, provided the value of the suit does not exceed Rs. 2,500, and provided further that the suit does not relate to Probate, Matrimonial and Insolvency proceedings. It is admitted that the present case falls within these provisions of the Madras City Civil Court Act.

On the above arguments, two questions arise for consideration: (1) Whether the jurisdiction to determine the subject-matter submitted to arbitration in the present case lies exclusively with the High Court, (2) if so, is the City Civil Court vested with that jurisdiction under the Madras City Civil Court Act? As we shall presently show, in the view that we take of this case, it is not necessary to express any definite opinion on the second question.

Under the Indian Law, reference to arbitration is governed by the provisions of the Code of Civil Procedure and the Indian Arbitration Act (Act IX of 1899). Under section 89, clause (1) of the Civil Procedure Code,

“Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being

in force, all references to arbitration, whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.”

Section 3 of Act IX of 1899 says that sections 523 to 526 of the Code of Civil Procedure, 1882, (paragraphs 17, 19 and 20 of Schedule II of the Code of Civil Procedure, 1908) shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply. This section excludes those references to arbitration to which the provisions of the Act apply from the operation of paragraphs 17 to 20 of the Second Schedule of the Civil Procedure Code. Section 2 of the Act states—

“This Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town.”

According to this section, the Act would apply to an agreement forming the subject-matter of a reference to arbitration only if a suit between the parties with respect to that subject-matter could be instituted in a Presidency Town. Section 4 of the Act states that “the Court” referred to in the Act in the Presidency towns is the High Court. In the present case it is clear that if a suit is instituted by the parties with reference to the subject of arbitration, i.e., the division of their family property, that suit will have to be instituted at Madras, and therefore, under sections 2 and 4 of the Act, the High Court will be the Court having jurisdiction to determine the reference to arbitration. This is the argument of the appellant. The respondents meet this argument by saying that the plaintiff in order to succeed in his contention should, besides showing that his case falls within section 2 of the Act, also show that the provisions of the Act would apply to the submission or arbitration in question. This argument

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has special reference to section 3 of the Act and is put in this way: Having regard to that section, only those submissions, i.e., written agreements to submit present or future differences to arbitration, whether an arbitrator is named therein or not, [see section 4(b)], to which the provisions of the Indian Arbitration Act will apply, will be exempt from the operation of the Code of Civil Procedure; in other words, if any of the provisions embodied in any section of the Arbitration Act will not apply to a "submission", then that "submission" will be governed by the rules of the Code of Civil Procedure. In this case, as one of the panchayatdars has refused to act, it is conceded that without resorting to sections 8 or 9,—if these sections will apply—his vacancy cannot be filled up and that relief cannot be given to the plaintiff. The respondent proceeds to show that sections 8 and 9 of the Indian Arbitration Act will not apply to a submission like the present one wherein the dispute is referred to the arbitration of five panchayatdars as those sections will apply only to cases where there is "a single arbitrator or but two arbitrators". In support of his interpretation of sections 8 and 9 of the Act, *Gopalji Kuverji v. Morarji Jeram*(1) is relied on. If this argument is accepted, it will follow that the question of the application of the Act should be considered with reference to both sections 2 and 3, and that if any of the sections of the Act will not apply in the matter of any submission, then despite the fact that a suit in respect of its subject-matter if instituted will undoubtedly lie in the High Court, the provisions of the Code of Civil Procedure will become applicable and the City Civil Court will have exclusive jurisdiction to deal with the matter.

(1) (1919) I.L.R. 43 Bom. 809.

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We will now proceed to see how far this argument of the respondent can be accepted. Section 8 of the Indian Arbitration Act deals with the power of the Court in certain cases to appoint an arbitrator, umpire or a third arbitrator. Section 9 of the Act deals with the power which the parties have in certain cases to supply the vacancy. I do not think it is necessary for deciding this case to deal at length with the scope of the provisions of these two sections, as I am prepared to accept the reasoning of the learned Judges in *Gopalji Kuverji v. Morarji Jeram*(1), in which the question is discussed elaborately. In that case, strongly relied on by the respondent, it was held by SCOTT C.J. and HAYWARD J. reversing the judgment of MARTEN J. that, in a case of submission to three named arbitrators all of them after acting having declined to proceed any further, the Court had no jurisdiction to appoint fresh arbitrators in their place under the Indian Arbitration Act. Generally stated, following the decisions in *In re Smith & Service and Nelson & Sons*(2), and *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(3), under the English Arbitration Act, the learned Judges adopted the view that sections 8 and 9 would apply only to cases where there is a single arbitrator or but two arbitrators. According to this decision, these sections will not apply to the present case as the agreement in question refers the matter in dispute to five panchayatdars, and therefore, if the respondent's argument is correct, it would follow that the provisions of the Code of Civil Procedure are not excluded under section 3 of the Act and the City Civil Court must be held to have exclusive jurisdiction to deal with the matter. The appellants

(1) (1919) I.L.R. 43 Bom. 809. (2) (1890) 25 Q.B.D. 545.
(3) [1900] 2 Q.B. 606.

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argue that this decision is wrong and rely on *General Electric Trading Company v. Siemens (India), Ltd.*(1). Sections 8 and 9 of the Indian Act correspond to sections 4 and 5 of the English Arbitration Act which correspond to clauses 12 and 13 of the Common Law Procedure Act of 1854. So far as I can see, though there is some variation in the wording of sections 5 and 6 of the English Arbitration Act from the wording of the corresponding section of the Common Law Procedure Act, the purport of the sections remains exactly the same. In my view there is no support for the view of GHOSE J. that the wording of sections 5 and 6 of the English Arbitration Act would make them applicable to cases of three arbitrators, cases to which admittedly sections 12 and 13 of the Common Law Procedure Act would not apply. In this connection, it may be observed that *In re Smith & Service and Nelson & Sons*(2), relied on by the learned Judges of the Bombay High Court, was decided after the passing of the English Act of 1889, and under it it was held that—

“where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator, the Court has no power under or apart from the Arbitration Act, 1889, to order him to do”.

In that case, LINDLEY L.J. made the following observations:—

“It certainly looks like a blot in the Act, that by reason of there being no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, sections 4, 5 and 6 do not apply; but we cannot help that.”

This so-called blot in the English Act was cured in England by the enactment of the Administration of

(1) (1928) I.L.R. 56 Calo. 548.

(2) (1890) 25 Q.B.D. 545.

Justice Act of 1925, 10 and 11 Geo. V, c. 81. This would show that the Legislature thought that the interpretation of sections 5 and 6 of the English Act adopted by the learned Judges in *In re Smith & Service and Nelson & Sons*(1) was correct. The blot in the Indian enactment has not been cured by the Indian Legislature as was done by the English Legislature with reference to the English Act. Having regard to these considerations it seems to me that the interpretation of the learned Judges in *Gopalji Kuverji v. Morarji Jeram*(2) of sections 8 and 9 of the Indian Arbitration Act is amply supported by the English authorities. The subsequent decision of the Bombay High Court, *In re Bahaldas Khemchand*(3), in no way conflicts with the prior decision in *Gopalji Kuverji v. Morarji Jeram*(2). *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(4) shows that—

“where the parties agree to refer their disputes to arbitration without the intervention of the Court, no suit having been brought in respect of those disputes, the Court has no power to order the issue of a commission for the examination of witnesses in the arbitration”.

Though I agree thus far with the respondent's contention that the provisions of sections 8 and 9 of the Indian Arbitration Act do not apply to a case of five panchayatdars like the present one, it does not necessarily follow from this conclusion that the Indian Arbitration Act will not apply to the present case. The very case so strongly relied on by the respondent, *Gopalji Kuverji v. Morarji Jeram*(2), supports this position. As observed by SCOTT C.J. (see page 831) “the Act does not attempt to provide for every case”, and HAYWARD J. points out that, though reference

(1) (1890) 25 Q.B.D. 545.

(3) (1919) I.L.R. 45 Bom. 1.

(2) (1919) I.L.R. 43 Bom. 809.

(4) (1923) I.L.R. 47 Bom. 250.

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to three named arbitrators is not included within the particular provisions of sections 8 and 9, they might fall within the provisions of the other sections including section 19 of the Indian Arbitration Act. In this connection attention may also be drawn to the observations of VAUGHAN WILLIAMS L.J. in *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(1), which show that the English Arbitration Act would govern a submission to arbitration even though the reference is to three arbitrators. The conclusion is, therefore, clear that, though sections 8 and 9 of the Indian Arbitration Act will not apply to the present case, still the case will fall under the purview of the Act, though the parties are left without any remedy under the Act. This blot in the Act will not, in my opinion, make the Act inapplicable to a case though reference is made in it to five Panchayatdars. Two inferences follow from this conclusion; (1) that section 3 cannot be used in the manner suggested by the appellant to limit the scope of section 2, that section 3 simply means that in cases governed by the Indian Arbitration Act, the operation of the provisions of the Code of Civil Procedure mentioned in it is excluded, that the reference to arbitration in the present case is not governed by the provisions of the Code of Civil Procedure and is not therefore within the exclusive jurisdiction of the City Civil Court and (2) that section 2 read with section 4 vests the jurisdiction to deal with the present reference exclusively in the High Court, but that the High Court, in the light of the foregoing observations, must be held to be unable to give the relief asked for by the plaintiff under section 8 or 9 of the Act, as, according to our interpretation, these sections

(1) [1900] 2 Q.B. 606.

cannot be applied to cases wherein the reference is made to five panchayatdars. This disability is certainly "a blot in the Act"; but it must remain so till it is cured by the Legislature.

It is conceded that, if the High Court cannot interfere in the present case, then, the City Civil Court which, according to the respondent, is directed to deal with the matter, is also helpless, and therefore the second question raised in this appeal as regards the jurisdiction of the City Civil Court under the Code of Civil Procedure need not be decided.

Having regard to my view that the relief asked for cannot be given to the plaintiff under section 8 or 9 of the Act, we must set aside the order of the lower Court. In the result the plaintiff's suit will be dismissed. In the circumstances, we make no order as to costs.

No special order is necessary in the Civil Revision Petition.

CORNISH J.—I agree. In my opinion the Arbitration Act governs the submission to arbitration in the case before us. If that be so, section 17 of the Second Schedule of the Civil Procedure Code has no operation; and it follows that the order of the Judge of the City Civil Court purporting to be made under that section was without jurisdiction and should be set aside. Section 2 of the Arbitration Act states that subject to the provisions of section 23 (which are not material here) the Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit, the suit could be instituted in the Presidency Town. Admittedly, a suit in respect of the subject-matter of the submission in this case could have been instituted in the Presidency Town. Then section 3 of the Arbitration Act provides that sections 523 to 526 of the Code of Civil Procedure, 1882, corresponding to

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paragraphs 17, 19, 20 and 21 of Schedule II of the Code of Civil Procedure, 1908—

“shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply.”

The meaning of this is, clearly, that when the Arbitration Act governs a submission, the operation of the specified sections of the Civil Procedure Code is excluded. This exclusion is recognized by section 89 of the Code of Civil Procedure, which says —

“Save in so far as is otherwise provided by the Indian Arbitration Act, 1889, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions in the Second Schedule”; and this must mean that the provisions of the Second Schedule shall apply to an arbitration except when the Arbitration Act says that they shall not. But the contention is that the Arbitration Act has no application when, as in the case before us, the submission is to more arbitrators than are contemplated by sections 8 and 9 of the Act. It is established by *In re Smith & Service and Nelson & Sons*(1), *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(2) and *Gopalji Kuverji v. Morarji Jeram*(3) that the power given to the Court by sections 5 and 6 of the English Act, and by the identical sections 8 and 9 of the Indian Act, is confined to cases where there is a single arbitrator or but two arbitrators; see the judgment of A. L. SMITH L.J. in *Manchester Ship Canal Company v. S. Pearson & Son, Limited*(2). But these authorities do not, nor do the later authorities *In re Babaldas Khemchand*(4) and *Mackintosh & Co. v. Scindia Steam Navigation Co., Ltd.*(5), in my opinion, support the argument that a submission ceases to be governed by the Arbitration Act by reason

(1) (1890) 25 Q.B.D. 545.

(3) (1919) I.L.R. 43 Bom. 809.

(2) [1900] 2 Q.B. 606.

(4) (1919) I.L.R. 45 Bom. 1.

(5) (1922) I.L.R. 47 Bom. 250.

of the submission being to three or more arbitrators. On the contrary that proposition appears to be negatived by the judgment of VAUGHAN WILLIAMS L.J. in *Manchester Ship Canal Company v. S. Pearson & Son, Limited* (1), where he said—

“In the report of *In re Smith and Service*(2) the judgments, in which it is said that sections 4, 5 and 6 [these sections corresponding to sections 19, 8 and 9 of the Indian Act] did not apply, must be read by the light of the argument for the appellants. It is there said that section 4 had no application to that case, because no legal proceedings had been taken. It is plain from this that when the learned Lords Justices said that section 4 did not apply, it was not meant that this was because it was a case of reference to three arbitrators, but only because no legal proceedings had been commenced.”

In short, it was pointed out that the Arbitration Act was not rendered inapplicable to a submission because in a particular instance the powers given to the Court by the Act were unavailing.

On the question which was raised by Mr. Sesha Ayyangar, whether the definition of “Court” in section 4 of the Arbitration Act is to be taken as indicating another exception to the jurisdiction conferred on the City Civil Court by section 3 of the Madras City Civil Court Act (VII of 1892), I do not think it is necessary to give a decision, for it is obvious that if the High Court has no power under section 8 or 9 of the Arbitration Act to make an appointment of an arbitrator when the reference is to five arbitrators, the City Civil Court has no such power.

For these reasons, I agree that the appeal should succeed and be allowed.

G.R.

(1) [1900] 2 Q.B. 606, 608.

(2) (1890) 25 Q.B.D. 545.

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APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Reilly.

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v.

RAJAMANICKA MUDALI (MINOR, BY FATHER AND
NEXT FRIEND EKAMBARA MUDALIAR) AND ANOTHER
(PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Legal representative—Suit against wrong—Instituted and conducted bona fide—Judgment and decree for plaintiff without fraud or collusion with defendant—Binding nature of decree on proper legal representative.

A debtor died leaving a will by which he bequeathed his estate to his nephew subject to certain dispositions. The widow of the debtor disputed the will. In ignorance of the will and *bona fide* believing the widow to be the proper legal representative, the creditor brought a suit against her alone, and obtained an *ex parte* decree for the debt to be paid out of her husband's assets in her hands. The widow was in possession of a few items of the estate. In a suit by the nephew to set aside the decree and the sale in execution thereof,

Held that, as the creditor *bona fide* believed the widow to be the proper legal representative and as she was then interested in defending the estate and sufficiently represented the estate and as he got his decree without any fraud or collusion with her, it was binding on the plaintiff, the residuary legatee, under the will.

APPEALS against the decree of the Court of the Subordinate Judge of Vellore in Original Suit No. 86 of 1922.

The facts are given in the judgment.

S. Duraiswami Ayyar (with *A. K. Ramachandran*) for appellant in Appeal No. 250 of 1925.

K. S. Desikan for appellant in Appeal No. 332 of 1925.

* Appeal Nos. 250 and 332 of 1925.

A. Viswanatha Ayyar (with *A. Ramaswami Ayyar*) for respondents in both.

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JUDGMENT.

MADHAVAN NAIR J.—The first defendant is the appellant in Appeal No. 250 of 1925 and he is the decree-holder in Civil Suit No. 81 of 1921 on the file of the High Court, Madras. The second defendant is the appellant in Appeal No. 332 of 1925 and he is the auction-purchaser of the properties sold in execution of the decree in Civil Suit No. 81 of 1921. These Appeals arise out of a suit instituted by the plaintiff for a declaration that the decree in Civil Suit No. 81 of 1921 and the attachment and sale held in execution of that decree are not binding on him.

The facts are briefly these. One Parthasarathi Mudali who was doing business in yarn and cloths had dealings with the first defendant, Kushaldoss and Sons, and owed them a considerable sum of money. He died on the 18th May 1920 leaving a will, dated 14th May 1920. By this will, the plaintiff, his nephew, was given the whole estate of the testator subject to the other dispositions mentioned in it. After the death of Parthasarathi Mudali, his widow, Sengalani Ammal, applied on 5th October 1920 for a succession certificate in order to enable her to collect the outstandings due to him. The plaintiff's father as his guardian objected to the issue of the certificate. But an order was passed in favour of the widow, as the counter-petitioner said that he intended to file a separate suit to establish his rights under the will and that he had no objection to the petitioner being given the certificate, provided she furnished substantial security. On 22nd December 1920, Original Suit No. 65 of 1921 on the file of the Court of the Subordinate Judge of Vellore was filed by the plaintiff

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to establish his rights. It was disposed of in his favour on 24th April 1922. Meanwhile, on 31st January 1921, that is, after the institution of Original Suit No. 65 of 1921, the present first defendant filed Civil Suit No. 81 of 1921 on the file of the High Court against Sengalani Ammal, the widow of the deceased Parthasarathi Mudali, as representing her husband's estate, for the recovery of money due from Parthasarathi Mudali. The suit was heard and decided *ex parte* on 30th March 1921, i.e., before the disposal of Original Suit No. 65 of 1921. The decree directed that "Sengalani Ammal, the defendant . . . do from and out of the assets of her deceased husband, Parthasarathi Mudali, come to her hands pay to the plaintiffs the sum of Rs. 3,518-11-0, etc., etc." This decree was transferred for execution to the Court of the District Munsif of Ranipet on 3rd July 1922 and the sale of the suit properties was posted to 28th August 1922. As the plaintiff had by that time obtained a decree in his favour he intervened in execution proceedings and wanted to be brought on record in order to oppose the execution, but as his petition was filed on the day fixed for sale of the properties it was dismissed as being too late. The sale proceeded and the second defendant purchased the suit properties for a sum of Rs. 3,850. It is the decree in Civil Suit No. 81 of 1921 on the file of the High Court and the execution sale in favour of the second defendant, which the plaintiff now contends do not bind him.

His case is that the first defendant was well aware when he instituted Civil Suit No. 81 of 1921 that he was the true legal representative and the residuary legatee under the will of the deceased Parthasarathi Mudali and knowing that, he instituted that suit in collusion with Sengalani Ammal, the widow, in fraud of the plaintiff's rights, and that she allowed the decree

for the principal and interest to be passed *ex parte* without contesting the claim for interest which she could have successfully resisted if the case had been properly conducted. These grounds are alleged to show that the decree obtained by the first defendant against Sengalani Ammal could not be regarded as a decree obtained *bona fide* and without fraud or collusion; and therefore cannot bind the plaintiff who is the real heir of Parthasarathi Mudali. It is also alleged that the execution proceedings in connection with the sale of the properties were not carried on *bona fide*. These allegations are denied by the defendants. The claim of the first defendant for the principal sum is admitted by the plaintiff.

The learned Subordinate Judge found that in the matter of the institution of the suit there was no collusion between the first defendant and Sengalani Ammal and that there was no evidence that the first defendant was actuated by any fraudulent motive in instituting the suit against the widow. He held that interest was rightly claimed in that suit by the first defendant and the claim for interest therefore cannot be considered to be a fraud perpetrated upon the estate of Parthasarathi Mudali. Notwithstanding these findings, the learned Subordinate Judge came to the conclusion that the decree was not obtained *bona fide* and cannot bind the present plaintiff on the ground that the first defendant had opportunities of finding out the true legal representative of the deceased Parthasarathi Mudali and that he instituted the suit without making sufficient enquiries. His conclusion might be stated in his own words:—"The conclusion that must be adopted is that Civil Suit No. 81 of 1921 was instituted against Sengalani Ammal without enquiry as to who was Parthasarathi's real heir when there was every opportunity to make such enquiry,

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and when, if such enquiry had been made in the right spirit and in the proper way, it would disclose the fact. It cannot be regarded as a suit instituted *bona fide* against the widow as heir." As regards the second defendant's participation in the proceedings, the learned Judge held that he purchased the suit properties knowing that there was a will set up by the plaintiff constituting him as the legal heir of Parthasarathi Mudali. He also held that the second defendant had no hand in the matter of filing Civil Suit No. 81 of 1921 and that the properties purchased by him were not sold for an inadequate price. As a result of these findings a decree was given in favour of the plaintiff as prayed for.

In appeal it is argued on behalf of the appellants that the circumstances of the case would show that the first defendant instituted the suit against Sengalani Ammal in the full belief that she was the true legal representative of the deceased Parthasarathi Mudali and that he made sufficient enquiries before instituting the suit; and that his conduct in connection with the suit and its proceedings was throughout *bona fide*. On behalf of the plaintiff-respondent it is urged that the Judge's finding that interest was properly decreed in the prior suit is not supported by the evidence, and that the properties were sold for an *inadequate* price, and that even if it is held that the decree against the widow was obtained by the first defendant *bona fide* and without fraud and collusion, in law, the decree is not binding on him as it was not obtained against him, he being the true legal representative of the deceased Parthasarathi; and that, if binding at all, it will be binding only as regards items 3 and 4 which are in the possession of the widow. It was also argued that, having regard to section 52 of the Transfer of Property Act, effect should not have

been given to the decision in Civil Suit No. 81 of 1921, as it was decided during the pendency of Original Suit No. 65 of 1921 which ended in his favour.

I shall first deal with the question whether the claim for interest was rightly allowed by the Court in Civil Suit No. 81 of 1921. The learned Subordinate Judge has found in favour of the appellant on this point. I cannot say that the evidence in the case does not support the conclusion of the Subordinate Judge. [After discussing the evidence on this point, his Lordship proceeded as follows:—]

On the whole, I am inclined to agree with him on his finding on this point. It therefore follows, the claim for principal being admitted, that Sengalani Ammal's failure to resist Civil Suit No. 81 of 1921 was in no way detrimental to the interests of the estate of Parthasarathi Mudali.

The next question for consideration is whether the first defendant knew at the time when he instituted the suit that a will was left by Parthasarathi Mudali and that the plaintiff was his true legal heir.

[After discussing the evidence on this question and answering it in the negative, his Lordship continued as follows:—] In these circumstances, I cannot agree with the opinion of the lower Court that it cannot be regarded that Civil Suit No. 81 of 1921 was instituted *bona fide* against a wrong heir. In my opinion the evidence in the case shows abundantly that Civil Suit No. 81 of 1921 was instituted by the first defendant *bona fide* against the widow as the legal heir of the deceased Parthasarathi and that there is nothing fraudulent in the conduct of the first defendant or the widow in connection with the proceedings in the suit and that the decree was obtained without fraud and collusion.

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As regards the value realized at the time of the sale, I agree with the learned Subordinate Judge that the value is not inadequate. He has considered the matter in paragraph 17 of his judgment, and I do not think I can add anything to that discussion.

For the above reasons, I would hold that the widow, Sengalani Ammal, sufficiently represented the estate of the deceased Parthasarathi in Civil Suit No. 81 of 1921 and that the decree in that suit is binding on the plaintiff.

Mr. Viswanatha Ayyar next argues as a proposition of law that even if Civil Suit No. 81 of 1921 was instituted by the first defendant *bona fide* against a wrong heir, and even if there be no fraud or collusion between the parties in respect of that suit, still the decree passed in the suit cannot be considered binding on the true legal representative (that is, the plaintiff) and if it is binding at all, it will be binding only with respect to the properties of the deceased which were in possession of the widow at the time of the suit—that is, only items 3 and 4 in the suit. In support of this argument he relied strongly on *Madavarayudu v. Subbamma*(1); *Gnanambal Ammal v. Veerasami Chetty*(2); *Kaliappan Servaikaran v. Varadarajulu*(3); *Srinivasa Ayyangar v. Kanthimathi Ammal*(4); *Bachu Soorayya v. Toomuloori Chinna Anjaneyalu*(5); and *Angadi Mallappa v. Neelana Gowdra Kare Gowd*(6).

The question how far and under what circumstances a decree passed against the wrong heir of a deceased person will bind his true heir has been considered in various cases. *Prima facie*, a decree will bind only the parties to it or those claiming through them; but there

(1) (1916) 81 M.L.J. 222.
(3) (1909) I.L.R. 33 Mad. 75.
(5) (1918) 36 M.L.J. 106.

(2) (1916) 29 M.L.J. 698.
(4) (1910) I.L.R. 33 Mad. 465.
(6) (1925) 50 M.L.J. 442.

are exceptions to this rule. The Courts have held that in certain circumstances when one who is not the true legal representative of a deceased person is impleaded as his legal representative, then a decree passed against him in his character as the legal representative of the deceased would be binding on the true representative though he is not a party to it. The suit may have been instituted against the wrong legal representative at the very commencement or the wrong legal representative may have been brought on record during the pendency of the suit or after the decree and for purposes of execution. An examination of these cases will show that, in deciding the point, the learned Judges put before themselves the question whether the estate was sufficiently represented by the alleged legal representative on record as the important factor for consideration, and this, they answered in the affirmative, if it was found that the suit was instituted *bona fide* against the alleged legal representative and the decree was obtained without any fraud or collusion between the parties.

In *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*(1), the suit was brought against a widow as the mother and guardian of her son, who was then a minor, to recover arrears of rent due from his deceased father. It was held by the Judicial Committee that the decree obtained against the widow as the legal representative of her husband was binding on the son, who, in law, was the true legal representative of the deceased, though the suit was not prosecuted against him.

This Privy Council decision entirely approved of the decision in *Ishan Chunder Mitter v. Buksh Ali Soudagur* (2). In that case, which is the earliest one mentioned

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(1) (1872) 14 M.I.A. 605.

(2) Marshall Ben. App. Cas. 614.

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in the Reports, it was held that the decree obtained against a Hindu widow for her husband's debt was binding on the son who was not a party to the suit. It would seem from the report that the plaintiff knew of the existence of the son when he sued the widow. The judgment shows that the question for consideration was whether the widow sufficiently represented the estate of the deceased. This is really the point that has to be decided in cases of this description.

In *Kadir Mohideen Marakkayar v. Muthu Krishna Ayyar*(1), the defendant died during the pendency of the suit and only one of his sons was brought on record as his legal representative. It was held that the share of the second son also was bound by the decree in the suit notwithstanding the fact that he was not joined in the suit as one of the legal representatives of his deceased father. The learned judges based their conclusion on the following reasoning :—

“In our opinion a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the Court enters on the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and in the absence of any fraud or collusion the decree passed in such suit will bind such estate.”

It is true that this is not a case where a person was wrongly brought on record as the legal representative, but it lays down a general principle.

In *Khairajmal v. Daim*(2), the Judicial Committee pointed out that the question whether the estate is or is not properly represented is not a mere question of form but of substance. That also was not a case where a wrong legal representative was brought on record in the place of the deceased person, but it was a case in which some of the legal representatives were brought

(1) (1902) I.L.R. 26 Mad. 280.

(2) (1904) I.L.R. 32 Cal. 296 (P.C.).

on record with respect to one of the deceased persons and no legal representative was brought on record with respect to another person. In the case of the one, their Lordships held that the estate was sufficiently represented, while, in the other case, they held that it was not represented at all.

In *Ramaswami Chettiar v. Oppilamani Chetti*(1), the defendant died after the decree and the plaintiff in the course of the execution proceedings brought on record as his legal representative one of two persons who appeared to have a better title at that time. It was held that the sale of properties in execution of the decree with such a person on record would bind the person who was subsequently found to be the true legal representative. The principle on which the decision is based is thus stated by the learned judges :—

“The creditor must, if he is not to be liable to lose his money, be permitted to apply for execution against that one of the rival claimants whom he honestly and reasonably believes to be the legal representative: and if the person so nominated, though it may turn out afterwards that he is not the true legal representative, is yet competent in fact to represent the estate, if his interests in respect of the proceeding in question are identical with those of his rivals, and if he acts without fraud or collusion, it is hard to see any reason why his representation should not be held to be sufficient.”

Later on, speaking of the representation of the estate by the wrong person being brought on record, they observe as follows :—

“His interests were absolutely identical in this matter with those of his rivals and he was better able than they to protect them. There existed, therefore, no reason why if one of the claimants was to represent the estate it should not be he, and no fraud or collusion has been proved in this case to vitiate his representation.

(1) (1909) I.L.R. 33 Mad. 6.

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There is then no good reason why as the person with the best *prima facie* title, and holding possession of the property, Krishnaswamy Panikondar should not be held to have sufficiently represented his natural son's estate in fact."

In my opinion there is no justification for confining the principle enunciated in this decision only to those cases where a wrong representative is brought on record in the course of execution proceedings. The question to be considered whether it arises in the course of execution proceedings or in the course of the suit is this; whether the estate of the deceased person was sufficiently represented by the legal representative who has been actually brought on record. I think the same principle should govern all cases where a wrong representative has been brought on record, whether such representative has been added in the course of the suit or in the course of the execution proceedings. The same consideration should apply also to a case where the suit itself is instituted against the wrong legal representative at the very commencement. The principle of the decision in *Ramaswami Chettiar v. Oppilamani Chetti*(1) has been applied in *Gnanambal Ammal v. Veerasami Chetty*(2), where the suit itself was instituted against a wrong legal representative of the deceased person as in the case before us. Referring to these decisions, SADASIVA AYYAR J. in that case observes as follows:—

"In that same volume (*Ramaswami Chettiar v. Oppilamani Chetti*) a case is reported which was argued by eminent vakils on both sides and it was held therein that a decree-holder may select from among several rival claimants to the estate of his judgment-debtor any one whom he believes honestly to have the best *prima facie* title as legal representative and that that representation in the absence of fraud or collusion will be sufficient to validate sales held in execution and to convey the

(1) (1909) I.L.R. 33 Mad. 6.

(2) (1915) 29 M.L.J. 698.

title of the deceased judgment-debtor through such sales. The broad principle of the decision in that case clearly seems to me to apply to the present case."

If the principle of the decision in *Ramaswami Chettiar v. Oppilamani Chetti*(1) applies to the case before us, as I think it does, there can be no doubt, having regard to the findings given above, that the decree against the widow, who has a *prima facie* title to represent the estate and whose interests in respect of the suit are identical with those of the plaintiff, must be considered to be binding on the plaintiff. It was argued that the decisions in *Ramaswami Chettiar v. Oppilamani Chetti*(1) and in the prior cases are no longer good law, as the wording of section 368 of the old Code which was in force when those cases were decided has been altered in the present Code. Order XXII, rule 4, is no doubt differently worded, but I do not think it was intended to introduce any new principle by the alteration in the language. As pointed out in *Dip Narain Rai v. Iachman Upadhiya*(2), Order XXII, rule 4, reproduces with no change in principle section 368 of the old Code as amended in 1888.

In *Kaliappan Servaikaran v. Varadarajulu*(3), a case very much relied on by the respondent, a suit was brought against A, the widow of the deceased person as his representative, and a decree was passed directing the recovery of the sum sued for from the estate of the defendant's deceased husband in her hands. Another person B brought a suit against A to establish his title to the property of the deceased and having obtained a decree in his favour took possession of the estate. The decree-holder then sought to execute the decree against B under section 252 of the Code of Civil

(1) (1909) I.L.R. 33 Mad. 6.

(2) (1925) I.L.R. 47 All. 468.

(3) (1906) I.L.R. 33 Mad. 75.

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Procedure. It was held that the decree was not against the estate but against *A* the legal representative and was capable of execution only against *A* and her representatives. Thus stated, the decision, no doubt, supports the respondent, but SADASIVA AYYAR J. points out the true scope of this decision in *Gnanambal Ammal v. Veerasami Chetty*(1) to be this: "What was decided in that case was that the true legal representative cannot, after the decree, be brought on the record for the purpose of execution and that the deceased debtor's property in his hands cannot be attached and sold in that same suit." Further on, he points out that the decision is not to be taken as having decided that, "if the wrong representative had been *bona fide* added or sued and a decree had been obtained and the property of the deceased had been brought to sale, the sale itself was invalid, and could not affect the estate of the deceased" (see page 703). If the decision is not read in this way, it really will not be reconcilable with the decisions in *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*(2) and *Ramaswami Chettiar v. Oppilamani Chetti*(3). In this view, it is clear that this decision does not support the respondent. Further, in the present case, the respondent has not obtained possession of the properties in execution of his decree. The decision in *Srinivasa Ayyangar v. Kanthimathi Ammal*(4) followed *Kaliyappan Servaikaran v. Varadarajulu*(5), and does not require further comment.

In *Gnanambal Ammal v. Veerasami Chetty*(1), the case just referred to, where a creditor of the estate, ignorant of the true state of affairs, sued the widow in possession and the illegitimate son who would have

(1) (1915) 29 M.L.J. 698.

(8) (1909) I.L.R. 33 Mad. 6.

(2) (1872) 14 M.I.A. 605.

(4) (1910) I.L.R. 38 Mad. 465.

(5) (1909) I.L.R. 33 Mad. 75.

been the legal representatives but for a will left by the debtor under which the first defendant was constituted executor and the plaintiff a legatee, and obtained a decree and in execution, the property in possession of the widow was purchased by a stranger, it was held that the sale was binding against the plaintiff. In that case the suit itself was instituted against the alleged legal representative of the deceased person and that legal representative, his widow, was in possession of one item of his properties. The question was whether the decree obtained against the widow which related to this item was binding on the true heir. The learned Judges relied upon *Ramaswami Chettiar v. Oppilamani Chetti*(1) and the decision of the Privy Council in *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*(2) in support of their conclusion that the sale was binding against him and in doing so they referred to the "broad principle" of the decision in *Ramaswami Chettiar v. Oppilamani Chetti*(1) already referred to. They also rely on the definition of the term "legal representative" in the new Code of Civil Procedure. I am mentioning this circumstance to show that the decision in that case was based, not solely on the ground that the widow was a legal representative of the deceased person as being in possession of the item of properties involved in the suit, but was based also upon the broad principle that, if the wrong heir is sued *bona fide* and the decree is not tainted with fraud and collusion, then the true heir is also bound by that decree. The words "I would further remark" in paragraph 2 at page 703 would show that the definition of "legal representative" in the new Civil Procedure Code was relied on only as an additional reason in support of

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(2) (1872) 14 M.I.A. 605.

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the conclusion arrived at by applying the general principle enunciated in *Ramaswami Chettiar v. Oppilamani Chetti*(1) and *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*(2). This decision was referred to in *Bachu Soorayya v. Toomuloori Chinna Anjaneyalu*(3), to which also SADASIVA AYYAR J. was a party. The judgment in this case also makes it clear that the new definition of "legal representative" was relied on only as a supplemental ground in support of the conclusion arrived at in *Gnanambal Ammal v. Veerasami Chetti*(4). These two cases, *Gnanambal Ammal v. Veerasami Chetti*(4) and *Bachu Soorayya v. Toomuloori Chinna Anjaneyalu*(3), do not in my view support the proposition contended for by the respondent's Counsel that, if the decree in question can be held to be binding, it will be binding *only* with respect to items 3 and 4 which are in the possession of the widow, for these cases approve the broad principle stated in *Ramaswami Chettiar v. Oppilamani Chetti*(1) and *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*(2), which do not limit the application of the principle in the way contended for by the respondent.

The decision in *Madavarayudu v. Subbamma*(5) is the case strongly relied on by the respondent in support of his plea that the decree passed against the wrong heir of the deceased *will not in any circumstance* be effective against the true heir. If that decision lays down that proposition, then certainly the decision is opposed to the prior decisions of this Court; but an examination of that case will show that it is perfectly consistent with the prior decisions of this Court and that it does

(1) (1909) I.L.R. 33 Mad. 6.

(3) (1918) 36 M.L.J. 106.

(5) (1916) 31 M.L.J. 222.

(2) (1872) 14 M.I.A. 605.

(4) (1915) 29 M.L.J. 698.

not support the respondent. In that case when the defendant mortgagor against whom the suit was instituted died, his divided brother's son was brought on the record as his legal representative while the true legal representative was his daughter. No reason was assigned as to why she was ignored. The person brought on record as the legal representative was practically a stranger. In the circumstances the learned Judges held that the decree obtained against such a person cannot be binding on the true legal representative. In the course of their judgment, the learned Judges after referring to *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Sing*(1), make the following observation:—

"In any case the widow against whom the proceedings were continued had a 'present interest' to protect and consequently that decision is within the principle enunciated in *Ramaswami Chettiar v. Oppilamani Chetti*(2)."

This shows that they approved of the decision in *Ramaswami Chettiar v. Oppilamani Chetti*(2), which lays down the broad principle I have already referred to. The decision in *Madavarayudu v. Subbamma*(3) must be read with reference to its special facts. So long as the daughter, the true legal representative, was alive, the person who was actually made legal representative in the suit had no interest in the property, and no reason was given as to why the daughter, the real legal representative, was overlooked by the plaintiff. *Prima facie* a decree obtained against a person in such circumstances can never be described as a decree obtained *bona fide* and without fraud or collusion between the parties to the suit. The decision in *Angadi Mallappa v. Neelana Gowdra Kare Gowd*(4) does not go further

(1) (1872) 14 M.I.A. 605.

(3) (1916) 31 M.L.J. 222.

(2) (1909) I.L.R. 33 Mad. 6.

(4) (1925) 50 M.L.J. 442.

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than *Madavarayudu v. Subbamma*(1), and must be read with special reference to the facts of the case. Attention may be drawn to the observations of SRINIVASA AYYANGAR J. about this decision in *Kolaremathu Amma v. Madavi Amma*(2). If a person, who is practically in the position of an absolute stranger, and who has no sort of right to represent the deceased, is made a party to a suit, and a decree is obtained against him as representing the deceased, such a decree, however *bona fide* the suit may be, cannot bind the real heir. This is all what the decisions in *Madavarayudu v. Subbamma*(1) and *Angadi Mallappa v. Neelana Gowdra Kare Gowd*(3) mean. These decisions cannot possibly apply to the case of a widow, who in the absence of a will, is the legal representative of her deceased husband and against whom a decree has been obtained *bona fide* by the creditor.

Many of the above decisions have been fully considered in a recent decision of this Court in *Sanna Govappa v. Rodda Sanna Govappa*(4), in which the learned Judges have enumerated all the circumstances in which a decree obtained against the wrong heir of a deceased person can be considered effective against the true heir who was not made a party to the suit (see pages 783 and 784). Various decisions of single Judges of this Court and a few decisions of other Courts, *Garapati Gangaraju v. Pendyala Somanna*(5), *Narasimaiah v. Jawantharaj Sowcar*(6), *Abdulla Sahib v. Vageer Beevi Ammal*(7), Second Appeal No. 210 of 1924, Second Appeals Nos. 1155 of 1924 and 757 of 1925; *Lalsa Rai v. Udit Rai*(8), *Premraj v. Javarmal*(9), *Pukhraj Jeshraj v.*

(1) (1916) 31 M.L.J. 222.

(3) (1925) 50 M.L.J. 442.

(5) (1926) 98 I.C. 618.

(7) (1928) A.I.R. Mad. 1199.

(2) (1927) M.W.N. 894.

(4) (1928) 30 L.W. 778, 781.

(6) (1928) A.I.R. Mad. 159.

(8) (1923) 75 I.C. 114.

(9) (1912) 15 Bom. L.R. 41.

Jamsetji Rustum(1), and *Jagarnath v. Mt. Bibi Amir-un-nissa*(2) were brought to our notice. But having regard to the cases above discussed which are decisions of this Court by Benches of two Judges I do not think it is necessary to examine them.

Now to sum up, the widow who was sued as the legal representative in Civil Suit No. 81 of 1921, was, but for the will, the true legal representative of the deceased; she was also in possession of at least two items of his properties. Her interests in defending the suit were identical with those of the plaintiff-respondent. The suit was instituted without any fraud or collusion between the parties. No more sum than was properly due from the deceased was claimed in that suit and as we have now found, the decree was obtained *bona fide* and without any fraud or collusion. In these circumstances, it must be held that according to the decisions of this Court the widow sufficiently represented the estate of the deceased in Civil Suit No. 81 of 1921 and that the decree obtained in it and the execution proceedings are binding on the plaintiff in respect of all the four items of the property involved in the present suit.

It was lastly argued that with reference to section 52 of the Transfer of Property Act, the attachment and sale of the properties in execution of the decree in Civil Suit No. 81 of 1921 should not be given effect to, having regard to the fact that the suit was decided during the pendency of Original Suit No. 65 of 1921 instituted by the plaintiff. This point was not raised in the lower Court and does not seem to have been ever raised in any of the cases discussed above. In my view, the argument is clearly untenable. If as we have found, the widow was properly sued as the legal representative of the

(1) (1926) I.L.R. 50 Bom. 802.

(2) (1928) A.I.R. Patna 197.

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deceased Parthasarathi in Civil Suit No. 81 of 1921 and if she sufficiently represented his estate, it is clear that the decision in that suit cannot affect the rights of the present plaintiff in any way, for he claims the property only as the legal representative of the deceased Parthasarathi, and the interests of both the widow and himself are identical as regards the subject-matter of the litigation in Civil Suit No. 81 of 1921. The decision in that suit being in effect a decision against the plaintiff himself, it is difficult to see how that decision can affect his rights as the legal heir of the deceased as declared in Original Suit No. 65 of 1921.

In the result, both the appeals are allowed with costs here and in the lower Court. In the circumstances of this case, I hold that the next friend shall also be liable with the plaintiff for costs.

REILLY J. — This appears to me a vexatious suit. It is admitted that the principal of the debt, for which the firm, called defendant 1 in this suit, got a decree in Civil Suit No. 81 of 1921 on the file of the High Court, was due from the estate of Parthasarathi Mudali. I agree that we have no sufficient reason to differ from the findings of the learned Subordinate Judge that the interest included in that decree was also due from Parthasarathi and that the part of Parthasarathi's property which was sold in execution of that decree was not sold for an inadequate price. The result is that for Parthasarathi's debt a not excessive part of Parthasarathi's estate has been sold in execution. That can have done no harm to the plaintiff, who is Parthasarathi's residuary legatee. But the plaintiff is trying to upset the execution sale and to escape the payment of the debt on the ground that defendant 1 in Civil Suit No. 81 of 1921 did not implead Parthasarathi's proper

representative, as he impleaded Parthasarathi's widow, Sengalani Ammal, instead of the plaintiff. The learned Subordinate Judge has found that defendant 1 was guilty of no fraud or collusion in the matter, and indeed, though fraud and collusion were alleged in the plaint, they were not properly pleaded and the allegations in that respect might well have been ignored. The learned Subordinate Judge has also found that defendant 1, when the firm brought the suit, did not know that Parthasarathi had left a will. Nevertheless he has found that the firm did not bring the suit against the widow as Parthasarathi's legal representative in good faith because they did not make sufficient inquiry before doing so. I agree that that finding is wrong. Wills are not yet so common among the country-people of this Presidency that a creditor whose debtor dies can be expected to inquire whether the debtor has left a will and what its dispositions are, if no one gives him information that a will has been made. In this case the creditor found that the debtor had left a widow but no children, that the widow was in possession of the debtor's shop and its contents and that she made several part-payments towards the debt. The will, which was eventually found to have been validly made by Parthasarathi, was not mentioned in any Court until six months after Parthasarathi died and was not then brought to defendant 1's notice. In the circumstances defendant 1 appears to have acted in good faith in making the widow Parthasarathi's representative in Civil Suit No. 81 of 1921, and the extravagant suggestions which have been made before us that defendant 1, a firm of very wealthy Guzarathi merchants in Madras, had a motive for suing a wrong representative appear to me baseless. And, if defendant 1 had pushed inquiries further, what would have been

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discovered? It would have been found that six months after Parthasarathi's death the minor plaintiff's father on his behalf had asserted in answer to the widow's application to the District Court of North Arcot for a succession certificate that Parthasarathi had left a will but had made no application for letters of administration: the widow had denied the genuineness of the will, and the District Judge had given her a succession certificate to collect amounts due to Parthasarathi's estate: the plaintiff through his father had then filed a suit, Original Suit No. 65 of 1921 in the Vellore Subordinate Judge's Court, against the widow and two others for a declaration that he was entitled to Parthasarathi's property as residuary legatee under the will and for the recovery of Parthasarathi's property from them. If defendant 1 had known all that, the firm might still reasonably have maintained that, pending that litigation, the proper person for them to sue was Parthasarathi's widow, to whom the District Judge had issued a succession certificate; and such a choice among possible representatives of Parthasarathi could not have been attacked as improper.

But it is urged for the plaintiff that it has turned out subsequently, as he eventually succeeded in Original Suit No. 65 of 1921, that the widow was not Parthasarathi's representative, and therefore the decree obtained by defendant 1 in the High Court suit is ineffective. I may remark that even now in strictness there is no one who can be sued as completely representing Parthasarathi's estate, as no one has ever applied for letters of administration. But, though it has turned out subsequently that the widow has no right to Parthasarathi's property, she was sued by defendant 1 in good faith, and at that time she had an existing interest to defend that suit—indeed she was quite as much interested

to do so as the plaintiff would have been. Then what ground have we for saying that a decree obtained against her as Parthasarathi's representative for a debt due from Parthasarathi is not binding on Parthasarathi's estate? The principle in such cases appears to me to be found in the *Durbhunga case*(1). But, as the facts of that case are rather obscurely stated and have often been misunderstood in some particulars, I think it is better to refer to *Ishan Chunder Mitter v. Buksh Ali Soudagur*(2), with which their Lordships of the Privy Council say in the *Durbhunga case*(1) they entirely agree. In that case a decree was obtained against a Hindu widow for her husband's debt, though he had left a son. It was held that the sale of her husband's property in execution of that decree was valid and bound the son. It does not appear that the widow ever set up any right against her son, and the report shows that the plaintiff knew of the son's existence when he chose to sue the widow. What PRACOCK C.J. emphasized in that case was that the debt was her husband's and the property sold was her husband's. The widow was treated as having sufficiently represented her husband's estate. In many later cases the essential question whether the deceased's estate has been sufficiently represented appears to have been obscured by other considerations, and legal representatives have been treated as if it were their own rights and not the rights of the person whom they represent that were in question. I agree with my learned brother that the proper principle is to be found in *Kadir Mohideen Marakayyar v. Muthu Krishna Ayyar*(3), *Ramaswami Chettiar v. Oppilamani Chetti*(4) and *Gnanambal Ammal*

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(1) (1872) 14 M.I.A. 605.
(3) (1902) I.L.R. 26 Mad. 230.

(2) Marshall's Ben. App. Cas. 614.
(4) (1909) I.L.R. 33 Mad. 6.

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v. Veeraswami Chetty(1). I do not think it necessary to discuss cases of the Bombay High Court or other Courts which adopt the view that the crucial question is whether the right heir or successor is on record, not whether the deceased's estate is sufficiently represented. And to my mind the question whether the representative on record is actually in possession of any of the deceased's property is not of importance, except as throwing light on the question of the plaintiff's good faith. If a plaintiff in good faith sues a person who appears to him to be the proper legal representative of his deceased debtor and that representative has an existing interest to defend the estate and there is no fraud nor collusion in the proceedings, then a decree so obtained is binding on the deceased's estate whoever may be actually entitled to the residue of the estate after the debts have been paid. That appears to me to be both good sense and good law as laid down by the Privy Council.

It has been urged that the change of wording between section 368 of the Code of Civil Procedure of 1882 and Order XXII, rule 4, of the present Code affects the validity of the old decisions on the subject. That contention appears to me to be entirely mistaken. The words of the Code of 1882 and that of 1859 may perhaps be taken to have given more freedom to a plaintiff in bringing on record the representative he chose and the words of the present Code to throw more responsibility in the matter on the Court. But that certainly cannot make a decree obtained after impleading a representative approved by the Court of less effect against the deceased's estate.

It has been suggested for the plaintiff that, as the decree of the High Court in Civil Suit No. 81 of 1921

(1) (1915) 29 M.L.J. 698.

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only directed the widow to pay "out of the assets of her deceased husband, Parthasarathi Mudali, come to her hands," at any rate it cannot be executed against any property not in her possession, and that, as out of the four items sold in execution only items 3 and 4 were in her possession, the sale of items 1 and 2 in execution must be invalid. But that form of decree, which is the usual form of decree against executors and administrators, is adopted only to make it clear that the decree is not to be executed against the representative, executor and administrator personally and that he is not directly responsible under the decree for property of the deceased which he has not yet recovered. It does not prevent the decree being executed against property of the deceased which has not been reduced to possession by the representative, executor or administrator. Items 1 and 2 in this case are admittedly Parthasarathi's property, and in my opinion they could be validly sold in execution of the decree in Civil Suit No. 81 of 1921.

The last contention for the plaintiff is that, as his suit, Original Suit No. 65 of 1921, was instituted before Civil Suit No. 81 of 1921, the sale in execution of the decree in Civil Suit No. 81 of 1921 is invalidated on the principle of *lis pendens*. That I agree is mistaken. Although in Original Suit No. 65 of 1921 the plaintiff incidentally obtained a decree that the widow and other defendants in that suit should deliver possession of items 3 and 4 to him and an injunction restraining them from interfering with his possession of items 1 and 2, the whole basis of his decree was the declaration, for which he sued, that he was the residuary legatee under Parthasarathi's will, that is, that he was entitled to the residue of Parthasarathi's estate after the payment of Parthasarathi's debts and the other legacies. The sale of items 1 to 4 in execution in no

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way affected his right as residuary legatee. The right of Parthasarathi's creditors to the satisfaction of his debts was paramount to the rights of any of the parties to Original Suit No. 65 of 1921 and did not indeed affect their rights.

Finally I may add that, if I had—as I have not—any reason to doubt the technical validity of the sale of items 1 to 4 in execution of the decree in Civil Suit No. 81 of 1921, in my opinion it would still not be proper to make for the plaintiff the declarations which he has sought in this suit that that decree and its execution are null and void against him. The plaintiff is not, as Mr. Viswanatha Ayyar in his argument represented him to be, the owner of Parthasarathi's property. He is merely the residuary legatee, entitled to the remainder of Parthasarathi's estate after all Parthasarathi's debts and the other legacies have been satisfied. It is not for him to say what parts of Parthasarathi's property shall go in satisfaction of his debts. By the execution of the decree in Civil Suit No. 81 of 1921 Parthasarathi's just debt has been paid out of Parthasarathi's property. The plaintiff's interest in the residue of Parthasarathi's estate has not been affected in any way. If the declarations for which he prays and which the Subordinate Judge has made were allowed to stand, defendant 1's just claim would be most seriously delayed and possibly defeated and the plaintiff would obtain a most unjust advantage. Such declarations would in the circumstances be obviously inequitable, and in my opinion no use of judicial discretion could justify them.

I agree that both these appeals must be allowed and the plaintiff's suit dismissed with costs in both Courts. In my opinion the plaintiff should pay the costs of both defendant 1 and defendant 2 (two sets) in both Courts

As I have said, the suit appears to me entirely vexatious. It is the plaintiff's next friend, his father, who is responsible for it. Instead of straightforwardly propounding Parthasarathi's will and applying for letters of administration, under which he would have been bound to pay Parthasarathi's debts, including this debt due to defendant 1, before the plaintiff could touch the estate, he has tried to defeat a creditor by this suit on technical and vexatious grounds. In the circumstances I think the plaintiff's father also should be made personally liable for the costs of defendants 1 and 2 in both Courts. I would suggest that he alone should be made liable for the costs but for the fact that it is represented that he is a man of small means and thereby the defendants might be prevented from realizing their costs in full.

B.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Reilly and Mr. Justice
Anantakrishna Ayyar.*

BALASUBRAMANIA PANDIYA TALAVAR (THIRD
RESPONDENT), APPELLANT

1930,
September 8.

and

SUBRAMANIAN CHETTIAR (PETITIONER), RESPONDENT.*

*Appeal, maintainability of—Order of an appellate Court to
furnish security to the satisfaction of lower Court—Finding
of lower Court in pursuance thereof.*

If in pursuance of an order of the High Court enabling a party to draw a certain amount from a District Court on furnishing security to the satisfaction of the District Court, the District Court makes an order declaring the sufficiency of the security offered, the order of the District Court is not appealable. It makes no difference that the High Court used the words "District Court" instead of "District Judge".

* Appeal against Order No. 204 of 1930.

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APPEAL against the order of the District Court of Tinnevely, dated 2nd day of April 1930, in Execution Applications Nos. 416 and 422 of 1929 in Original Suits Nos. 2 and 3 of 1922.

T. M. Krishnaswami Ayyar (with *T. M. Ramaswami Ayyar*) for appellant.

K. S. Krishnaswami Ayyangar (with *N. Srinivasa Ayyangar*) for respondent.

JUDGMENT.

A preliminary objection is raised that no appeal lies in this case. In Civil Miscellaneous Petitions Nos. 1612, 1613 and 1616 of 1929 RAMESAM and JACKSON JJ. ordered that the respondent in this appeal might draw some amounts from the District Court on giving security to the satisfaction of the District Court. After an elaborate enquiry the District Judge found the security offered sufficient for a certain amount. This appeal is to the effect that the District Judge ought not to have been satisfied that the security was worth so much. No decision has been brought to our notice that an appeal lies in such a matter. On the contrary the principle of *Hoare & Co. v. Morshead*(1) is against it. Without discussing other reasons why the finding of the District Judge that the security offered is worth a certain amount does not come within section 47, Code of Civil Procedure on the ground that the question was left to him by the order that the security must be to his satisfaction we uphold the preliminary objection. In our opinion it makes no difference in this connexion that the words used by the learned Judges were "to the satisfaction of the District Court" instead of "to the satisfaction of the District Judge".

This appeal is dismissed with costs.

B.C.S.

(1) [1908] 2 K.B. 859.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Bardswell.

KUNHI KUTTI ALI AND ANOTHER (DEFENDANTS 2 AND 3),
APPELLANTS,

1930,
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MUHAMMAD HAJI AND OTHERS (PLAINTIFF, FIRST DEFENDANT
AND LEGAL REPRESENTATIVES OF THE PLAINTIFF), RESPONDENTS.*

Marumakkathayam tarwad—Karnavan of—Lease by—Suit by a junior member to set aside—Maintainability of—Civil Procedure Code (Act V of 1908), O. XXVI, r. 10 (3)—Successive commissions on a particular subject, issue of—Practice relating to—Legality of.

Where an alienation by the karnavan of a Marumakkathayam tarwad, which is attacked as fraudulent, improper or detrimental to the tarwad, does not amount to more than a lease, a suit to set it aside by a junior member of the tarwad can only be brought in exceptional circumstances.

A Court, which has issued a commission to deal with a particular subject, should not issue a second commission unless it thinks that the report of the first commissioner is not satisfactory, in which case the earlier commission should be wiped out altogether, and attention should be paid only to what is reported by the second commissioner. It is not at liberty to treat both reports as evidence.

The practice prevalent in Malabar of issuing separate commissions in succession on the same subject without setting aside the previous ones is improper and contrary to what is contemplated by Order XXVI, rule 10 (3) of the Civil Procedure Code, 1908, and should no longer be continued.

Ambi v. Kunhikavamma, (1929) 118 I.C. 293, referred to.

APPEAL against the decree of the Court of the Subordinate Judge of South Kanara in Original Suit No. 55 of 1922.

* Appeal No. 128 of 1925.

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The suit was by a junior member of a Marumakka-thayam tarwad for a declaration that a lease (pattadharam) executed by the first defendant, the karnavan of the tarwad, in favour of the second and third defendants, was not valid and binding on the plaintiff or his tarwad, and for directing the defendants 2 and 3 to deliver possession of the properties to the plaintiff on behalf of the tarwad. The Subordinate Judge, who tried the suit, held that the lease was not binding on the tarwad and directed the defendants to deliver possession of the suit properties to the plaintiff on behalf of the tarwad. The second and third defendants preferred the above appeal.

T. Rangachari (with *P. Govinda Menon*) for appellants.—The suit is not maintainable by a junior member to set aside a lease of lands granted by a karnavan on the ground that it was an improper lease. No such suit will lie. A lease by a karnavan is an ordinary act of management, unlike a kanom: see *Govindan Nair v. Narayanan Nair*(1). A karnavan has higher powers of management than a widow or the manager of a joint Hindu family. A kanom and a melcharth by a karnavan are cases of alienation, and so a suit may lie to set them aside at the instance of a junior member of the tarwad, but no such suit will lie in the case of a lease by the karnavan. Kanoms and melcharths are not in the ordinary course of management. Cases of kanoms and melcharths are not analogous to leases. In *V. K. Packi v. V. K. Muhammad*(2), *PHILLIPS J.* held that an anandravan cannot sue unless there are very special circumstances, such as fraud, on the part of the karnavan. There is a distinction as to the powers of the karnavan over the corpus and the income of the tarwad property. See *Abdurehman Kutti Haji v. Hussain Kunhi Haji*(3). Even in an ordinary Hindu family, a junior member cannot set aside a lease by the manager as improper; he can only sue for partition. It may be a ground in some cases for suing for the removal of the karnavan from his position as such.

(1) (1912) 23 M.L.J. 706 (719).

(2) A.I.R. 1926 Mad. 160.

(3) (1919) I.L.R. 42 Mad. 761, 770.

B. Sitaram Rao (with *K. P. Sarvothama Rao*) for third respondent, and *B. Pocker* for second respondent:—A junior member can sue to recover property improperly alienated by way of a lease even without seeking to set it aside, as in the cases of kanoms or melcharths improperly effected by a karnavan. See *Unni v. Kunchi Amma*(1), *Chappan v. Raru*(2) and *Manavadan v. Sreedevi*(3). A lease is in the same position as a kanom and a melcharth. In both cases the transfer is invalid, if it is not beneficial to the tarwad or is in fraud of the rights of the tarwad. Here the lease is at a very low rent to members of the first defendant's tavazhi and has been granted to benefit them to the detriment of the other members of the tarwad.

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JUDGMENT.

The suit under appeal has been brought as a representative suit by a junior member of a Marumakathayam tarwad for a declaration that the pattadharam granted on 18th July 1922 by defendant 1, who is the present karnavan, is not valid and binding on the plaintiff, his tarwad or the suit properties and for delivery of the suit properties to the plaintiff on behalf of the tarwad. The tarwad consists of two branches, the descendants of two women, Aliathe and Birambi, who were sisters. The defendants are all of the branch of Birambi while the plaintiff belongs to that of Aliathe and claims to be the senior anandravan, though this claim is challenged. The plaintiff asserts that the suit pattadharam has been granted by defendant 1 to two members of his own branch with a view to defrauding the plaintiff of the benefit of the great improvements which he has effected to the suit lands, while it prejudices the tarwad, on whose behalf the suit is brought, in that the amount of rental fixed under it is far too low. The Court below has found that the suit pattadharam was

(1) (1890) I.L.R. 14 Mad. 26.

(2) (1912) I.L.R. 37 Mad. 420.

(3) (1926) I.L.R. 50 Mad. 431.

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not executed by defendant 1 in the *bona fide* exercise of his powers of management as karnavan of the tarwad but for the purpose of enriching members of his own tavazhi at the sacrifice of the interests of the entire tarwad; and it has therefore granted a decree to the plaintiff as prayed for. Against this decision defendants 2 and 3 are appealing.

It has been urged for the appellants and for defendant 1 as second respondent that the suit is not maintainable on two grounds. The former of these grounds is that leave has not been properly obtained by the plaintiff to sue in a representative capacity. This, however, is a point that we cannot allow to be taken. The plaintiff definitely states in paragraph 14 of his plaint that he has obtained the leave of the Court to sue on behalf of the tarwad and this recital has not been challenged in any written statement, nor was any issue taken as to it. We have to presume in these circumstances that there was no irregularity in the proceedings in the trial Court and that the plaintiff was properly permitted to bring the suit as a representative one.

The other ground is more important. It is that the grant of the pattadharam by defendant 1 was an ordinary act of management by the karnavan, in the exercise of his legitimate powers; and that consequently no suit can be brought by a junior member of the tarwad to have it set aside but that, if the view of the learned Subordinate Judge in this particular instance as to the nature of the act of the karnavan that is in question is correct, then the proper remedy was to bring a suit for the karnavan's removal. There is no dispute as to the correctness of the view expressed in the lower Court's judgment that, on the face of it, the suit pattadharam, which grants a kuzhikanom lease for a

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period of twelve years, is an ordinary act of management within the karnavan's competence. Stress is laid on *Abdulla Koya v. Eacharan Nair*(1), in which a Bench of this Court has remarked, in the matter of a suit as to a melcharth granted, as it was contended, improperly, by a karnavan—

“No doubt if a karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the tarwad, this would be a ground for removing him from the karnavastanam, but we do not think that a particular lease can be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the tarwad. To fetter a karnavan's discretion in this way would be to render his whole management of the property liable to criticism and reversal at any moment.”

Again, in *Kizhakkumbrath Moidin v. Koyambrath Murkothakandi*(2), it has been held by a Bench of this Court that—

“where a kanom is executed by the karnavan of a Malabar tarwad for the purpose of paying off a debt binding on the tarwad, the Court is not required to investigate with meticulous care whether the transaction was a prudent one or whether there was necessity for entering into such a transaction for the purpose of raising the necessary amount.”

On the other hand a number of decisions have been quoted to us to show that, in the case at any rate of kanoms that have been improperly granted, the Court will interfere, and that at the instance of junior members of a tarwad. One of these is *Unni v. Kunchi Amma*(3), which dealt with a suit brought to recover property that had been improperly alienated by a karnavan under a kanom. The point, however, for decision in that case was one of limitation while the kanom had been executed by a previous karnavan who had been removed from office, and the suit was brought by two persons who claimed to have been

(1) (1917) 35 M.L.J. 405.

(2) (1927) 108 I.C. 788.

(3) (1890) I.L.R. 14 Mad. 26.

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appointed managers by a decree of Court. In *Anantan v. Sunkaran*(1), it was held that junior members of a tarwad could maintain a suit against their karnavan, senior anandravan and others for a declaration that a kanom was invalid and for recovery of properties. In that case, however, the kanom was granted not by the karnavan but by the senior anandravan to whom the karnavan had delegated the management under a karar, and emphasis was laid on the fact that the time for filing the suit had almost expired and that the karnavan, who was joined as a defendant, had failed to sue. It is to be observed that in *V. K. Packi v. V. K. Muhammad*(2), it has been remarked that this decision, in so far as it suggests the broad proposition that in all circumstances the junior members will be entitled to sue when the karnavan has failed to do so seems to be opposed to all the prior and subsequent decisions, but that on the actual facts the case came within the accepted principle that the anandravan may be permitted to sue when the karnavan has disabled himself from bringing such a suit, that is, when the circumstances are exceptional. *Vatavatta Nair v. Kenath Puthen Vittil Kuppattan Menon*(3) deals with a suit brought by a senior anandravan for having set aside a kanom granted by the karnavan in office who was defendant 2. The suit was allowed on the principle that a kanom granted, as had been in that suit, by way of renewal of an earlier kanom the term of which had not expired, was not binding on the tarwad except on proof of necessity or benefit to the tarwad which proof was lacking. *Chowkaran Kunhi Pocker v. Chowkaran Malikaimal Valia Bappotty*(4) is a case in which a junior member of a tarwad successfully sued to recover properties for which a kanom had been

(1) (1890) I.L.R. 14 Mad. 101.
(3) (1918) 36 M.L.J. 630.

(2) A.I.R. 1928 Mad. 150.
(4) (1919) 37 M.L.J. 544.

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given, but it was a case in which the kanom had been granted by a previous karnavan. The plaintiff in that case had obtained permission to sue on behalf of all the members. In *Koppassa Menon v. Kalliani Ammal*(1), the senior anandravan brought a suit to set aside a kanom that had been renewed prematurely by the karnavan in office who was a defendant, and lost the suit not because he had no right to maintain it, but because it was held that in the circumstances the renewal was proper.

It would thus appear that a junior member of a tarwad may bring a suit to set aside even a kanom that has been executed by a karnavan who is still in office, but that he can only do so in exceptional circumstances is shown by the decision in *Ottaparakkal Thazhath Soopi v. Charichal Pallikkal Mariyamma*(2). There it was held that, except in very special circumstances, where the karnavan is proved to be guilty of gross misconduct and collusion, it is not competent to the junior members of the tarwad to sue for redemption of a kanom granted by their karnavan.

Bikutti v. Kalendan(3) deals with a case of a deed of gift and holds that junior members of a tarwad could bring a suit for the cancellation of such a deed, but this was in exceptional circumstances in that the karnavan, who was defendant 1, could not maintain the deed in that it had been granted by himself.

P. P. Kunhamod Hajee v. P. P. Kuttiath Hajee(4) indicates what is an appropriate remedy in the event of a grossly improper lease being granted by the karnavan in office, what it finds being that the grant of a very improvident lease, following on a course of conduct pursued for some years, in which the interests of the

(1) (1923) 45 M.L.J. 258.

(3) (1890) I.L.R. 14 Mad. 267.

(2) (1919) 38 M.L.J. 207.

(4) (1881) I.L.R. 3 Mad. 169.

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tarwad were persistently disregarded, is sufficient ground for removing the karnavan from the management of the tarwad property. That this is an appropriate remedy is also indicated in *Abdulla Koya v. Eacharan Nair*(1), to which reference has been made above. No case has been shown to us in which a suit has been brought successfully by a junior member of a tarwad against his karnavan, praying for such relief as has been granted to the plaintiff in respect of such an ordinary act of management as the granting of a twelve-year kashikanom lease. Our attention has been called to *Chappan v. Raru*(2), in which it has been remarked that the property of a tarwad is vested in its members, who, when the karnavan makes an alienation that is not binding on them, can sue to recover possession and may do so on their title without even asking for the alienation to be set aside, it being for the alienee to prove that the alienation was binding on them. That, however, was a case in which the alienation by the karnavan was by way of a mortgage. The case for the plaintiff (first respondent) in this connection receives most assistance from some remarks of JACKSON J. in *Manavadan v. Sredevi*(3). In his judgment in that case the learned Judge has stated that the rights of the junior members of a tarwad are confined to suing for maintenance, to suing for cancellation of any transaction entered into by the karnavan to the detriment of the family and to suing for his removal. The junior members sued in that case for the removal of the karnavati on allegations of fraud and misappropriation of family funds and it was held that they could not, as a matter of right, when suing for such relief, ask for the karnavati to render general

(1) (1917) 35 M.L.J. 405.

(2) (1912) I.L.R. 37 Mad. 420.

(3) (1926) I.L.R. 50 Mad. 431.

accounts. As a matter of fact, the karnavati, a woman, ceased in the course of the suit to occupy her position as such because by the rule of family succession she moved to a higher sphere. In such circumstances it was found that the plaintiffs had no cause of action. They were entitled to sue for a decree removing defendant 1 from management and to contend that, if she gave no account by way of rebutter of their proved allegations, such a decree should be granted and defendant 1 should be removed. As, however, the removal was already an accomplished fact such a contention would be idle. The judgment then goes on to remark that the plaintiffs might have brought their suit in a different way that each proved defalcation might be set aside and defendant 1 held liable. These remarks, however, as to the kind of suits which junior members of a tarwad are entitled to bring, are by the way and have no bearing on the point which the case actually decided, and, in any case, they have to be considered along with what has been laid down in the other decisions to which reference has been made already. These make it clear that when the alienation, which is attacked as fraudulent, improper or to the detriment of the tarwad, does not amount to more than a lease, a suit to set it aside can only be brought in exceptional circumstances. It is unnecessary in this particular case to say more than this, apart from reiterating that no precedent has been shown to us for such a relief as has been granted in this suit, in a suit framed as this has been, as we are satisfied that in this case no circumstances have been shown to exist which would justify its being regarded as one in which the plaintiff is entitled to exceptional treatment.

The plaintiff asserts that the suit pattadharam is to the prejudice of the members of the tarwad

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generally and the main consideration from this point of view is whether the rent fixed under Exhibit XI is a reasonable one or is one, as the Court below has found it to be, that is quite inadequate. The plaintiff asserts that a good many of the suit items have been assigned for the maintenance of his branch by a former karnavan and that the assignment has been continued by subsequent karnavans, but the learned Subordinate Judge does not give any clear finding as to there having been such a grant for maintenance nor is the point one of great importance. Even too, if some of these suit lands have been granted to plaintiff's branch for maintenance, their being leased out under the suit document will matter little as long as a proper rental has been obtained for them which can be used for the purpose of such maintenance. We may, however, remark that the evidence as to there having been such a grant is not entirely convincing. Plaintiff himself as P.W. 2 shows that the grant was not for the whole branch to which he belongs but only to his particular sub-tavazhi, and he admits that there was no such grant to the other two sub-tavazhis of his branch and that the grant which he sets up was made orally only and was not reduced to writing. Further there is the matter of a house. This house does not stand on one of the items which is said to have been allotted for maintenance but on what was a waste plot. On this plot there is a house called Kadinhamoola which the plaintiff says is a tarwad house occupied by himself and the four daughters of his deceased sister. He declares that there was formerly a small house and that he has had this house built, while on the defence side there is evidence that this house was not built by him and that he does not himself live in it. This, however, is again a matter of no very great importance as it is clear even

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from the evidence of plaintiff himself, that there are other places of residence available for his branch and he has not stated that no provision can be made, or is being made, by the karnavan for his residence in the event of his leaving this house. According to D.W. 3 there are three other houses available for his branch.

We come, then, to the question of rental in which connection the learned Subordinate Judge has taken largely into consideration the reports of two commissioners, both of whom have reported on the probable yield of the suit lands. We have, in the first place, to remark that the lower Court should not have issued two separate commissions to deal with one and the same subject and to treat the reports of both the commissioners as evidence in the case. The exact circumstances in which he came to issue the second commission do not appear from the record that has been placed before us, but the second commission should not have been issued, unless it was thought that the report of the first commissioner was not satisfactory, in which case the earlier commission should have been wiped out altogether and attention should have been paid only to what was reported by the second commissioner. Instead of this the learned Subordinate Judge has balanced the report of one commissioner against that of the other and has expressed a preference for the views of the first commissioner. In taking this course he has acted with great impropriety and contrary to what is contemplated by Order XXVI, rule 10 (3) of the Civil Procedure Code. Though the practice which he has adopted may be one that is prevalent in Malabar, it is one that should no longer be continued as has been pointed out in clear terms by this Court in *Ambi v. Kunhikavamma*(1).

(1) (1929) 118 I.O. 296.

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Apart, too, from this consideration, the report of neither commissioner deserves any attention as neither of them has come to any independent conclusion of his own, but each of them has only made a collection of statements of what he had learned on enquiry from others. The first commissioner made his enquiries as to the rent from some tenants who happened to be present and as to the yield from some neighbours. The second commissioner got most of his information from defendant 3, though he also questioned the tenants, but without reducing their answers to writing. In these circumstances their reports are not of the slightest value.

[Their Lordships then dealt with the evidence as to the adequacy of the rent and proceeded as follows:—]

We do not, however, propose to discuss these documents as they would only require consideration if the plaintiff had made out an exceptional case of gross betrayal of the interests of the tarwad as a whole. This, however, he has quite failed to do.

A suggestion has been made that a third commission should be ordered to be issued but it is one that does not appeal to us. This is really not a case in which a commission such as was ordered was necessary. What was required was evidence as to the yield of the lands from persons with local knowledge of the conditions. The plaintiff has had ample opportunity of letting in such evidence and has not availed himself of it. There is no reason for giving him any further chance of adducing any kind of evidence.

The result, then, is that the appeal succeeds. The decree of the lower Court is reversed and the suit is dismissed with costs to the defendants 1, 2 and 3 in this Court and in the Court of first instance.

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

In re NANDIPATI RAMIREDDI AND ANOTHER
(ACCUSED), PETITIONERS.*

1930,
December 17.

*Criminal trial—Practice—Accused persons anticipating defence
—Petitions to trial Court and written orders thereon—
Revision.*

The practice of accused persons before they are charged and put upon their defence anticipating their defence by petitions on which the trial Court passes written orders is misconceived. They must wait till they are charged before they defend themselves; and if they are convicted their first remedy in most cases will be by way of appeal.

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 Sub-Magistrate of Pamarru, dated 1st December 1930, and made in Calendar Case No. 228 of 1930.

A complaint was preferred against the accused under sections 447, 323 and 325 of the Indian Penal Code in the Court of the Sub-Magistrate of Pamarru, Kistna District. A petition was filed by the accused praying for the examination of certain witnesses to prove that the offences were compounded. The complainant was absent and after hearing the evidence of two witnesses cited by the accused, the Court found that there was no completed composition of the offences under section 345 of the Code of Criminal Procedure and dismissed the petition. Against that order of

* Criminal Revision Case No. 914 of 1930.

RAMISREDDI,
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dismissal a Criminal Revision Petition was filed in the High Court praying the High Court to revise the order. The case came on for admission.

V. Pattabhirama Sastri for petitioners.

JUDGMENT.

It seems that an entirely wrong system of procedure is developing in the lower Courts. Accused persons before they are charged and put upon their defence anticipate their defence by petitions on which the trial Court writes written orders, and these are then brought up on revision. The procedure is quite misconceived. An accused person must wait till he is charged before he defends himself, and if he is convicted his first remedy is in most cases by way of appeal. At this stage there is no room for revision.

The Criminal Revision Petition is dismissed.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Sundaram Chetti.

1930,
July 28.

In re VELIVALLI BRAHMAIAH AND TWO OTHERS
(ACCUSED NOS. 1 to 3), PETITIONERS.*

Code of Criminal Procedure, 1898, sec. 265 (2)—Judgment of a Bench of Magistrates—Necessity for signature—Compliance with mandatory provision of section—One member initialling judgment, others signing—Whether an irregularity cured by sec. 537 of Code—Practice of Bench granting copies of judgments with signature of presiding magistrate alone.

A judgment of a Bench of Magistrates has to be signed as required by section 265 (2) of the Code of Criminal Procedure, and the requirements of public policy necessitate the writing of the full name of the Magistrate signing the

*Criminal Revision Case No. 990 of 1929.

judgment, and the mere putting in of the initials is not a sufficient compliance with the mandatory provision of section 265 of the Code.

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The initialling of a judgment by one of the members constituting the Bench, the other members signing it, is not an irregularity which under the amended Code (XVIII of 1923) can be cured by section 537 of the Code. It affects the validity of the proceeding and vitiates the conviction and sentence.

The practice of Courts of Benches of Magistrates granting copies of their judgments with the signature of the presiding Magistrate alone copied deprecated.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the First Class Bench of Magistrates at Guntūr in Summary Trial No. 879 of 1929.

V. Pattabhirama Sastri for petitioners.

K. Venkataraghava Chari for Acting Public Prosecutor (*K. N. Ganpati*) for the Crown.

JUDGMENT.

This is a petition by the accused 1 to 3 against the conviction and sentence of fine passed by the First-Class Bench at Guntūr. The charge against these accused was under sections 504 and 352 of the Indian Penal Code. Apart from the merits of the case, one objection that is taken against the legality of the conviction is, in my opinion, sufficient to set it aside. It is clear from the register of summary trials maintained by the aforesaid Bench, that the judgment has in fact been signed only by two of the three magistrates who heard and decided the case, the other having only initialled it. The mandatory provision in section 265 of the Criminal Procedure Code is to the effect, that a judgment shall be signed by each member of the Bench present taking part in the proceedings. There is no definition of the

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word "sign" in the Criminal Procedure Code. The word "signing" has been interpreted in some judicial decisions and that meaning can be safely adopted for purposes of the present case. In the two decisions of the Calcutta High Court, namely, *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya*(1), *Mahabharsha Bankapore v. The Secretary of State for India in Council*(2), the word "signing" has been taken to mean the writing of the name of the person who is the signatory, so that it may convey a distinct idea to others that the writing indicates a particular individual whose signature it purports to be. This question was considered in the first case in respect of a will and in the other case as regards a risk-note to be signed and delivered to the railway company. In another Calcutta case, namely, *Abdul Gafur v. Queen Empress* (3), the same question arose in connection with a warrant of arrest issued by a Criminal Court. That warrant was not signed by the Magistrate as required by section 75 of the Criminal Procedure Code, but it bore only his initials. The legality of the warrant so issued was questioned and it was held that the warrant was not signed as required by law. In view of this defect and some other defect pointed out in that judgment, it was held that the person obstructing the execution of such a warrant could not be convicted under section 186 of the Indian Penal Code. In a decision of this Court reported in *Lakshmanacharyulu v. Venkataramanujacharyulu*(4), it was held that for purposes of a valid acknowledgment under section 19 of the Limitation Act, initials are not equivalent to signature. Though there is no direct authority in respect of the word "signed" occurring in section 265, clause 2 of the Criminal

(1) (1898) I.L.R. 25 Cal. 911 at 915.
(3) (1898) I.L.R. 23 Cal. 896.

(2) (1915) 20 C.W.N. 685.
(4) (1926) 51 M.L.J. 414.

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Procedure Code, the meaning attached to that word in the aforesaid decisions can well-nigh be applied to it. A judgment of a Bench of Magistrates has to be signed as required by law, and the requirements of public policy necessitate the writing of the full name of the Magistrate that signs the judgment and the mere putting in of the initials is not, in my opinion, a sufficient compliance with the mandatory provision of section 265 of the Code.

In this connection, it must be considered whether the initialling by one of the Magistrates in the judgment in question, instead of signing, is only an irregularity which can be cured under section 537 of the Criminal Procedure Code. In the old Code, an illustration was added to section 537 as follows:—

"The Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceeding."

But in the amended Code, this illustration is omitted. The repeal of this illustration in the amended Code clearly indicates that the Legislature no longer views the defect pointed out in the aforesaid illustration as a mere irregularity not affecting the validity of the proceeding. The inference from the omission of this illustration is that the defect affects the validity of the proceeding and vitiates the conviction and sentence.

In the case of trials by a Bench of Magistrates, the practice of some of the magistrates not signing the judgments or putting in merely their initials instead of the full signatures is to be deprecated. There seems to be also another practice, namely, that, when copies of such judgments are given, the signature of the presiding Magistrate alone is copied, omitting the signatures of the other magistrates (as was done in this case). Such a copy is obviously an incorrect one and it is inconceivable why the copy should be defective in this important

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particular. It is hoped that in future the Benches of Magistrates would strictly follow the mandatory provisions of the Code in the matter of signing judgments.

For the reasons stated by me, the conviction and sentence are vitiated by non-compliance with the mandatory provisions of section 265 of the Criminal Procedure Code. The conviction and sentence have, therefore, to be set aside.

But in the circumstances of this case, it seems to me that the ordering of a retrial is useless and not in furtherance of public interests. I may also point out that though the offences complained of in the present case fell under sections 504 and 352 of the Indian Penal Code (as shown by the register), the conviction was under section 323. There is absolutely nothing in the judgment to show how the accused could be convicted for hurt under section 323, while the finding seems to be that their guilt was under sections 504 and 352.

In the result, the Revision Petition is allowed and the conviction and sentence are set aside. The fines, if levied, will be refunded to the petitioners.

B.C.S.

PRIVY COUNCIL.*

OBLA SUNDARACHARIAR AND OTHERS (DEFENDANTS),
APPELLANTS,

v.

NARAYANA AYYAR AND OTHERS (PLAINTIFFS),
RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

*Registration—Mortgage by deposit of documents of title—
Memorandum signed by mortgagor—Admissibility in evidence—Indian Registration Act (XVI of 1908), ss. 17 and 49.*

A memorandum signed by the mortgagor in relation to a mortgage by deposit of documents of title may be a document which the Indian Registration Act, 1908, section 17, requires to be registered, even though it does not embody all the particulars of the transaction, but registration is not so required unless the memorandum on its face embodies such terms, and is signed and delivered at such time and place and in such circumstances, as to lead legitimately to the conclusion that so far as the deposit is concerned it constitutes the agreement between the parties.

The plaintiff verbally agreed at Madras to make a further advance to the defendants, making Rs. 60,000 in all, upon the deposit of certain documents of title. The defendants' agent signed and handed to the plaintiff a memorandum stating "As agreed upon in person I have delivered to you the undermentioned documents as security", a list of the documents following, also a promissory note for Rs. 60,000. After examination of the documents the agreed amount was handed over.

Held that the memorandum was not a document which required registration, even if the agreed advance was conditional upon it being given; and that, there being no written agreement, the memorandum as well as oral evidence was admissible in evidence to prove the intent to create a security by deposit of the documents named.

* Present :—Lord TOMLIN, Lord MACMILLAN, Sir JOHN WALLIS,
Sir LANCELOT SANDERSON, and Sir GEORGE LOWNDES.

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Subramonian v. Lutchman, (1922) I.L.R. 1 Rang. 66; I.L.R. 50 Cal. 338; L.R. 50 I.A. 77 distinguished. Decree of the High Court affirmed.

APPEAL (No. 59 of 1930) by special leave from a decree of the High Court at Madras (October 26, 1928) affirming a decree of the Subordinate Judge of Dindigul (November 3, 1923).

The plaintiff, since deceased, and represented by the respondents, brought a suit to enforce by sale a mortgage by deposit of documents of title alleged to have been made at Madras.

The question arising upon the appeal was whether or not a memorandum signed by the agent for the mortgagors and handed to the mortgagee was a document which by section 17 of the Indian Registration Act required registration and was therefore by section 49 inadmissible in evidence in the absence of registration.

The facts appear from the judgment of the Judicial Committee.

The High Court (MADHAVAN NAIR and JACKSON JJ.), affirming the Subordinate Judge, held that the memorandum was not within section 17 and was admissible in evidence; the usual mortgage decree was made with liberty to apply under Order XXXIV of the Code of Civil Procedure for a personal decree if the sum realized was insufficient to discharge the debt.

Upjohn K. C. and *Narasimham* for appellants.

Dunne K. C. and *Dube* for respondents.

Reference was made to *Subramonian v. Lutchman*(1), *Kedarnath Dutt v. Shamloll Khettry*(2), *Pranjivandas Jagjeeandas Mehta v. Chan Ma Phee*(3), and *Shaw v.*

(1) (1922) I.L.R. 1 Rang. 66; I.L.R. 50 Cal. 338; L.R. 50 I.A. 77.
(2) (1873) 11 Ben. L.R. (O.C.J.) 405.

(3) (1916) I.L.R. 43 Cal. 895; L.R. 43 I.A. 122.

Foster(1); also to *Chegamull v. Govindaswami*(2), referred to in the judgment of the High Court.

The JUDGMENT of their Lordships was delivered by Lord TOMLIN:—

The suit out of which this appeal arises was instituted in 1921 in the Court of the Subordinate Judge at Madura by one Samoo Battar, a money-lender doing business in Palghat, Madras, and other places. He claimed in effect to enforce an equitable mortgage by deposit of title deeds to secure Rs. 60,000 and interest and to recover a personal judgment for the amount of the mortgage debt so far as the security should prove insufficient.

The defendants to the suit were the members of a joint family firm trading at Madura. The present appellants, who are assignees of the interest of the joint family firm in the property comprised in the title deeds in question, were brought into the suit as additional defendants.

On the 3rd November 1923, the Subordinate Judge made the usual mortgage decree for the amount claimed and costs with a direction for sale in default of payment, and with liberty for the plaintiff, if the proceeds of sale of the property proved insufficient, to apply for a supplemental decree against the family properties of the members of the joint family firm, and also against the members of the joint family firm personally.

The present appellants appealed to the High Court.

On the 26th October 1928, the High Court dismissed the appeal with costs.

The appellants obtained special leave to appeal to His Majesty in Council. The respondents to the appeal are the legal representatives of the plaintiff who is dead.

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(1) (1872) L.R. 5 H.L. 321.

(2) A.I.R. 1928 Mad. 972.

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The question raised by the appeal is whether there is any mortgage capable of legal proof having regard to the fact that there was a written memorandum relating to the matter which was not registered under the Registration Act (XVI of 1908).

The facts are to be gathered from the documents and the evidence of witnesses called by the plaintiff. No evidence was adduced by the defendants.

The story is in substance as follows :—

The joint family firm owed the plaintiff Rs. 36,809-0-10 and wanted a further advance so as to make up a total debt of Rs. 60,000. Their manager, Krishnaswami Ayyar, entered into negotiations with the plaintiff through the plaintiff's son and eventually came to Madras to deal with the matter. Security was demanded. The deeds of two properties were offered but rejected as inadequate. Then the deeds of three additional properties were offered. The five properties were considered adequate security. The transaction was completed on the 14th March 1921, between 4 p.m. and 6 p.m., in the house of the plaintiff's son. There were present the plaintiff, his son, the manager of the joint family firm, and one Doraisami.

Before the plaintiff arrived on the scene the manager had already handed the deeds to the plaintiff's son with two documents which he had written out and signed, namely: (1) a promissory note for Rs. 60,000 payable on demand with interest at one per cent per mensem, and (2) a memorandum which consisted of a list of the title deeds, with the following introductory words :—

"Written to E. N. A. Samoo Battar by Krishnaswami Ayyar, of S. V. Ramaswami Ayyar and Brothers. As agreed upon in person I have delivered to you the undermentioned documents as security."

Both documents were dated the 14th March 1921.

The promissory note was signed by the manager but was not witnessed. It showed on its face that the Rs. 60,000 was made up of Rs. 36,809-0-10 amount already due and Rs. 23,190-15-2 "amount received in cash to-day."

The memorandum was signed by the manager and witnessed by Doraisami.

Upon the arrival of the plaintiff his son showed him the deeds and the promissory note and the memorandum and was instructed by the plaintiff to examine the deeds to see whether they were in order.

When this examination had been completed and the deeds were found to be in order, the deeds, the promissory note, and the memorandum were put away by the plaintiff's son in a safe, and a cheque for Rs. 23,115 together with cash to make up Rs. 23,190-15-2 was handed to the manager.

Under section 17 of the Registration Act, registration is required of (a) instruments of gift of immovable property, and (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards, to or in immovable property.

By section 49 of the same Act it is provided that no documents required by section 17 to be registered shall (a) affect any immovable property comprised therein; (b) confer any power to adopt; or (c) be received as evidence of any transaction affecting such property or conferring such power; unless it has been registered.

It is necessary also to bear in mind section 59 of the Transfer of Property Act which provides that where the principal money secured is Rs. 100 or upwards a mortgage can be effected only by a registered instrument

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signed by the mortgagor and attested by at least two witnesses, but that nothing in the section now being cited shall be deemed to render invalid mortgages made in the towns of Calcutta and Madras, and certain other towns therein mentioned, by delivery to a creditor or his agent of documents of title to immovable property with intent to create a security therein.

Now this transaction took place in Madras and did not therefore require a registered instrument under section 59 of the Transfer of Property Act.

The question which falls to be determined is whether the memorandum, having regard to its true construction and the circumstances in which it came into existence and passed into the hands of the plaintiff, is an instrument which purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of Rs. 100 and upwards, to or in immovable property.

If the memorandum is considered *in vacuo*, its meaning is plain. It records particulars of documents which, it states, have been delivered as security in pursuance of an agreement reached in person.

It does not state what were the terms of the agreement or indicate the nature of the matter for which the deeds were deposited as security. So far as anything disclosed by the memorandum is concerned, the security may have been for money lent or to be lent or for the performance of some obligation, the breach of which would sound in damages.

Considered in this light, the memorandum, in their Lordships' judgment, merely records particulars of deeds, the subject of a deposit. Is there then anything in the circumstances connected with the creation of the memorandum or in the way in which the parties dealt

with it which permits or requires some other meaning or effect to be given to it?

The answer, in their Lordships' judgment, must be in the negative. Even if it was a condition of the advance that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit could not alter the nature and meaning of the document. It was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties. Upon this view of the matter, apart from authority, it would, in their Lordships' opinion be impossible to hold that the document purported or operated to create or declare any right, title or interest in the property, and required to be registered under section 17 of the Registration Act.

In this connection it may be observed that, though an agreement embodied in a written document requiring registration under section 17 of the Registration Act and not so registered cannot be proved by the written document (see section 49 of the Registration Act) or by oral evidence [see *Shaw v. Foster*(1)], yet where there is no written agreement, there seems no reason why the intent to create a security by deposit of title deeds under the exception provided for in section 59 of the Transfer of Property Act should not be evidenced by written as well as by oral evidence.

It is, however, urged by the appellants that the present case is covered by the decision of their Lordships' Board in *Subramonian v. Lutchman*(2), and that the appeal should succeed.

(1) (1872) L.R. 5 H.L. 321.

(2) (1922) I.L.R. 1 Rang. 66; I.L.R. 50 Calo. 338; L.R. 50 I.A. 77.

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The memorandum in that case was held to embody the agreement between the parties and is, in their Lordships' view, different in that respect from the memorandum here under consideration.

Lord CARSON, in delivering the judgment of the Board, quoted with approval a passage from the judgment of COUCH C.J. in *Kedarnath Dutt v. Shamloll Khettry*(1). That passage is in the following terms:—

"The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement. If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement it would be the instrument by which the equitable mortgage was created and would come within section 17 of the Registration Act."

Ultimately, Lord CARSON summed up the conclusion of the Board in these words:—

"Their Lordships have no doubt therefore that the memorandum in question was the bargain between the parties and that without its production in evidence the plaintiff could establish no claim and as it was unregistered it ought to have been rejected."

While their Lordships do not think that the language of Lord CARSON conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within section 17 of the Registration Act, unless it embodies all the particulars of the transactions of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section unless on its face it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the

conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties.

Having regard to the view already expressed of the effect of the memorandum now under consideration, no comfort is to be found for the appellants in the case upon which they relied.

Their Lordships reach the conclusion that the memorandum was not other than a written record of the particulars of deeds the subject of an agreement constituted in fact by the act of deposit and the payment of the money, and that it neither purported nor operated to create or declare any right, title or interest in the property included in the deeds, with the result that it did not require registration.

In their Lordships' opinion the appeal fails and should be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellants.—*H. S. L. Polak.*

Solicitor for respondents.—*Douglas Grant and Dold.*
A.M.T.

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(1) (1873) 11 Ben. L.R. (O.C.J.) 405, 412.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Pakenham Walsh.*

1930,
November 14 ARUMILLI VIRAMMA (FIRST COUNTER-PETITIONER), APPELLANT
AND PETITIONER,

v.

ARUMILLI SESHAMMA AND ANOTHER (PETITIONER AND
SECOND COUNTER-PETITIONER), RESPONDENTS IN BOTH. *

*Will—Executor by implication—Appointment of—Letters of
Administration—Minor-executor—Guardian of—Grant to—
Conditions—Indian Succession Act (XXXIX of 1925), ss.
234 and 244—Applicability of.*

A provision in a will appointing A to discharge the testator's debts makes A an executor by implication.

Section 234 of the Indian Succession Act (XXXIX of 1925) does not apply to a case where there is an executor (whether express or implied) who has not refused to act. Section 244 of the Act is the only section enabling the Court to grant letters of administration to the legal guardian of a minor who is the sole executor, but, before such letters can be granted, the legal guardian must apply to the Court to be appointed the minor's guardian for the purpose of getting the letters of administration; otherwise no letters can be granted.

APPEAL preferred against, and Civil Revision Petition presented under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise, the order of the District Court of East Gōdāvari at Rajahmundry, dated 13th November 1929, and made in Original Petition No. 85 of 1929.

A. Lakshmayya for appellant.

N. Rama Rao for respondents.

* Appeal against Order No. 218 of 1930 and Civil Revision Petition No. 838 of 1930.

JUDGMENT.

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BEASLEY C.J.—In this case the first respondent, the grandmother of one Ramarayudu, a minor, applied to the lower Court for a limited grant to her of probate of a will asserting that a man named Krishnamurthi, her son, had died and that previous to his death he had made a will under the provisions of which she herself was a legatee and some of the property fell to her grandson a minor. This alleged will effectively shut out the alleged testator's widow, the counter-petitioner in the petition in the lower Court. The first respondent accordingly applied to have the will probated and eventually recognizing that she was not entitled to ask for probate changed the nature of her application and asked instead to have granted to her letters of administration. This application was refused; and on the 13th November last the learned District Judge passed the following interim order:—

“There is no ground to reject the application. This is really governed by section 234. The alleged residuary legatee—granting he is one—is a minor.”

That is the order appealed against here. The question which, in my view, determines this matter is whether the minor was under the alleged will an executor by implication. The alleged will put forward states as follows:—

“It is devised that my nephew Ramarayudu is to discharge the debts due by me to the world.”

The question is whether that provision makes Ramarayudu an executor by implication. Section 222 of the Indian Succession Act says that probate shall be granted only to an executor appointed by the will and that the appointment may be expressed or by necessary implication. Here, of course, no question arises as to whether there was an express appointment of Ramarayudu as an executor, but the only question is whether

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by necessary implication he was so appointed. To section 222 there are three illustrations and the third illustration seems to me to cover this case. There the words were "I appoint my nephew residuary legatee to discharge all lawful demands against my will and codicils signed on different dates" and the nephew was held to be appointed an executor by implication. The wording there seems to me to be very similar to the wording in the present case, and, in my view, the minor was clearly appointed an executor by implication. If that is so, the learned District Judge was wrong in saying that the application was covered by section 234 of the Indian Succession Act. It clearly was not. That section only deals with cases where no executor has been appointed or if an executor has been appointed he declines to act. Here an executor was appointed and it was not a case of his declining to act because in law he could not act. In my view, minor executors are expressly and solely provided for by section 244 of the Act. Where a minor executor is appointed, then it is open to his legal guardian, or such other person as may seem to the Court fit, to have letters of administration issued to him; and, if there is any section at all in the Indian Succession Act which enables the respondent in this case to apply for letters of administration, it is section 244. In *Bhagwati Kuer v. Bahuria Ramsakhi Kuer*(1), which followed the decision in *Nirojini Debi, In the goods of*(2), the corresponding section 33 in the Probate and Administration Act (V of 1881) was considered, and it was held that, before letters of administration could be granted to a legal guardian of a minor, the legal guardian must apply to be appointed the minor's guardian for the purpose of enabling him or her to obtain those

(1) (1920) 5 Pat. L.J. 347.

(2) (1907) 1.L.B. 34 Calo. 706.

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letters of administration for the use and benefit of the minor. In this case there is no such application by the respondent, and, being of the opinion as I am that the only section under which this application can be made is section 244, this appeal must be allowed. In doing so, we leave it open to the respondent to get herself appointed, if she can, as the guardian of the minor. Then, if the Court so think fit, she can obtain letters of administration. This appeal must, therefore, be allowed with costs. No orders are necessary on the Civil Revision Petition.

PAKENHAM WALSH J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Horace Owen Compton Beasley, Chief Justice,
and Mr. Justice Curgenvven.

T. S. RAMABADRA ODAYAR AND ANOTHER
(PLAINTIFF AND SUPPLEMENTAL APPELLANT), APPELLANTS
IN APPEAL No. 439 OF 1925,

1930,
May 1.

v.

T. S. GOPALASWAMI ODAYAR AND 13 OTHERS
(DEFENDANTS 1 TO 10 AND 27 AND 28 AND PARTY RESPONDENT
AND SUPPLEMENTAL RESPONDENT), RESPONDENTS
IN APPEAL No. 439 OF 1925.*

*Hindu Law—Partition—Fixing of shares of members with
reference to a partition at a future date—Binding nature,
effect and validity of.*

Where, in consideration (a) of composing existing and possible future family disputes and (b) of one member of the family who was issueless consenting to relinquish his right to a share in case the other members postponed the division of the

* Appeal Nos. 439 and 411 of 1925 and Appeal No. 6 of 1926.

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joint family properties till after his death, all the adult members of all the branches of a joint Hindu family not only agree to postpone the division accordingly but also fix and consent to take their shares in proportions slightly different from what each might, but for such considerations, be entitled to, under the law, on the date of the agreement, such an agreement will be valid and binding on each of the parties thereto and his descendants.

Such an agreement does not in law effect a division in status between them as from its date. Hence a clause therein to the effect that until division "all the members will treat themselves as members of an undivided family subject to the law of survivorship" is valid.

The share of one of the members bound by such an agreement dying issueless in the interval goes by survivorship to the other members of his branch only and not also to the members of other branches.

APPEALS against the decree of the Court of the Subordinate Judge of Kumbakonam, dated 25th October 1924, in Original Suit No. 22 of 1924.

The facts of the case are fully set out in the judgments of their Lordships.

The material portions of the partition deed, Exhibit A in the case, are as follows:—

Deed of partition executed on 25th November 1895 amongst us living in Thannirkunnam, Mannargudi taluk, viz. (1) Muthu Odayar, son of Subrahmanya Odayar Avargal, Malaiyamar, Saivite, Mirasidar; (2) Balasubrahmanya Odayar, son of Kuppu Odayar Avargal, deceased, who is the son of the said Subrahmanya Odayar Avargal by his senior wife; (3) Singaravelu Odayar, son of Samu Odayar, deceased and grandson of the said Subrahmanya Odayar's younger brother Ramu Odayar; (4) Somasundara Odayar, son of the above person; (5) Sivaswami Odayar and (6) Gopalaswami Odayar—the other son of Samu Odayar; (7) Gopalaswami Odayar aforesaid, the guardian and father of his minor son, Vijayaragunathan; (8) Singaravelu Odayar aforesaid, the guardian and junior paternal uncle of the minors Balaguruswami and Balakrishnaswami, who are the grandsons of said Samu Odayar and sons of Ayyadurai Odayar, deceased; and (9) Siva Vadivelu Odayar, grandson of

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the said Subrahmanya Odayar's elder brother Sinnu Odayar and the adopted son of Sendalangara Odayar, deceased. In consideration of the fact that disputes might arise in our family in connection with partition and heavy loss might be sustained thereby, of the fact that the said Samu Odayar and his father Ramu Odayar aforesaid had been very prominent members of our family, carried on business, etc., acquired properties by hard work, and brought our family to a very prosperous condition, of the fact that towards the said Samu Odayar's heirs—viz., Singaravelu Odayar, Sivaswami Odayar, Gopalaswami Odayar, Balaguruswami and Balakrishnaswami—the rest of us have natural affection, and of the fact that the other members have affection towards the said Balasubrahmanya Odayar, the partition arrangements we have come to amongst us are as follows:—

1. Of our family properties, Balasubrahmanya Odayar shall take one-fifth share and the remaining four-fifths share inclusive of Muthu Odayar's share,—(1) Singaravelu Odayar and Somasundara Odayar, (2) Sivaswami Odayar, (3) Gopalaswami Odayar and Vijayaragunathan, (4) Balaguruswami and Balakrishnaswami, sons of Ayyadurai Odayar, and (5) Siva Vadivelu Odayar—these shall divide off in equal shares, that is to say, in five equal shares.

2. (This clause gives a list of the properties belonging to the joint family.)

3. Out of the said properties, the sharers other than Balasubrahmanya Odayar of us shall, for their four-fifths share, take the immovable properties specified in list A hereunto annexed, the jari manai, waste poramboke, tank, pond and trees, etc., with all samudayams pertaining to the respective villages, subject to any excess or deficit in the respective villages, and the outstandings, with interest, mentioned in list C; and Balasubrahmanya Odayar of us shall, for his one-fifth share, take the immovable properties specified in list B and the jari manai, waste poramboke, tank, pond, trees, etc., pertaining to the respective villages, subject to any excess or deficit with all the samudayams pertaining to the respective villages. And, they (the sharers) shall enjoy them with all rights, from son to grandson and so on in succession, with power to make alienations by way of gift, exchange, sale, etc.

4. (This clause provides for the contingency of any properties being omitted in lists A and B referred to in clause 3.)

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5. (This clause mentions the share of the movable properties given to Balasubrahmanya, and provides that Balasubrahmanya was to have no concern in the outstandings due to, or the liabilities of, the other sharers, and that the latter were similarly to have no concern in the outstandings due to, or the liabilities of, Balasubrahmanya.)

6. Inasmuch as, for the reason that Muthu Odayar of us has natural affection towards Samu Odayar's heirs, viz., Singaravelu Odayar, Sivaswami Odayar, Gopalaswami Odayar, Balaguruswami and Balakrishnaswami, and for the reason that they might get a smaller share and for various other reasons, Muthu Odayar of us has given away to them his share in the family properties, as he has no heirs and as he is advanced in age, the rest of us to the exclusion of Balasubrahmanya Odayar shall, during the lifetime of said Muthu Odayar, live as members of one family. After Muthu Odayar, partition shall be effected according to the shares given in paragraph one hereof. The said Muthu Odayar shall, during his life, be at perfect liberty to utilize, as he pleases, a sum of Rs. 4,000 (four thousand) per annum from and out of the income from the four-fifths share of properties aforesaid.

7. Gopalaswami Odayar of us shall perform the obsequies of Muthu Odayar as the son to a father. If, after the lifetime of said Muthu Odayar, his wife Alamelu Achi does not find it convenient to live amicably in the family consisting of the sharers other than Balasubrahmanya Odayar of us, the other sharers shall pay to her, during her life, maintenance at the rate of Rs. 200 (two hundred) per annum. If the other sharers aforesaid should effect a division amongst themselves, a sum of Rupees 2,500 (two thousand five hundred) shall, from and out of the said four-fifths share of properties, be deposited as principal with Gopalaswami Odayar of us; and he shall, for the interest thereon, pay to the said Achi Rs. 200 per annum as stated above. The said Gopalaswami Odayar shall himself perform the said Achi's obsequies, and shall, after the lifetime of the said Achi, take also the sum of Rs. 2,500 aforesaid.

8. So long as the sharers other than Balasubrahmanya Odayar of us remain joint without effecting a division according to the shares mentioned in paragraph one hereof, the family shall be treated as an ordinary undivided Hindu family subject to the law of survivorship.

9. If anything happens to be sold in the village of Thannirkunnam comprised in the said lists A and B, which is our own place and that an important one, out of the villages belonging to our family in Mannargudi taluk, the same shall be sold to, and purchased by, any person from amongst ourselves. Hereafter, there shall be only friendship between Balasubrahmanya Odayar and the other sharers, but no monetary relationship. The amount mentioned in page 18 hereof as having been received by Balasubrahmanya Odayar of us and thus discharged, the other amount of outstandings mentioned in the said page as due in the names of the other sharers and Kuppu Odayar, the other movable properties, etc., and the amount given in list C and the interest thereon—these, all told, are below Rs. 1,75,000.

Advocate-General (A. Krishnaswami Ayyar) with K. Narasimha Ayyangar and S. Venkatesa Ayyangar for appellants (plaintiff and party appellant).—No division in status was effected by Exhibit A. Exhibit A must be ignored as it contains provisions contrary to law. The family always continued joint and must be considered to have so continued and the plaintiff is entitled to one-half of the family properties. Clause 8 of Exhibit A alters the ordinary rule of succession to divided property by substituting the rule of survivorship. Parties cannot by their agreement create for themselves a new mode of devolution or inheritance contrary to the ordinary law.

See Palani Ammal v. Muthuvenkatachala Moniagarar(1), *Sudarsanam Maistri v. Narasimhulu Maistri*(2), *Juttendromohun Tagore v. Ganendromohun Tagore*(3), Vol. 22, Halsbury's Laws of England, page 313, *Sivasankara Pillai v. Soobramania Pillai* (4) and *Soundara Rajan v. Natarajan*(5).

If clause 8 is to prevail, then the plaintiff also is entitled to the benefit of the rule of survivorship and is entitled to a greater share than that given by the lower Court.

K. S. Krishnaswami Ayyangar (with S. Ramanujam and S. Panchanada Mudaliyar) for sixth respondent (sixth defendant).—The circumstances under which Exhibit A came into existence show that the parties intended to become divided in

(1) (1924) I.L.R. 48 Mad. 254, 261 (P.C.).

(2) (1901) I.L.R. 25 Mad. 149.

(3) (1872) Sup. I.A. 47; 9 Ben. L.R. 377 (P.C.).

(4) (1908) I.L.R. 31 Mad. 517, 521.

(5) (1925) I.L.R. 48 Mad. 908 (P.C.).

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status as from its date. *Appovier v. Rama Subba Aiyar*(1), *Parbati v. Nannihal Singh*(2), *Syed Kasam v. Jorawar Singh*(3) and *Girja Bai v. Sadashiv Dhundiraj*(4). Exhibit A is a family arrangement to compose existing and future differences in the family; it is therefore binding upon all the parties thereto and it was also acted upon. In a partition, parties can give up some of their rights in favour of others. *Lakhmi Chand v. Anandi*(5), *Brijraj Singh v. Sheodan Singh*(6), *Ram Nirunjun Singh v. Prayag Singh*(7), *Naraganti Achammagaru v. Venkatachulapati Nayanivaru*(8) and *Baijnath Prasad Singh v. Tej Bali Singh*(9). Clause 8 is not invalid and does not offend against any rule of Hindu Law or the rule against perpetuities. This clause can stand along with clauses 1 and 3. *Juttendromohun Tagore v. Ganendromohun Tagore*(10), *Sreemutty Soorjee Money Dossee v. Denabundoo Mullick*(11), *Kristoromoni Dasi v. Narendro Krishna Bahadur*(12), *Muthuraman Chettiar v. Ponnusamy Odayar*(13), and *Lakshminarayana Nainar v. Valliammal*(14).

K. V. Krishnaswami Ayyar (with *T. R. Srinivasa Ayyangar*) for fourteenth respondent (party respondent) adopted Mr. K. S. Krishnaswami Ayyangar's argument and added: Two widows may agree to divide their inheritance with or without the benefit of survivorship in case of either's death. See Mayne's Hindu Law, 9th edition, page 810, section 554. *Sudalai Ammal v. Gomathi Ammal*(15) and *Lakhmi Chand v. Anandi*(5). Similarly, parties can by mutual agreement convert a joint family estate into an impartible estate. *Prayag Kumari v. Siva Prasad*(16), and *Baijnath Prasad Singh v. Tej Bali Singh*(9). So also they can agree to have survivorship after division.

S. Varadachari (with *N. A. Krishna Ayyar*) for first respondent (first defendant).—Exhibit A can be acted upon only so far as its conditions conform to law and it must be rejected as to the rest. Exhibit A creates on its date a division in status by fixing the shares not only for Balasubrahmanya but also for the other members. Hence this case is distinguishable from cases

(1) (1866) 11 M.I.A. 75.

(3) (1922) I.L.R. 50 Calo. 84 (P.C.).

(5) (1926) I.L.R. 48 All. 313 (P.C.).

(7) (1881) I.L.R. 8 Calo. 138, 139, 146.

(9) (1921) I.L.R. 48 All. 228, 237 (P.C.).

(10) (1872) Sup. I.A. 47; 9 Ben. L.R. 377 (P.C.).

(11) (1862) 9 M.I.A. 123.

(13) (1915) 29 M.L.J. 214.

(15) (1912) 23 M.L.J. 355.

(2) (1909) I.L.R. 31 All. 412 (P.C.).

(4) (1916) I.L.R. 43 Calo. 1031 (P.C.).

(6) (1913) I.L.R. 35 All. 337 (P.C.).

(8) (1881) I.L.R. 4 Mad. 250.

(12) (1888) I.L.R. 16 Calo. 383, 392 (P.C.).

(14) (1910) I.L.R. 34 Mad. 250, 251.

(16) (1925) 42 C.L.J. 280, 294.

like *Balabux v. Rukhmabai*(1), where the Privy Council considered the effect, on the status of the other members of the family, of some members alone getting themselves divided from the rest. Parties cannot agree in law to have a rule of survivorship after division. As the plaintiff belongs to a different branch he is not entitled to the benefit of survivorship.

Sir C. P. Ramaswami Ayyar (with *T. V. Ramanatha Ayyar*) for ninth respondent (ninth defendant) adopted the contentions of Mr. S. Varadachari.

M. Ranganatha Sastri for second respondent (second defendant).

N. Kunjitapadam Ayyar for eighth respondent (eighth defendant).

R. Gopalaswami Ayyangar (with *K. S. Desikan*), for thirteenth respondent (party respondent).

S. Ramaswami Ayyangar for second appellant in Appeal No. 411 of 1925.

R. Rajagopala Ayyangar and *S. V. Venugopalachariar* for fourth respondent in Appeal No. 411 of 1925 (tenth defendant).

K. Bhashyam Ayyangar and *V. C. Veeraraghavachari* for appellants in Appeal No. 6 of 1926.

JUDGMENT.

BEASLEY C.J.—These are three linked appeals BEASLEY C.J. namely, Appeal No. 411 of 1925, Appeal No. 439 of 1925 and Appeal No. 6 of 1926. Of these, Appeal No. 439 of 1925 was argued first as in that the main and the most important contentions between the parties had to be considered. I propose in my judgment to deal with all the three appeals together.

All these appeals arise out of Original Suit No. 67 of 1919* in the Court of the Subordinate Judge of Kumbakonam. That was a suit for partition. The parties to the suit were all members of an undivided Hindu family related to one another in the manner set out in Schedule

(1) (1903) I.L.R. 30 Calo. 725 (P.C.).

* Renumbered as Original Suit No. 22 of 1924.

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A to the plaint. This Hindu family was possessed of considerable immovable property and in the partition suit the plaintiff claimed a half-share in the whole property. The plaintiff stands by himself representing one branch of the family. The genealogical table (Schedule A) shows that all the parties to the suit trace their descent back to one Sepperumal Odayar; and in the judgment of my learned brother CURGENVEN J. the genealogical table has been described in detail and therefore it is unnecessary for me to explain any further how the parties stand in relationship to one another.

In the Court below, a preliminary decree was passed by means of which the plaintiff was given one-fifth share, defendants 3, 4, 5, 7 and 8 one-fifth share, the 6th defendant one-fifth share, the 9th defendant one-fifth share, and defendants 1 and 2 one-fifth share. The learned Subordinate Judge gave a decree for an account and also directed that the accounting was to be upon the basis of an undivided family although he found that the family had become divided in status by reason of a document, Exhibit A. This document has been the cause of all the trouble in the suit. Various constructions have been placed upon it by the contending parties both here and in the Court below and these appeals depend entirely upon what view we take of that document. In order that it can be better understood we have to go back to the year 1895. Exhibit A is dated the 25th November of that year and is described as a deed of partition. On that date, there were alive Muthu Odayar who died in 1903, Balasubrahmanya Odayar who died since the suit was filed, Singaravelu Odayar who died in 1917, Somasundara Odayar his son who subsequently died leaving a widow the tenth defendant, Sivaswami Odayar who died in 1909 leaving a widow the ninth defendant, Gopalaswami Odayar, and

Siva Vadivelu Odayar, the grandson of Sinnu Odayar and the adopted son of Sendalangara Odayar, who was himself the son of Sinnu Odayar, the son of Sepperumal Odayar, the common ancestor. By this deed, Balasubrahmanya Odayar separated himself from the rest of the family, and under clause 1 of the deed it was agreed that he should take a one-fifth share of the whole property, the remaining four-fifths share being agreed to be allotted in five equal shares to (1) Singaravelu Odayar and Somasundara Odayar, (2) Sivaswami Odayar, (3) Gopalaswami Odayar and Vijiaraghunathan, (4) Balaguruswami and Balakrishnaswami and (5) Siva Vadivelu, father of the plaintiff. In Exhibit A his adoption by Sendalangaram is recognized and the learned Judge in the Court below has found that adoption proved. The consideration for this document is set out in the preamble to it and is stated to be the fact that disputes might arise in the family in connection with the partition and heavy loss might be sustained thereby, that Samu Odayar and his father Ramu Odayar (Nos. 4 and 11 in the genealogical table) had acquired properties by hard work and brought the family to a very prosperous condition and the natural affection towards his heirs, namely, Singaravelu Odayar, Sivaswami Odayar, Gopalaswami Odayar, Balaguruswami and Balakrishnaswami and also towards Balasubrahmanya. Under clause 6 of the document Muthu Odayar gave away his share in the family properties as he had no heirs and was advanced in age; but there is a reservation that during his lifetime he should be at liberty to utilize a sum of Rs. 4,000 per annum out of the income from the four-fifths share of the properties ascertained in clause 1. Another clause of importance is clause 3 which provides that the sharers are to take the immovable properties specified in list A and the

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outstandings in list C and that Balasubrahmanya, the outgoing member, is to take the immovable properties specified in list B. Clause 6 must again be referred to here as it is there provided that the sharers as ascertained in clause 1 are during the lifetime of Muthu Odayar to live as members of one family and that after him partition of the property is to be effected according to the shares given in clause 1. Then comes clause 8 which reads as follows :—

“ So long as the sharers other than Balasubrahmanya Odayar of us remain joint without effecting a division according to the shares mentioned in paragraph one hereof, the family shall be treated as an ordinary undivided Hindu family subject to the law of survivorship.”

It is this clause that has given rise to the whole of the trouble. In the absence of such a clause it would be a very difficult task for the plaintiff to contend that Exhibit A did not effect a division in status between those members of the family who were parties to it, Balasubrahmanya, of course, going out altogether and having by the deed separated himself entirely from the family. The construction of Exhibit A would then, in my view, have been quite a simple matter and it would have been that the family agreed to divide in status according to certain shares but to live together until the death of Muthu Odayar. The case would then, in my view, have been plain sailing. But there is clause 8 and this has enabled the Advocate-General on behalf of the plaintiff to contend that there was no division in status created by Exhibit A and that Exhibit A must be ignored altogether and the family dealt with in the partition suit as an undivided Hindu family subject to none of the provisions of Exhibit A. This, he contends, entitles the plaintiff to a half-share of the family property upon a division. Alternatively, he argues that clause 8 is so inconsistent with the other

clauses in the document that it alone must be applied. On the other hand, it is contended by Mr. Varadachari for the first defendant that, if clause 8 is inconsistent with clause 1, then the former must be cut out and the parties governed by clause 1. Mr. K. S. Krishnaswami Ayyangar for the sixth defendant contends that full effect must be given to Exhibit A, that its provisions are not inconsistent with one another and that both clause 1 and clause 8 can be taken together and a meaning given to the document. In this contention he is supported by Mr. K. V. Krishnaswami Ayyar for the fourteenth respondent. The conflicting contentions of the parties, therefore, may be briefly stated as follows :—The plaintiff wishes to ignore Exhibit A altogether and treat the family as an undivided family, and the defendants contend for the position of a division in status brought about by Exhibit A and an agreement under it to live as if the family were an undivided family but not really an undivided family and an agreement to divide by metes and bounds at a later date in accordance with the shares as ascertained in clause 1 of the document. Mr. Varadachari and Mr. K. S. Krishnaswami Ayyangar, however, do not go the whole way together in that argument. The latter argues that clause 8 is not repugnant in any sense and that what it means is that, although the family is a divided family, it is to be treated as if it were an undivided family and as if the members of it at the time of the execution of the document had agreed together to dispose each of their shares to the others in the event of their dying without male issue. Mr. Varadachari on the other hand contends that there could be no such disposition in law or in fact and that clause 8 itself is repugnant to the rest of the other clauses in the document. The Advocate-General also contends that the evil of

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this clause is that it is an agreement to alter the ordinary rule of succession and therefore is quite inconsistent with the position of a division in status which creates a tenancy in common because it is provided that the property is to go by survivorship instead of by inheritance as it would do in the case of a tenancy in common. The learned Subordinate Judge, having held that under clause 1 of Exhibit A there was a disruption of the joint family and therefore a tenancy in common, says that clause 8 creates a coparcenary with the rights of survivorship, that where there is a disruption of the coparcenary the right of survivorship is gone and that a coparcenary is purely a creature of law and cannot be created by the act of parties. He has therefore held that clause 8 is wholly inconsistent with the scheme of division set out in the previous paragraphs and has rejected clause 8 on the ground that where there are two clauses in a deed which are wholly inconsistent with and irreconcilable to each other the former prevails. He has further held that clause 8 relating to the right of survivorship prevents the devolution of property to female heirs and is void since it alters the line of succession allowed by the Hindu Law.

We have first of all to consider whether the claim to a half-share in the property put forward by the Advocate-General can possibly be sustained. If a document is unambiguous in its terms, then little difficulty arises. So far as the terms of the document itself are concerned, it is contended by the learned Advocate-General and Mr. Varadachari that it is impossible to hold that they are unambiguous; and we have been addressed at great length for very many days as to the meaning or possible meaning or impossible meaning of its provisions. It is obvious that, when clause 8 is contrasted with the other

clauses, they are, without a consideration of the intention of the parties, irreconcilable. We have therefore to see whether we can gather from this document what the intentions of the parties to it were, coupled with their conduct subsequent to it, as it is the duty of the Court to give effect to a document if it possibly can. The Advocate-General invites us to reject the document altogether except as bringing about the separation of Balasubrahmanya from the rest of the family. But I am unable to agree with the suggestion put forward by him that all that was intended by the parties to this document was by it merely to separate Balasubrahmanya from the rest of the family. To begin with, in the preamble it is stated: "In consideration of the fact that disputes might arise in our family in connection with partition and heavy loss might be sustained thereby." It cannot, in my view, have been intended by this merely to refer to disputes between Balasubrahmanya and the other members of the family as it seems to me obvious that it refers to possible disputes between all the members of the family on a partition. Then again in clause 1 the remaining four-fifths shares are divided up into five equal shares and allotted to groups 1 to 5. If the document was merely entered into for the purpose of separating Balasubrahmanya from the rest of the family, it was unnecessary to deal with any of the remaining four-fifths shares by dividing them equally into five shares. All that it was necessary to do was to give Balasubrahmanya his one-fifth share and let him go out. Then under clause 6 Muthu Odayar gives up his share in the family having no heirs and being advanced in age; and there is the provision already referred to that the other sharers are during his lifetime to live as members of one family and after his death to effect a partition. The parties to the document must have had

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some intention when they made that arrangement. Having ascertained the shares in clause 1, in clause 6 not only do they agree after Muthu Odayar's death to effect a partition but to effect it according to the shares as ascertained in clause 1. Then in clause 8 a division according to the shares mentioned in clause 1 is referred to. Therefore, in my opinion, it is impossible to hold that the intention of the parties by this document was merely to separate Balasubrahmanya. The document must be given a meaning. There appear to be two possible alternatives, namely, that the parties intended by this document to divide in status but to remain, although divided in status, as an undivided family and after Muthu Odayar's death to effect a division by metes and bounds in accordance with the shares agreed upon by clause 1, that they recognized that by executing Exhibit A they were dividing in status but wished to live together as one family until Muthu Odayar's death, and that they decided that, during that time and until they did effect a partition by metes and bounds, the rule as to the devolution of property in a Hindu undivided family should apply. The other possible alternative is that they did not intend to divide themselves in status by Exhibit A, that all they intended to do was to postpone a division until some future date and that when they did divide the division was to be in accordance with clause 1 of the document. But, before the latter alternative is considered, we have to consider whether the execution of Exhibit A, quite irrespective of what the intentions of the parties might be, did bring about a disruption of status, and upon this point there are some cases which have to be considered. The first of these is *Appovier's case*—*Appovier v. Rama Subba Aiyar*(1), a decision of

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the Privy Council. There it was held that "According to the true constitution of an undivided Hindu family no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain definite share. The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and each member has thenceforth a definite and certain share in the estate, which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided." Where, therefore, a deed of partition was made and executed by the members of an undivided family, dealing with and making actual partition of a portion of the joint estate, but leaving the remainder to be divided at a future period in the same manner, such deed was held to be a division of right operating as a conversion of the tenancy and a change of status in the family as regards the property specified, changing, as it were, the joint tenancy thereof into a tenancy in common, and by operation of law making the members of the previously undivided family a divided family, in respect of such property. At page 89 Lord WESTBURY, in delivering the judgment of the Judicial Committee, states as follows:—

"Certain principles, or alleged rules of law, have been strongly contended for by the appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family,

(1) (1866) 11 M.I.A. 75.

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that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds. Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject, to which the title is applied. According to the true notion of an undivided family in Hindu Law, no individual member of that family whilst 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 rent, and claim to take from the Collector or receiver of the rents, a certain definite share."

He then proceeds to say that the members of an undivided family can agree amongst themselves that the property shall be the subject of ownership in certain defined shares and this alters the character of undivided property, that the joint enjoyment is taken away from it and the member has a right to claim to receive and enjoy it in severalty and that by such an agreement therefore the joint tenancy is converted into a tenancy in common. In *Balabux v. Rukhmabai*(1), the Privy Council held that there is no presumption when one coparcener separates from the others that the latter remain united, that where it is necessary, in order to ascertain the share of the outgoing coparcener, to fix the shares which the others are or would be entitled to, the separation of one may be said to be the virtual separation of all and that an agreement amongst the remaining coparceners to remain united or to re-unite must be proved like any other fact. There can be no question in this case of any agreement to re-unite as there were minors in existence and such minority renders any such agreement impossible. The importance of this decision lies in its placing the burden upon

(1) (1903) I.L.R. 30 Cal. 725 (P.C.).

those who maintain that there has been no division in status of displacing the presumption which this judgment holds arises. In a later case, *Parbati v. Naunihal Singh*(1), another decision of the Privy Council, it was held that, where one member of the family effects a separation of himself from the family and where the ascertainment of the shares of the remaining members of the family is merely incidental to that one member's separation, the presumption is that the other members remain undivided. Both *Appovier's case*(2) and the case of *Balkishen Das v. Ram Narain Sahu*(3) were considered and the principles laid down in them followed, but it was stated that the High Court had proceeded in an erroneous method in considering whether each document was by itself sufficient to rebut the *prima facie* presumption that as the family was joint before 1861 it continued to be joint, and omitting to take into account the cumulative effect of all the documents which taken together showed that all the transactions for many years could only be reconciled and made consistent on one hypothesis, namely, that the important document was a genuine document and the agreement in it embodied a real agreement. There, after the death of one of the members of the joint family in 1861, the other members mutually agreed that the joint property should thenceforth be held and enjoyed by the various members of the family in certain defined shares which they specified in a petition to the Collector to have their names entered to that effect in the official papers of the village. This was done, the petition was filed and it was held that on the evidence and in the circumstances of the case a partition of the

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(1) (1909) I.L.R. 31 All. 412 (P.C.). (2) (1866) 11 M.I.A. 75.
(3) (1903) I.L.R. 30 Cal. 738 (P.C.).

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property had been effected in 1861 and that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time. In a later case, namely, *Palani Ammal v. Muthuvenkatachala Moniagarar*(1), the Privy Council held that, when a member of a joint family has separated, an agreement by the remaining members to continue undivided may be inferred from the way in which their business is carried on after the separation. On page 257, it is stated in the judgment:

"In coming to a conclusion that the members of a Mitakshara joint family have or have not separated, there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves, is now well-established law."

Then a reference is made to *Appovier's case*(2), and it proceeds:

"But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be."

The result seems to me to be that, where the ascertainment of the shares of the remaining coparceners is merely incidental to the separation of one of them, no presumption arises that the family hitherto undivided has become divided. The High Court judgment in this case is reported in *Palani Ammal v. Muthuvenkatachala Moniagarar*(3). On page 780, KUMARASWAMI SASTRI J.,

after reviewing a number of authorities upon the question of whether the separation of one member *ipso facto* effects a separation between all the others, stated his opinion to be that, where the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one coparcener without knowing how many coparceners there are and their shares), the status of the others is unaffected by a decree or division in favour of one member.

Syed Kasam v. Jorawar Singh(1) is another case to which we were referred. There a member of a joint Hindu family governed by the Mitakshara claimed his share of the family property, and the members of the family agreed to appoint an arbitrator to partition the property among them and to accept his partition, and it was argued that this agreement to appoint an arbitrator effected a severance of the joint estate. This contention the Privy Council accepted and, at page 92, Viscount CAVE states as follows:

"It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree."

But the facts of this case are very different to those in that case on account of clause 8 of the present agreement. Whilst that remains, it seems to me that it cannot be held that the ascertainment of the shares of the coparceners in the earlier clauses of it necessarily brings about a division in status. It seems to me that, in all the cases to which we were referred upon this

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(1) (1924) I.L.R. 48 Mad. 254 (P.C.).

(2) (1866) 11 M.I.A. 75.

(3) (1917) 33 M.L.J. 759.

(1) (1922) I.J.R. 50 Cal. 84 (P.C.).

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point, upon the facts of them a present intention to divide in status was apparent. In this case, as I have already said, in the absence of clause 8, such an intention is discoverable. But effect has to be given to this agreement and to clause 8, unless it can be shown that, whatever the intention of the parties to the agreement may have been, the ascertainment of the shares of the remaining members of the family must in law operate as a division in status. No authority for this proposition has been put before us, and I am clearly of the opinion that such a proposition as that cannot be supported by reference to any of the cases referred to. One fact must not be overlooked, and that is, that Exhibit A. was drafted by a Vakild and it is hardly likely that he would have drafted a document intending in the earlier part of it to convert the estate into a tenancy in common and yet in the latter part of it to preserve the coparcenary. He could not have intended to disrupt the status of the family and yet to apply the principle of survivorship to it. This would, in my view, have created an impossible position. What, therefore, was it that the parties intended? It was contended before us that the wishes of Muthu Odayar were intended to be given effect to and they were that the family should remain an undivided family during his lifetime. He was an old man and willing to give up his share in the family property to the others. I think that this contention is well-founded and that in deference to Muthu Odayar's wishes the family agreed to remain undivided during his lifetime and had no present intention at the date of the execution of Exhibit A. to divide in status at all. Clearly there had been disputes in the family. The adoption of Siva Vadivelu was open to question and in Exhibit A. that matter was set at rest. There were also other matters which required adjustment and

there is nothing unreasonable in supposing that, when the parties came together for the purpose of dividing themselves from Balasubrahmanya, they took that opportunity of settling once and for all all the matters then in dispute and likely to cause dispute thereafter—indeed, it is so stated in the document—that there never was any intention to become divided in status but that they agreed to a future partition and that, when the occasion for it should arise, there should be no dispute as to the shares of the coparceners on such a partition. No other view of the intention of the parties seems to me possible and I have no difficulty in thinking that such was the intention. That such was the intention of the parties was nobody's case in the appeal, but the comment to be made upon that is that all the parties to the appeal were trying to get a larger share of the family property and that this case suited no one. The view that I have taken is strongly supported by the subsequent conduct of the family.

[His Lordship here discussed the evidence as to conduct and came to the conclusion that it was quite incompatible with any other position than that of an undivided family.]

Much was addressed to us in argument upon the meaning of the words in clause 8 "the family shall be treated as an ordinary undivided Hindu family." It was contended that the use of the word "treated" implied that the family was not actually an undivided family because "treated" is to be read as "deemed"; but, although upon a strict construction of the word "deemed", it may possibly imply something different to actual, I do not think that when the whole of the clause is read it means anything else than an actual ordinary undivided Hindu family. The Vakild who was responsible for drafting the document could not have

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intended to say that a tenancy in common was nevertheless to "be deemed to be an undivided Hindu family subject to the law of survivorship." I think that it is more probable that he had in mind the possible result of the earlier ascertainment of the shares of the members of the family, and that in clause 8 he decided to make it clear that there had been no division in status by that ascertainment, and so emphasized the retention of the undivided status in order to remove any possible misconception. This is the conclusion I have arrived at as to the construction of Exhibit A and, in my view, it cannot be argued that it is not binding upon the plaintiff. It is an agreement which, in the absence of any authority to the contrary, can be validly entered into and was entered into by his father, Siva Vadivelu, and was an agreement between all the adult members of the family. There was certainly consideration for it in that it settled the disputes between the parties and recognized the adoption of the plaintiff's father and, in fact, gave him a somewhat larger share than he would have got by reason of such adoption and, furthermore, there was a relinquishment of Muthu Odayar's share. In view of this finding that there was no disruption in the family on the date of Exhibit A even in status and that the family remained undivided, it is unnecessary to deal with the arguments of Counsel based upon a division in status effected on the date which Exhibit A bears. On the question of upon what basis the accounts are to be taken, it follows from this decision that it must be on the basis of an undivided family from 5th November 1917, and, following the form in *Sri Ranga Thathachariar v. Srinivasa Thathachariar*(1), I have arrived at the same conclusion upon this point as that

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of the learned Subordinate Judge but, of course, for different reasons, because he found that Exhibit A did effect a division in status. I agree with the learned Subordinate Judge also in rejecting the plaintiff's claim to past mesne profits in respect of items C-5 and C-7 against the 27th and 28th defendants as he has found that they were not in adverse possession and I am not inclined to disagree with that finding. The result of this therefore is that the appeal must be dismissed with costs. Two sets of costs to respondents, defendants 1, 2 and 9 in one group and defendants 3, 4 and 6 in the other group. (Defendant 28 does not ask for any costs.)

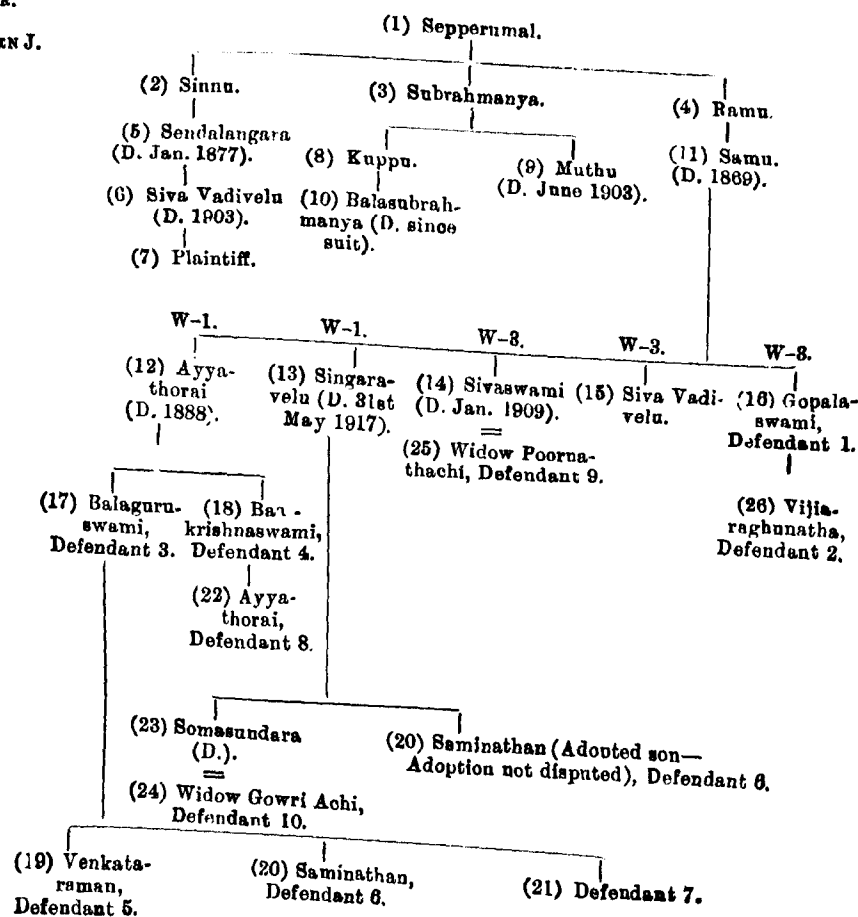
With regard to Appeal No. 411 of 1925, the only question in that was the construction to be placed upon clause 8 of Exhibit A. That only fell for discussion in the event of our holding that Exhibit A effected a division in status, and, as we have held that it did not, this appeal is not capable of further argument but is allowed to the extent indicated in the judgment of CURGENVEN J. Costs of all parties to come out of the estate. Certain other matters are left over for future argument.

With regard to Appeal No. 6 of 1926, I agree with the conclusions of my learned brother whose judgment I have read, and with his reasoning also. This appeal must be dismissed with costs.

CURGENVEN J.—These three appeals arise out of a CURGENVEN J. suit for the partition of the joint property of a family of Odayars known as the Thannirkunnam family. This property comprised the whole or portions of several villages in the Tanjore District, as well as movables and outstandings, the whole amounting, according to the plaint valuation, to some four and a

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half lakhs. The following is the family genealogical table:—



The family lived in a condition of undisputed jointness until 1895, but not without disputes regarding certain matters which will be referred to later. In that year all the adult members subscribed to a partition-deed, Exhibit A, and it is upon the construction of this document that the first two of the three appeals have to be decided.

The questions to which the document, Exhibit A, gives rise are, firstly, what does it mean and, secondly, is it binding upon the signatories to it and those claiming

under them. Very long and elaborate arguments have been addressed to us upon the former of these two questions, the parties ranging themselves into three main groups, each with its own construction to put forward. How these groups came to be formed, and in what circumstances the document originated, need to be borne in mind in attempting to discover the intention underlying the deed.

The family, as the genealogical table shows, consisted in 1895 of three main branches, those of Sinnu, Subrahmanya and Ramu Odayar. Sinnu's branch depended for its existence upon the fact of the adoption of Siva Vadivelu, a member of Ramu's branch, by Sinnu's son Sendalangara. Subrahmanya's branch was represented by two members, Balasubrahmanya and Muthu. The third branch, that of Ramu, included a number of persons, Ramu's son, Samu, having had five sons. All those defendants who belong to the family are representatives of this branch. Up to 1895, as has been said, the family formed a single coparcenary, although, being possessed of extensive property and engaged in various activities, its members may have exhibited some external marks of separateness. Sometime before the date of Exhibit A various disputes arose. One, it is said, had reference to Siva Vadivelu's adoption. Another was concerned with the nature of some of the property, whether it was self-acquired or joint. Balasubrahmanya, of the second branch, evinced a desire to get his share divided, while Muthu, of the same branch, was strongly of opinion that the whole family should remain joint. It was a question, therefore, whether to agree to his division, and if so, what share he should get. Some of these circumstances will need to be considered again when the binding character of the document is inquired into. It is sufficient to say here that Balasubrahmanya had his way

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and split off from the remainder of the family; and this seems primarily to have afforded occasion for the deed. At the same time there is no doubt that the opportunity was availed of to compose the other outstanding questions and to settle once for all how upon a general partition the property was to be allotted.

The document begins by calling itself a deed of partition between the signatories, a description which the cleavage with Balasubrahmanya would in itself justify, and adverts to the danger that disputes might arise in connection with partition and heavy loss be occasioned thereby. Grounds are then found in the services to the family of Ramu Odayar and his son Samu Odayar for giving their branch special consideration. Accordingly, "the partition arrangements we have come to amongst ourselves are as follows." Then follow nine clauses setting forth these arrangements. Of these, the language of clauses 1, 3, 6 and 8 must decide the construction to be placed upon the document. Clause 1 assigns to Balasubrahmanya a one-fifth share and provides as regards the remaining four-fifths that the division is to be into five equal shares—four to go to the four sub-branches of the third branch, and one to Siva Vadivelu. Clause 3 defines Balasubrahmanya's share by means of a list, and collects the remaining property, comprising the family property of the remaining members, into two other lists. Clause 6 recites that Muthu Odayar, out of natural affection for Samu Odayar's heirs, and because they would otherwise get a smaller share, gives them his share in the family property, being himself without heirs and advanced in years. In view of this "the rest of us shall during the life-time of Muthu Odayar live as members of one family. After Muthu Odayar, partition shall

be effected according to the shares laid down in clause 1." Clause 8 runs as follows:—

"So long as the sharers other than Balasubrahmanya Odayar of us remain together without effecting a division by metes and bounds according to the shares mentioned in clause 1, the family shall be regarded as an ordinary undivided Hindu family subject to the law of survivorship."

The meaning of these clauses, as I have said, has been variously interpreted. The plaintiff, while very willing to avail himself of the document so far as it confirms his father's adoption, contends that clause 8 shows that the family remained joint and that the specification of shares in clause 1, being repugnant to the notion of a joint family, is invalid. He asks for a half-share in the entire remaining property, including that resigned by Muthu Odayar. A directly contrary view is pressed upon us on behalf of the first, second and ninth defendants. One of Samu Odayar's sons, Sivaswami, died subsequent to the execution of the document, leaving a widow, the ninth defendant. Of course, if the family remained joint, she will only be entitled to maintenance. But, if Exhibit A created a severance of status, the question whether or not she is to take her husband's share will depend upon whether, in spite of that circumstance, the rule of survivorship is to be applied under clause 8. She therefore contends for the virtual rejection of this clause. The first defendant is the sole surviving full brother of Sivaswami Odayar, and supports the widow in consideration of his reversionary interest. The third group—descendants of Ayyathorai Odayar (defendants 3, 4, 5, 7 and 8) and Singaravelu's adopted son (sixth defendant)—contend that, although clause 1 may have effected a severance of status, yet it is possible to give legal effect to clause 8 in such a manner as to apply what is, within certain limits, a rule of survivorship. The Principal Subordinate

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Judge has found in favour of the construction contended for by defendants 1, 2 and 9. This has given rise on the one hand to an appeal by the plaintiff (Appeal Suit No. 439 of 1925) and on the other to an appeal by defendants 3 to 8 (Appeal Suit No. 411 of 1925).

In approaching the construction of the document, no authority is needed for the principle that every endeavour should be made to ascertain from it, read as a whole, what was the expressed intention of the parties to it. Each part must, if possible, be reconciled to the remainder, because it must be presumed, unless and until such presumption appears to be forbidden by the language, that it was drafted to subserve a consistent purpose and course of action. Observation of this principle would seem to require that those constructions which would reject either clause 1 or clause 8 should, to begin with at least, be put on one side; because it seems clear that the adoption of either must frustrate some part of the intention with which the settlement was executed. There remain two interpretations to consider. The first supposes clause 1 to have effected a division in status, while clause 8 preserves the rule of survivorship. The second, which none of the parties finds it in his interest to support, but which may not be the less worth considering on that account, would construe clause 1 as no more than an agreement into what shares the property should be divided after Muthu Odayar's death, and not as evidencing a resolve immediately to sever in status. The clause would then plainly be reconcilable with clause 8.

Dealing with the merits of these two views, it may be conceded that, but for the existence of clause 8, the natural view, and the view supported by authority, would be that a severance of status resulted from the declaration contained in clause 1. So far as the partial

partition of Balasubrahmanya's share was concerned, all that was needed was to specify his one-fifth, and to leave the remaining members as an undivided family in possession of the remainder. Without doubt, therefore, a further intention is denoted by the apportionment of the four-fifths remaining into five equal shares. It has been urged that, whether that intention was to divide prospectively or immediately, the mere definition of shares in law converted the joint tenancy of a coparcenary into a tenancy in common; because an essential incident of a coparcenary is that no member can predicate what his share would be upon a partition. Before considering the case-law upon this point, a few elementary considerations need to be stated. The members of a coparcenary own their property jointly, and the interest which each member has in it fluctuates with the number of other members, as some are born and some die. It fluctuates by operation of the rule of survivorship, and, since that rule is a necessary incident of the status, so must be the liability to fluctuation. Hence, abrogation of the rule, rendering the shares fixed, necessarily involves a disruption of the joint status. The members become tenants in common, each possessed of individual rights which they may dispose of as individual property. They have substituted the rule of inheritance for the rule of survivorship. But if they retain the rule of survivorship, it is not easy to understand how they can be said to have fixed their shares, because by the terms of their agreement those shares are still subject to the fluctuation produced by the rule operating upon them. Merely to specify, therefore, that on partition the property will be divided according to a certain method, and until then the members will remain joint, would not seem, on first principles, necessarily to precipitate a severance. A simple illustration

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of the distinction I seek to draw may be given. Suppose four brothers and a cousin (son of a deceased paternal uncle) compose a joint family. Upon a partition, the cousin would take half the property, the primary division being *per stirpes*, and the four brothers would each take one-quarter of the other half. Suppose however that these five members come to a settlement whereby they agree that, when a partition takes place, it is to be *per capita* throughout instead of *per stirpes* in the first instance, so that each member would obtain one-fifth, the family in the meanwhile to remain joint. There has been a substitution of one rule for another for the ascertainment of shares, but the shares are not thereby any the more or the less ascertained. Much less has any division of rights been effected. Yet that is very much what has occurred here. What the parties in effect said was, "We will recognize Siva Vadivelu's adoption, but when we come to divide we will ignore it, and count this member as though he occupied his natural place as a son of Samu Odayar": though it may be a question how the rule of survivorship should be applied to such an arrangement. I do not think that there is any authority for the view that such an agreement necessarily causes a division of status. The dicta of Lord WESTBURY in *Appovier's case* [*Appovier v. Rama Subba Aiyan*(1)] do not apply to such circumstances, because there the family members agreed that thenceforth the property should be subject to ownership in certain defined shares, so that there was a division of rights, although it was not followed up by an actual partition. In *Balkishen Das v. Ram Narain Sahu*(2), the members of a joint family executed an *ikrarnama*, and the question was whether it effected a division in

status. Their Lordships experienced "no difficulty in the construction of the *ikrarnama*, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several coparceners," and that they were thereby converted from joint tenants into tenants in common. In the present case, assuming the retention of the rule of survivorship, the conversion of the joint tenancy into a tenancy in common can scarcely have occurred. Another case in the same line of Privy Council decisions is *Parbati v. Nawnihal Singh*(1), which related to an agreement by the members of a joint family that the family property should be thenceforth held and enjoyed by the various members of the family in certain defined shares. In deciding that the agreement produced a division in status, their Lordships were, I think, more concerned with the construction of the documents evidencing the agreement than with their legal effect, once it was found that an immediate division into shares was intended. The use of the word "thenceforth" will be noted. Another and not dissimilar case is *Syed Kasam v. Jorawar Singh*(2), of some assistance here, because of an observation that the agreement was "quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship." Only by holding that clause 8 of the present agreement cannot operate can the agreement itself be held to effect such a severance.

I think it will be found that in each of these cases a present intention to divide in status was discovered, and none of them is authority for the view that the parties cannot agree to certain principles of partition, to be applied *in future*, without becoming tenants in common. This in my view disposes of the contention

(1) (1909) I.L.R. 31 All. 412 (P.C.). (2) (1922) I.L.R. 50 Calo. 84, 99 (P.C.).

(1) (1866) 11 M.I.A. 75.

(2) (1903) 30 Calo. 738 (P.C.).

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that the family members here, irrespective of their own wishes, and irrespective of the terms upon which they proposed to hold their property until Muthu Odayar's death, must be regarded as severed in status. Before going further, it will be convenient to consider what their actual intention seems to have been. The document was drafted by a Vakil, and, although unfortunately it has given rise to this costly litigation, it is not unreasonable to suppose that it was drafted with due regard to the principles of Hindu Law. It can hardly be supposed that any one conversant with those principles would draw an instrument of so hybrid a character that in one place it divides status and makes the signatories tenants in common, while in another it applies to their property so well understood an incident of the joint family status as the rule of survivorship. It is not too much to say that this rule is the logical outcome of conditions wholly at variance with the incidents of a co-tenancy. If Mr. K. S. Krishnaswami Ayyangar, in his endeavours to reconcile the two things, has convinced me of one thing, it is the extreme difficulty of the task which was set him. He had to admit that the survivorship principle could only be applied with modifications, and Mr. Varadachari found no difficulty in suggesting problems and anomalies to which its application would give rise. Let us then see what the members of the family would seem to have desired. One thing is clear—that very great deference was paid to the wishes of Muthu Odayar. He was the only surviving member of his generation, and, as the document says, “advanced in years.” His name stands first in the deed. He was to give up his share to the others, and, as the evidence shows, he was most anxious that, apart from Balasubrahmanya's separation, which he deplored, the family should remain joint. Doubtless some slur may attach

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to family members who dispute and divide. It was therefore provided that so long as he lived there should be no further partition. I can see no reason to suppose that during his lifetime a division even of status was intended. After all, although such a severance is a familiar enough legal conception in the Courts, the necessity for partition first by status and then by metes and bounds does not very commonly arise in practice. Nor, again, if such was the intention, are the parties likely to have nullified its main legal effect by the addition of clause 8. Accordingly, I cannot escape the conclusion that what they wanted was to remain joint until after Muthu Odayar's death, while settling how the property should then be divided. I have myself no difficulty in construing Exhibit A as an expression of such an intention. It has been asked why, if no immediate division was intended, the parties should have been at pains to declare, in clause 8, that “the family shall be treated as (or “deemed to be”) an ordinary undivided Hindu family subject to the law of survivorship”; and stress has been laid on the word “treated” or “deemed” as indicating a consciousness that the family was not in fact joint. No doubt the phrase “deemed to be” is commonly used in statutes to extend the application of a provision of law to a class not otherwise amenable to it. But, as the learned Advocate-General observes, one cannot apply to a mufassal document rules of construction that would be appropriate in the case of a statute. I think the reasonable view to take is that the draftsman, having in mind such decisions as *Appovier's case* and, realizing that clause 1 might imperil the joint status (a fear, as the sequel shows, not unfounded), inserted clause 8 as a precautionary measure. A case which bears some resemblance to this one was decided by KRISHNAN

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and RAMESAM JJ. in *Venkatachala Pillai v. Arunthavathi*(1). The second of three brothers was adopted out of the family, the other two remaining joint. All three entered into an agreement to put their property together and live as members of a joint family, and, when a division should take place, to divide into three equal shares,—subject to the operation of the law of survivorship. It fell to be decided whether the agreement had occasioned a severance of status, and there, as here, it was argued that the deed “as a matter of legal consequence, whatever the parties might have intended, resulted in the severance of coparcenary”; but the learned Judges observe that the document recited that no party to it was to assert that any portion of the property belonged to him separately or exclusively, and provided for future born children to be made sharers. It was further suggested that the fixing of the shares at one-third each was an indication that a division was intended, and *Balkishen Das v. Ram Narain Sahu*(2) was cited in support of this contention. The answer to this, equally applicable I think to the present case, was that the definition of shares amounted to nothing more than a mere statement as to what each person would be entitled to in case of a division if no brother were born.

I should be prepared to hold then that the document is not ambiguous of the intention to remain joint, and is not ambiguously expressed. But conceding that there may be ambiguity, it is permissible to look at the subsequent conduct of the parties to ascertain if it favours the one view or the other. [His Lordship here discussed all the available documentary evidence as to conduct and held that no other conclusion was possible but that those

members of the family whose views were ascertainable from those documents entertained the view that they were still undivided in status.]

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My conclusion then is that the family members intended to remain joint until Muthu Odayar's death, while entering into this agreement as to what their shares should be thereafter. I have already expressed the view that an agreement of this nature does not necessarily disrupt the status. Nor has any authority been shown for the position that the members of a joint family are incapable of entering into such an agreement. There is no doubt that at the time of partition the members may by general agreement distribute the property otherwise than as Hindu Law provides, and there seems no reason why such an agreement cannot be entered into beforehand. In the Privy Council case, *Lakshmi Chand v. Anandi*(1), two brothers, while remaining joint, agreed that, if either died without male issue, his widow should take a life interest in half the estate, thereby abrogating the rule of survivorship. It was held that the agreement was valid because a co-sharer may with the consent of the remaining co-sharers mortgage or charge the share to which he would be entitled upon a partition; and, on the same principle, he may deal otherwise with such a share. If therefore all the family members enter into a settlement whereby some will, upon a partition, receive less than under Hindu Law would be their share, the latter cannot afterwards plead that they were legally incompetent so to agree. Nor, I think, can the plaintiff succeed in attacking the agreement on the ground that, being without consideration, it is not binding upon him. It was entered into by his father, Siva Vadivelu Odayar, before he was born,

(1) (1930) I.L.R. 48 All. 313 (P.C.).

(1) (1922) 17 L.W. 755.

(2) (1903) I.L.R. 30 Cal. 738 (P.C.).

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and although Siva Vadivelu lived until 1903 he never repudiated it. So far as the other signatories are concerned, it settles the question of his adoption, for which it seems there is extremely little independent evidence,—a batch of four sale deeds (see Exhibits Z and Z-1) in which this relationship is recited being the only documentary evidence (if indeed they are legal evidence at all) originating before Exhibit A upon the record. On the other hand, the evidence of the first and third defendants as D.Ws. 18 and 13 shows that there were disputes within the family about the adoption, and this is borne out by two other witnesses, D.Ws. 4 and 5. If Exhibit A goes, therefore, the plaintiff's status, following Siva Vadivelu's status as an adopted son is at least in jeopardy, and, as that would be fatal to the claim he makes to a half-share in the property, he does not handle this two-edged argument very confidently. It seems incontestable that Exhibit A is binding for the sufficient reasons that it was an agreement between all the adult members of the family, and that it put an end—for the time being at least—to the disputes between them. Besides the matter of the plaintiff's father's adoption, there was the connected question of the share which Balasubrahmanya Odayar was to take. If the adoption was to be recognized, he would get one-sixth of the whole, if not, one-fourth. A mean was struck, and he received one-fifth. It appears, too, that there was a disagreement whether certain property was self-acquired by Ramu and Samu Odayar or joint family property, a question which would affect the shares to be taken by each branch. Lastly, the settlement included Muthu Odayar's resignation of his own share, subject to the payment to him annually of a sum of Rs. 4,000. Altogether, there can be no question but that, just as where a number of creditors accept a composition, so in

the general give-and-take and composing of differences, Exhibit A as a family settlement is binding upon its signatories and those claiming under them.

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The result of these findings will be that the undivided share of Sivaswami Odayar will pass by survivorship to the remaining members of his own branch, viz., (1) the descendants of Ayyathorai, defendants 3 to 5, 7 and 8, (2) the sixth defendant as representing his adoptive father, Singaravelu, and (3) Gopalaswami and his son, defendants 1 and 2. Each of these will receive one-third of one-fifth share in addition to his or their own one-fifth in all four-fifteenths each, this fraction being further subdivided, in the case of the first branch, equally between the third and fourth defendants' sub-branches. The decree of the lower Court will be modified accordingly. The plaintiff, belonging to a different main branch from Sivaswami Odayar's, cannot benefit by his death, but will take the one-fifth already awarded him by the lower Court. As regards the other orders to be passed in Appeal Suits Nos. 411 and 439 of 1925, I agree to the terms of them as proposed by my Lord.

[His Lordship then considered Appeal No. 6 of 1926 preferred by certain lessees and agreeing with the Court below dismissed the appeal with costs.]

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1930,
July 22.

ANNAMALAI DESIKAR AND ANOTHER (PETITIONER
AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

RAJU PILLAI AND ELEVEN OTHERS (DEFENDANTS 2, 4, 7, 10,
19, 23 to 28 AND LEGAL REPRESENTATIVE OF FIRST DEFENDANT),
RESPONDENTS.*

*Indian Limitation Act (IX of 1908), sec. 3, arts. 181, 182—Step
in aid of execution—Application for extension of time to
pay money due under decree, whether a step in aid—Sec.
48, Code of Civil Procedure (Act V of 1908).*

A decree directed possession of land to be given to the plaintiff on payment of the amount due to the defendant for improvements, to be ascertained by the Court later. On an application for execution by the plaintiff for possession and for ascertainment of the amount due for improvements, the Court ascertained the amount on a certain date and fixed a date for payment. Unable to pay on the date fixed, the plaintiff unsuccessfully applied for extension of time for payment. On a further application for execution,

Held, (1) that, assuming that article 182 of the Limitation Act applied; the application for extension of time to make the payment was not a step in aid of execution within the meaning of the article, (2) that, as no time was originally fixed in the decree for payment, article 182 did not apply, but article 181 applied, under which the right to apply for execution, which was not a continuing right, accrued on the date of the ascertainment of the amount and not on the date of the dismissal of the petition for extension, (3) that section 48 of the Code of Civil Procedure does not give a period of twelve years for execution, but only provides for dismissal of an execution petition which is filed after the period of twelve years, and (4) that article 181, like the other articles of schedule I of the Limitation Act, must be read with section 3 of the Act and refers to applications for which no period of limitation for the purpose of dismissal is provided

* Appeal against Order No. 141 of 1927.

elsewhere in the schedule or by section 48 of the Code of Civil Procedure.

APPEAL against the order of the District Court of North Arcot, dated 25th October 1926, in Execution Petition No. 26 of 1924 in Original Suit No. 10 of 1914.

The facts are fully given in the judgment.

K. Rajah Ayyar and V. Ramaswami Ayyar for appellants.—Any application which takes a pending execution petition a step further by trying to provide facilities for execution is a step in aid of execution within the meaning of article 182 of the Limitation Act. An application for extension of time to pay the amount ordered by a decree to be paid to the other side as a condition precedent to execution is such a step in aid; *Sankara Nainar v. Thangamma*(1), *Abdul Kader Rowther v. Krishnan Malaval Nair*(2), *Haridas Nanabhai v. Vithaldas Kisandas*(3), *Seshadasacharya v. Bhimacharya*(4), *Pitam Singh v. Tota Singh*(5), *Bhairon Prasad v. Amina Begam*(6) and *Raghunath Prasad Singh v. Lachhmi Narain Singh*(7). *Masilamani Mudaliar v. Sethuswami Ayyar*(8), *Ramaswami v. Veeranna*(9) can be distinguished. See *Kunhi v. Seshagiri*(10), *Krishna Pattar v. Seetharama Pattar*(11), *Hamidudin Saheb v. Ghouse Saheb*(12) and *Vappu Rowther v. Sivakataksham Pillai*(13). Alternatively, if article 182 does not apply, then the execution of the decree is governed by article 181 which gives three years from the date when the right to apply accrues. The right to apply accrues not from the date of ascertainment of value but from the date on which the application for extension of time to pay was dismissed. The right to apply is a continuing right up to twelve years from the date of the decree as the decree had not fixed any time for payment; see *Rukminakur v. Sheo Dat Rai*(14) and *Chhedi v. Lahu*(15).

In any event section 48 of the Code of Civil Procedure gives the decree-holder twelve years period of limitation.

T. R. Ramachandra Ayyar, S. Srinivasa Ayyar and V. C. Viraraghavan for respondents were not called upon.

- (1) (1921) I.L.R. 45 Mad. 202.
(3) (1912) I.L.R. 36 Bom. 638.
(5) (1907) I.L.R. 29 All. 801.
(7) (1925) I.L.R. 47 All. 687.
(9) (1927) 58 M.L.J. 766.
(11) (1928) 51 M.L.J. 480.
(13) (1929) 58 M.L.J. 406.

- (2) (1913) I.L.R. 38 Mad. 695.
(4) (1912) I.L.R. 37 Bom. 317.
(6) (1914) I.L.R. 38 All. 690.
(8) (1917) I.L.R. 41 Mad. 251.
(10) (1922) I.L.R. 5 Mad. 141.
(12) (1926) 51 M.L.J. 499.
(14) (1919) 17 A.L.J. 841.

- (15) (1902) I.L.R. 24 All. 300.

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JUDGMENT.

REILLY J.—In this case a decree was made that the plaintiff should recover certain property from the defendants and that he should pay to certain of the defendants amounts for improvements. Grammatically those might be two separate provisions in the decree; but I think there is no doubt that the intention of the decree was that on the payment of those amounts the plaintiff should be entitled to recover possession. The learned District Judge adopted a rather curious course in making his decree in respect of those amounts to be paid for improvements. He fixed them provisionally. He provided in the decree that they were subject to revision on the report of a commissioner to be appointed by the Court. There was an appeal against the decree; but it was dismissed by this Court in December 1918. On the 15th of December 1919 the plaintiff put in an execution petition, in which he prayed for the appointment of a commissioner to fix the amounts to be paid for improvements and for possession of the property. Eventually the commissioner made his report, and the District Judge after considering it adopted the amounts suggested by the commissioner on the 12th of November 1920 and ordered that the plaintiff should pay those amounts into Court by the 17th of December 1920. The amounts were not paid by that date, and the execution petition was adjourned from time to time; and eventually on the 8th of August 1921 the plaintiff put in an application that further time might be granted to him for payment, and time was granted to him up to the 16th of August 1921. On that date the money had not been paid and the execution petition was dismissed. Then on the 6th of August 1924 the plaintiff put in Execution Petition No. 26 of 1924 for delivery of the property on payment of the amounts fixed. Objection was taken by some of the defendants that that petition

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was time-barred, because it was put in more than three years after the previous execution petition. The plaintiff contended that the bar of limitation was saved by his application of the 8th of August 1921 for the adjournment of the previous execution petition in order to allow him time to make the payments. The learned District Judge decided against that contention and dismissed the second execution petition. The present appeal is against that order of dismissal.

Mr. Rajah Ayyar, who appears for the plaintiff, has first contended that the application for extended time for payment, which was made on the 8th of August 1921, was a step in aid of execution within the meaning of article 182 of the Limitation Act. He has first referred us to *Sankara Nainar v. Thangamma*(1), in which it was held that an application made by a mortgagor for extension of the time allowed him for payment in a decree for redemption was a step in aid of execution. With very great respect I am not able to understand that decision. The application of the mortgagor in that case appears to me to have been an application to extend the time fixed in the original decree, that is an application to vary the original decree. There are provisions for making such applications in respect of redemption decrees. I do not myself understand how such an application could be treated as coming within the words "step in aid of execution" in article 182 of the Limitation Act. But that, as I have said, was a decision in a mortgage suit and so perhaps may be regarded as not exactly applicable to the present case. What appears to be of more use to the plaintiff in this case is the decision in *Abdul Kader Rowther v. Krishnan Malaval Nair*(2), in which an application for time to get an encumbrance certificate for the purpose

(1) (1921) I.L.R. 45 Mad. 202.

(2) (1913) I.L.R. 38 Mad. 695.

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of a sale in execution was regarded as a step in aid of execution. AYLING J. in *Masilamani Mudaliar v. Sethuswami Ayyar*(1) expressed dissent from that view; and it has to be noticed that there is a decision directly in conflict with it in *Ramaswami v. Veeranna*(2). But Mr. Rajah Ayyar has brought to our notice two cases of the Bombay High Court, *Haridas Nanabhai v. Vithaldas Kisandas*(3), and *Seshadasacharya v. Bhimacharya*(4), in which applications for time for getting copies of decrees or other documents were held to be steps in aid of execution, and has also quoted *Pitam Singh v. Tota Singh*(5), *Bhairon Prasad v. Amina Begam*(6), and *Raghunath Prasad Singh v. Lachhmi Narain Singh*(7), which are to the same effect. But, even if to ask for time to get from other persons documents necessary for execution proceedings can properly be regarded as a step in aid of execution, in my opinion to defer, or to ask time for, doing something which concerns the decree-holder himself cannot properly be regarded as aiding execution. It is rather in my opinion postponing execution. To say that it is aiding execution to ask for extended time for payment, because the decree-holder, if he gets time, may be able to earn or borrow or otherwise raise money, appears to me unreasonable; and no decision has been brought to our notice in which an application for time for that purpose has been held to be a step in aid of execution. The payment of the money may well be a step in aid of execution; but the means and the opportunity of the decree-holder for raising it appear to me to be entirely unconnected with execution. In my opinion therefore the application of the plaintiff for further time to make the payment was not a step in aid of execution.

(1) (1917) I.L.R. 41 Mad. 251.

(3) (1912) I.L.R. 38 Bom. 688.

(5) (1907) I.L.R. 29 All. 801.

(2) (1927) 58 M.L.J. 786.

(4) (1913) I.L.R. 37 Bom. 817.

(6) (1916) I.L.R. 38 All. 690.

(7) (1925) I.L.R. 47 All. 667.

But Mr. Rajah Ayyar has contended alternatively that article 182 of the Act has no relation to this case, because in the decree no time was fixed for the payment of the amounts for improvements and they could not have been paid on the date of the decree as they had not then been determined. That appears to me to be a good argument, and, if it is so, then we must turn to article 181. If we do that, we find that the period of limitation is three years from the date when the right to apply accrues. Mr. Rajah Ayyar indeed goes further and has contended that, as no time was fixed for payment in the decree, the plaintiff might have paid at any time up to the end of twelve years, and in support of that he has quoted *Rukmina Kuar v. Sheo Dat Rai*(1) and *Ohhedi v. Lalu*(2). Neither of those cases appears to me to support that contention as each turned upon the interpretation of the particular words of the decree concerned. In the first case the decree-holder was at liberty to pay the amount at any time in a certain month in any year. In the second case, which was one of pre-emption, time was held to run from the date of the payment of the pre-emption amount within the period allowed in the decree. Neither of those cases, I think, can help the plaintiff. The appropriate article appears to me to be article 181, and we have only to determine the date when the right to apply accrued. In this case the accrual could not be a continuing thing; the right must have accrued on some particular date. Now, as I have said, the District Judge left the amounts to be paid for improvements unsettled in the decree, and under the decree they were to be fixed later, on the report of a commissioner. A commissioner was appointed, and on his report the District Judge fixed the amounts on the 12th of November 1920. In my opinion

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(1) (1919) 17 A.L.J. 841.

(2) (1902) I.L.R. 24 All. 800.

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the effect of that was that those amounts were fixed upon that day and then became part of the decree. If there was anything irregular in the learned District Judge's procedure in arriving at his decree in that way, the plaintiff or anyone else concerned had his right to appeal; but that is not a question to be decided in execution. The amounts were fixed on the 12th November 1920, and the order then made was that they should be paid by the 17th of December 1920. But, as I have mentioned, they were not paid, and that execution petition was eventually dismissed on the 16th of August 1921. Mr. Rajah Ayyar contends that, even if we are to take the amounts as brought into the decree when the District Judge eventually fixed them in November 1920, yet, because the execution petition was not disposed of until the 16th of August 1921, his right to apply within the meaning of article 181 did not arise until the dismissal of the petition on the 16th of August 1921. That appears to me an untenable contention. The suggestion is that the fixing of the amounts on the 12th of November 1920 was merely an interlocutory matter, which did not really take effect until the execution petition was finally disposed of in August 1921. But, if we look upon the fixing of the amounts as an interlocutory matter incidental to the execution petition, when that petition was dismissed, the order fixing the amounts went with it. I do not think that is the proper way to regard the matter. If we remember the way in which this decree was drawn, the fixing of the amounts by the learned District Judge on the 12th of November 1920 appears to me to have been the final settling of the decree, and from that date the plaintiff was at liberty to make his payment and his right to apply within the meaning of article 181 accrued.

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Mr. Rajah Ayyar has raised one more contention, viz. that even apart from the facts that no date for payment was fixed in the decree and payment could not be made on the date of the decree, article 181 of the Limitation Act does not apply to this case, but only section 48 of the Code of Civil Procedure, which gives the decree-holder twelve years from the date of his decree for his application. That contention depends upon the wording of article 181. The wording is "applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908." Mr. Rajah Ayyar suggests that section 48 of the Code of Civil Procedure does provide a period of limitation, twelve years, for all decrees other than decrees for injunction, and that, if we exclude from article 181 all applications which are provided for in other articles of the Limitation Act and also decrees (other than decrees for injunction) which are provided for in section 48 of the Code, there is very little left for article 181 and certainly not enough to cover this case. That is a curious result of what at first sight might be taken to be the grammatical meaning of article 181. If we look at article 182, we find that the wording on the face of it may present almost the same difficulty. It runs:—

"For the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Code of Civil Procedure, 1908."

Literally, according to Mr. Rajah Ayyar's interpretation, that would mean that article 182 first excludes decrees included within article 183 and then excludes every decree which comes within section 48 of the Code of Civil Procedure. Then to what decrees other than decrees for injunction would article 182 apply? I think those conundrums arise only from a superficial view of the wording of articles 181 and 182. Those

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articles like the rest of Schedule I of the Limitation Act must be read with section 3 of the Act. Section 3 of the Act provides that suits, appeals and applications made after the periods of limitation prescribed in the first Schedule shall be dismissed, that is, these periods of limitation set out in the different articles of Schedule I of the Act are only to be taken in reference to the question of dismissal. Then we come to article 182. If we read it, as I think we ought to, "for the execution of a decree or order not provided for as regards dismissal by article 183 or by section 48 of the Code of Civil Procedure," there is no difficulty about it, because section 48 of the Code only provides for the dismissal of execution petitions which come in after the period of twelve years. It has no application to execution petitions put in at an earlier date and does not purport to deal with them. And in the same way, if we read article 181 as "applications for which no period of limitation for the purpose of dismissal is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure," there is no difficulty about it, and in fact the universally recognized interpretation of those articles is the right one, not the curious interpretation which Mr. Rajah Ayyar suggests from his view of the grammatical language of the articles, which is perhaps not very happy.

Mr. Rajah Ayyar's last contention, therefore, that neither article 181 nor article 182 applies to this case, but only section 48 of the Code of Civil Procedure, in my opinion also fails.

In my opinion this appeal must be dismissed with costs.

ANANTAKRISHNA AYYAR J.—I agree.

G.B.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

SIVARAM DUBAI (FIFTH PETITIONER), APPELLANT,

1930,
July 23.

RAJAGOPALA MISRA AND ANOTHER (PETITIONERS 4 AND 7),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 92—Decree in a scheme suit under—Provision for Court filling up future vacancies—Validity of—Appointment of new trustees—Appeal or Revision, maintainability of.

A provision in a decree framing, under section 92 of the Code of Civil Procedure, a scheme for the future management of a charitable trust to the effect that the Court which passed the decree was to fill future (and not then existing) vacancies amongst the trustees is neither an alteration nor a modification of the scheme within the scope of *Veeraraghavachariar v. Advocate-General, Madras (1927) I.L.R. 51 Mad. 31 (F.B.)*, and is hence not *ultra vires*.

An appointment made by the Court filling, under such a provision, a vacancy arising after the decree is not one made without jurisdiction and hence is not revisable by the High Court under section 115, Civil Procedure Code.

Not being an order made in execution of any direction in the decree to fill any particular existing vacancy, such order of appointment is not one made in execution under section 47, of the Code of Civil Procedure and is not appealable. *Ponnam-bala Tambiran v. Sivagnana Desika Unanasambandha Pandara Sannadhi*, (1894) I.L.R. 17 Mad. 343 (P.C.), distinguished.

APPEAL against the order of the District Court of Madura, dated 17th April 1930, and made in Original Petition No. 19 of 1930. Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order

* Appeal against Order No. 254 of 1930 and Civil Revision Petitions Nos. 1000 and 1001 of 1930.

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of the District Court of Madura, dated 17th April 1930, and made in Original Petition No. 19 of 1930.

K. Rajah Ayyar for respondents.—There is no right of appeal. Section 47 does not apply, as the matter arises neither in execution nor between the parties to the suit; *Sivan Pillai v. Venkateswara Aiyar*(1), *Abdul Hakim Baig v. Burramiddin*(2), and *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee*(3).

P. R. Ganapati Ayyar (with *T. R. Srinivasa Ayyangar*) for appellant.—An appeal lies from an order of appointment under section 47, Civil Procedure Code; see *Ponnambala Tambiran v. Sivagnana Desika Gnanasambandha Pandara Sannadhi*(4), and *Ramanotham Chettiar v. Balayee Ammal*(5). If a scheme framed under section 92, Civil Procedure Code, directs that future vacancies amongst the trustees shall be filled up by the Court, the direction is *ultra vires*, as it violates clause (b) of section 92. Hence the order is revisable as one made without jurisdiction. See *Veeraraghavachariar v. Advocate-General, Madras*(6), *Ambalavana Thambiran v. Vungeesam Pillai*(7).

K. Rajah Ayyar replied.—The direction is not opposed to the decision in *Veeraraghavachariar v. Advocate-General, Madras*(6), since it neither alters nor modifies the scheme framed but only carries it out; hence the order is not *ultra vires*.

JUDGMENT.

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ANANTAKRISHNA AYYAR J.—This appeal and the revision petitions arise out of an order passed by the learned District Judge of Madura by which he appointed two new persons as trustees of the Ranga Chattram charities in the place of two old trustees whose term of office expired after they had held office for five years under the scheme. One of the trustees whose term had so expired sought re-appointment and, as he was not re-appointed, he has preferred this Miscellaneous Appeal

(1) (1925) 22 L.W. 796.

(3) (1925) 49 M.L.J. 25 (P.C.).

(5) (1927) 27 L.W. 32.

(2) (1925) I.L.R. 49 Mad. 580.

(4) (1894) I.L.R. 17 Mad. 343 (P.C.).

(6) (1927) I.L.R. 51 Mad. 31 (F.B.).

(7) (1929) M.W.N. 744.

and the connected revision petitions. Mr. Rajah Ayyar, who appears for the respondents, the newly appointed trustees, raised a preliminary objection that the appeal does not lie; and the answer of Mr. Ganapati Ayyar was that the matter in dispute is really covered by section 47 of the Code of Civil Procedure and that an appeal lies. He also argues that we should in any event interfere under our revisional powers because, he says, the learned District Judge was not entitled to make the appointment complained of, and that, in spite of the terms of the scheme decree, such an appointment could be made only in a suit instituted under section 92 of the Code of Civil Procedure, after the necessary sanction had been obtained. I think it will be more convenient to deal with the second objection first. To appreciate Mr. Ganapati Ayyar's argument it is necessary to refer to paragraphs 4 and 15 of the scheme. Paragraph 4 runs as follows:—

“Each of the two trustees to be appointed by the Court should hold office for a term of five years but should be eligible for re-appointment, and any vacancy in the office of either of the said trustees shall be filled up by the Court.”

Paragraph 15 is to the following effect:—

“Liberty is reserved for the parties to the suit or for the Advocate-General to apply to the Court with reference to the carrying out of the directions contained in the scheme.”

Mr. Ganapati Ayyar argued that the provision in paragraph 4 of the scheme only means that the Court, when approached under section 92, should have the power to appoint proper trustees in cases of vacancy. He also relied on the decision of the Full Bench in *Veeraraghavachariar v. Advocate-General, Madras*(1). I am unable to agree with him. That decision only laid down that, in cases where it is sought to effect

(1) (1927) I.L.R. 51 Mad. 31 (F.B.).

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alterations or modifications of a scheme, the same could be effected only by proceedings taken under section 92 of the Code of Civil Procedure. The question referred to the Full Bench was whether, in cases where liberty to apply is reserved to a person to ask for directions as to the carrying out of a scheme or to move the Court for alterations or modifications of the scheme, applications to have such things carried out could be made in the suit itself, or whether the same could be done only by separate proceedings taken under section 92 of the Code of Civil Procedure. At page 45 of the judgment of the learned Officiating Chief Justice, who delivered the opinion of the Full Bench, it is mentioned as follows :—

“The scheme having been framed, any modification or alteration of it is in effect a new scheme and the power to frame (a new scheme) is given only subject to the conditions specified in section 92.”

In the present case, if, by virtue of the liberty given by the scheme to apply to the Court, it be sought to effect alterations or modifications of the scheme, then, by virtue of the Full Bench decision, they can be effected only after proceedings are taken under section 92. But there is paragraph 4 of the scheme which I have already mentioned. It provides for the filling up of vacancies whenever such vacancies occur ; and it says that any vacancy in the office of either of the said trustees should be filled up by the Court. I do not agree with the arguments of the learned Advocate for the appellant that filling up vacancies under such provisions of the scheme amounts to either alteration or modification of the scheme. I put him the question whether he would contend that, if the scheme contained a provision for the filling up of vacancies by a vote of the majority of a board of electors, or by any specified authority and

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such authority appointed particular persons to fill up the vacancies, the same also would come within the ruling of the Full Bench. If I understood him correctly, he was not prepared to go to that extent ; and his argument was that, in cases where the right to appoint is given to the Court, the power of appointment could not be exercised, as the provisions of section 92 are automatically attracted. I am unable to agree. In this respect, I am unable to find any material difference between a case where, under the scheme, the power to appoint is given to an outside body and one where such power is given to the Court itself. It therefore seems to me that the present is not a case where any modification or alteration of the scheme is asked for by virtue of any power to apply reserved under the scheme. If I am right in this view, it would follow that the lower Court had jurisdiction to entertain the application and that we should not be justified in interfering in revision.

But the learned Advocate argued that in that view the matter must be taken to be one arising in execution and falling within the scope of section 47 of the Code of Civil Procedure and that he would have a right of appeal. In support of that argument he relied on the decision of the Privy Council in *Ponnambala Tambiran v. Sivagnana Desika Gnanasambandha Pandara Sannadhi*(1), and that of a Bench of this Court in *Ramanatham Chettiar v. Balayee Ammal*(2). After carefully considering the wording of the decree which was the subject of comment by the Privy Council, I find that that case does not really lend support to his contention. The decree which was the subject of discussion before the Privy Council is found at page 339 of *Gnanasambanda v. Visvalinga*(3).

(1) (1894) I.L.R. 17 Mad. 343 (P.C.). (2) (1927) 27 L.W. 82.
(3) (1890) I.L.R. 13 Mad. 338.

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The decree is set out *in extenso* there, and I find that the operative portion of the decree was

"That the Subordinate Judge of Kumbakonam, in order to fill up the now vacant office of tambiran of the Tiruppanandal mutt, do direct the appellant to name a tambiran from among the tambirans of his *Adhinam*, competent to discharge the duties of managing tambiran of the Benares (Kasi) mutt at Tiruppanandal ;"

The matter before the Court thus related to the filling up of a then existing vacancy, and not to provide for the filling of all future vacancies, should there be any, and it was with reference to the filling up of the actual vacancy which was the subject-matter of the suit that the litigation was carried to the Privy Council; and, when the remarks of their Lordships of the Privy Council are read in the light of the wording of the decree in that case, I think that the judgment of the Privy Council does not support the contention of the appellant before us. The provision in paragraph 4 of the scheme before us is not for the filling up of any existing vacancy; and that, I think, is a material distinction between the case quoted by the appellant and the one before us. The other case referred to by the learned Advocate, viz., *Ramanatham Chettiar v. Balayee Ammal*(1)—a judgment of RAMESAM and CORNISH JJ.—was a case where the learned Judges specifically observed that they did not question the correctness of the numerous cases quoted before them, in which with reference to scheme suits generally it was held that the matter did not relate to execution and that an appeal did not lie; they distinguished the case before them on the ground that, when specific directions were given in the scheme-decree, then with reference to such directions the decree would be an executable decree. They, however, felt

(1) (1927) 27 L.W. 32.

some doubt on the question, and accordingly resolved to treat the matter before them as coming under clause (2) of section 47 under which Courts are given a discretion to allow a petition filed under that section to be treated as a plaint. Both the learned Judges refer to this aspect of the case; and they finally resolved to treat the proceeding before them as a plaint as there was no other objection to their doing so.

Having thus disposed of the two cases on which reliance was mainly placed by the learned Advocate for the appellant, I may state that our attention was drawn by the learned Advocate for the respondents to numerous cases where this Court held that an appeal does not lie in such cases and that such matters could not be taken to be matters arising under section 47 of the Code; *Ranganatha Thathachariar v. Krishnaswami Thathachariar*(1) (OLDFIELD and VENKATASUBBA RAO JJ.), *Sivan Pillai v. Venkateswara Aiyar*(2) (SPENCER and MADHAVAN NAIR JJ.), *Bangarammal v. Ramanuja Iyengar*(3) (DEVADOSS and WALLER JJ.), and *Abdul Hakim Baig v. Burramiddin*(4) (DEVADOSS and WALLACE JJ.) are among the cases to which our attention was drawn by the respondents' learned Advocate. It was there held that in such cases section 47 would not apply. I do not see any reason for not following those cases; more especially as the observations of the Privy Council in the *Dakore case*, *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee*(5), seem to lend support to the contention of the respondents.

For the above reasons I hold that no appeal lies in this case under section 47 of the Code of Civil Procedure

(1) (1923) I.L.R. 47 Mad. 139.

(2) (1925) 22 L.W. 796.

(3) (1925) 94 I.C. 610.

(4) (1925) I.L.R. 49 Mad. 580.

(5) (1925) 49 M.L.J. 25 (P.C.).

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and I would accordingly dismiss the appeal with costs. I would fix the pleader's fee at Rs. 250.

I have already mentioned that the lower Court had jurisdiction to proceed to make the appointments by virtue of the provisions of clause 4 of the scheme and that the decision of the Full Bench in *Veeraraghavachariar v. Advocate-General, Madras*(1) does not support the contention of the petitioner that the lower Court had no jurisdiction to do so. That being so, I would dismiss the revision petitions also, but in the circumstances, without costs.

No orders are necessary on the miscellaneous petitions.

REILLY J.

REILLY J.—I agree that in this case no appeal lies both because, as my learned brother has pointed out, the proceedings before the District Judge were not proceedings within section 47 of the Code arising in execution and because the parties concerned are not parties to the suit. But the most interesting and important part of Mr. Ganapati Ayyar's contentions was that clause 4 of the scheme for this trust, under which the District Judge has appointed the two respondents trustees, is *ultra vires*, having been made in a scheme suit under section 92 of the Code of Civil Procedure, but according to his contention being in conflict with the Full Bench decision of this Court in *Veeraraghavachariar v. Advocate-General, Madras*(1). In this case we are fortunate in the fact that my learned brother was a member of that Full Bench, and he has expounded the decision of the Full Bench. As he has pointed out, it was there laid down that, if a scheme made in a suit under section 92 of the Code provides for liberty to apply for the modification of

(1) (1927) I.L.R. 51 Mad. 31 (F.B.).

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that scheme, then that provision is *ultra vires*; and, as I understand the case, it was also decided that, if the scheme provides for liberty to apply for directions, those directions cannot extend to anything which the Court is empowered to do under section 92 of the Code. Mr. Ganapati Ayyar urges that under that section the Court has power to appoint a new trustee; and from that he argues on the strength, as he says, of the Full Bench decision that any provision in a scheme made under the section that a trustee shall be appointed to fill a vacancy by the Court is *ultra vires*. To my mind the selection and appointment of a trustee by the Court in accordance with such a scheme when a vacancy occurs is a very different thing from the appointment of a new trustee referred to in the section. If we look at the section, we find that under it the question of the Court appointing a new trustee arises only when the direction of the Court is deemed necessary for the administration of the trust. That may happen when a trustee is removed by the Court and no other machinery for replacing him comes into play or when a direction in the matter is required in other circumstances. But, when a scheme has provided regular machinery for the appointment of a trustee if a vacancy occurs, no direction of the Court is required for working that machinery in an ordinary case or in a case such as this. The machinery is there ready for use; and it does not appear to me to make any difference whether the machinery set up by the scheme is a Court which would have jurisdiction in a suit under section 92 of the Code or any other body or person. In my opinion therefore the provision in this scheme that, when vacancies occur among the trustees other than the life-trustee, the vacancies shall be filled by the District

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Court is not in any way in conflict with the interpretation of section 92 of the Code by the Full Bench in *Veeraraghavachariar v. Advocate-General, Madras*(1).

I agree that this appeal and the revision petitions should be dismissed. I also agree with the order proposed by my learned brother as to costs.

G.R.

ORIGINAL CIVIL.

Before Mr. Justice Venkatasubba Rao.

R. SABAPATHY RAO AND OTHERS (PETITIONERS),

AND

SABAPATHY PRESS COMPANY, LTD. (RESPONDENTS),
POLA SANKARIAH AND OTHERS (APPLICANTS).*

Company—Winding-up—Liability to pay interest on debts carrying interest from date of order of winding-up—Company in ordinary course of trade contracting to purchase goods and taking delivery of them between presentation of petition and order of winding-up—Right of vendor to be paid value—Applicability of section 227 of the Indian Companies Act (VII of 1913).

Where a company has been ordered to be wound up, the interest upon debts carrying interest ceases to run from the date of the order directing the winding-up, unless, after payment of the principal and interest up to the date of the winding-up there are sufficient assets to meet the liability on account of interest accruing after the commencement of the liquidation; *In re Humber Iron Works and Shipbuilding Co. (Warrant Finance Company's Case)*, (1869) 4 Ch. App. 643, *In re Duncan & Co.*, [1905] 1 Ch. 307, *Ghansham Das v. Public Banking and Insurance Co.*, (1919) I.L.R. 1 Lah. 154 and *Devi Ditta Mal v. Official Liquidator, Amritsar Bank, Limited*, (1920) I.L.R. 1 Lah. 368, followed.

(1) (1927) I.L.R. 51 Mad. 31 (F.B.).

* Original Petition No. 94 of 1922.

Where a company, between the presentation of the petition for winding-up and the winding-up order, contracted in the ordinary course of trade to purchase goods and actually took delivery of them, *held*, that section 227 of the Indian Companies Act (VII of 1913) did not in terms apply to such a transaction, and that the vendor of the goods was entitled to be paid the value of the goods; *Gosling v. Gaskell* [1897] A.C. 575, referred to.

CLAIMS by certain creditors for payment of moneys alleged to be due to them by the Sabapathy Press Company, Limited, in liquidation (In the matter of the Indian Companies Act and In the matter of the Sabapathy Press Company, Ltd., Original Petition No. 94 of 1922 on the Original Side).

B. Somayya, T. Krishnaswami Ayyangar and T. M. Venugopala Mudaliyar for creditors and shareholders.

T. R. Arunachala Ayyar for Official Liquidator.

JUDGMENT.

I have to deal with this claim in the winding-up proceedings. A creditor, Pola Sankariah by name, applied to the liquidator for payment of his debt. He failed to comply with the request and I have now to decide whether the creditor's claim is well-founded.

To make the point at issue clear, I must briefly set forth the course taken by these liquidation proceedings. The petition to wind up this company (The Sabapathy Press Co., Ltd.) was filed on the 8th of May 1922. KUMARASWAMI SASTRI J. dismissed the petition on 30th November 1922 holding that no valid grounds existed for making an order of compulsory winding-up. Against this order, an appeal was filed, and on 5th November 1924 the Appellate Court set it aside and remanded the petition to the Original Side for fresh disposal. The matter then came up before BEASLEY J.

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(as he then was), and on the 9th of April 1927 he made an order referring two questions to the Official Referee. With one of those questions we are directly concerned. That related to the debt now claimed as due by the creditor. It was then pleaded that that debt was discharged either by payment or adjustment on the 31st of December 1921. The Official Referee submitted his report, finding, *inter alia*, that the debt due to the applicant was not discharged as alleged. BEASLEY J. accepted the Official Referee's findings, found that the Company's affairs were in a very unsatisfactory state and made an order, dated 16th November 1927, directing the Company to be compulsorily wound up. Mr. Venkata Rao, by dubious methods (this is the effect of the judgment of BEASLEY J.) acquired a dominant position in the Company and, by adopting an aggressive and high-handed attitude, used that position to gain dishonest advantage for himself, his relations, and friends. A firm known as "K.V.S.R." which, as the learned Judge observes, was Venkata Rao's own firm, was appointed treasurers of the Company and some of the Company's factories were leased to this firm on terms highly detrimental to the Company. This K.V.S.R. firm in their turn sub-leased the factories making a large profit to a joint family concern of which the present applicant, Pola Sankariah, was a member. There were two factories, one at Tadpatri and the other at Adoni. The sub-lessees effected certain repairs to these factories and a large sum became payable to them on this head by the Company. The debt became due before December 1921. It amounted to about Rs. 25,000. This fact is not disputed. Before proceeding further, I may mention that the winding-up order made by BEASLEY J. was confirmed on the 18th of April 1929.

[His Lordship then dealt with the question as to whether the debt due to the creditor was discharged either on the 31st December 1921 or on the 31st December 1922 and found as follows :—]

I therefore find that neither on the 31st of December 1921 nor on the 31st of December 1922 was the debt due to the creditor discharged by payment or adjustment.

Then there is another question that the liquidator raises. I have already said that the petition for winding-up was originally dismissed in 1922. Till the winding-up order was made in 1927, Mr. Venkata Rao continued to act as the Chairman of the Board of Directors. On the 10th of December 1926, in that capacity, he entered into a settlement of accounts with the creditor in question. It was found that the debt was reduced to Rs. 19,987-3-9. The creditor wants to abide by this settlement, and the question is, is it binding upon the liquidator? The capital of the Company is represented by 500 shares. Mr. Somayya appears for persons owning 342 shares and Mr. Venugopala Mudaliar for a gentleman holding 9 shares. On behalf of these shareholders, I am asked to treat the settlement as binding. Then there are three creditors of this Company, two represented by Mr. Somayya and one by Mr. T. Krishnaswami Aiyangar. On behalf of these creditors also, it is stated that the settlement should be treated as binding. In the view that the settlement is beneficial to the Company, the liquidator now concurs. My decision, therefore, is that the settlement, dated the 10th of December 1926, must be taken as binding.

In regard to this debt, there is a further question raised. In the case of a winding-up by the Court, the winding-up dates from the presentation of the petition (section 168 of the Indian Companies Act). In this

case, nearly six years elapsed between the presentation of the petition and the winding-up order. I have already said that the petition was presented on the 8th of May 1922 and the winding-up order was made on the 9th of April 1927. The question I am asked to decide is whether interest is to be computed or not subsequent to the winding-up. It is not disputed that the debt carries interest. The law on this point is stated thus in Palmer's Company Law (12th Ed., page 439):—

"When a company has been ordered to be wound up, the interest upon debts which carry interest ceases to run from the date of the winding-up order, unless the assets are enough to pay all debts in full."

The point was first fully considered in *In re Humber Iron Works and Shipbuilding Co. (Warrant Finance Company's case)*(1). The position of the creditors, SELWYN L J. observes, must be considered under two aspects—first when there is, and next when there is not, a surplus. Where the estate is insolvent, nothing should be allowed for interest, but the opposite rule applies where the estate is solvent, that is, where there is a surplus. In the latter case, in whatever manner the dividends may originally have been made, if it turns out that there is an ultimate surplus, the account must be taken as between the company and the creditors in the ordinary way; that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividend and the surplus, if any, to the reduction of the principal. The rule that interest is payable notwithstanding the winding-up when there are surplus assets is also laid down in *In re W. W. Duncan & Co.*(2). This is now treated as settled law. This question was considered in a Lahore case and this principle was applied. SHADI LAL J., after stating the rule in the

(1) (1869) 4 Ch. App. 648.

(2) [1905] 1 Ch. 307.

terms I have just mentioned, proceeds to lay down the test of solvency. The company's solvency is established, if, after payment of the principal and interest up to the date of the winding-up, there are some assets sufficient to meet the liability on account of interest accruing after the commencement of the liquidation, *Ghansham Das v. Public Banking and Insurance Company*(1). The same view was taken in another Lahore case, *Devi Ditta Mal v. Official Liquidator, Amritsar Bank, Limited*(2). In the present case, it is admitted that even after all the creditors are paid in full, there will be a substantial balance available for meeting the claims of the contributories. I therefore hold that interest has not ceased to run from the date of the winding-up order.

These, I understand, are the only three points in regard to which the liquidator wants my directions in respect of this debt. In the light of my judgment, the parties are directed to bring in a statement showing the amount due to the applicant.

The matter will stand adjourned a week for this purpose. The applicant's costs, which I fix at Rs. 400, must be paid out of the assets. I do not propose to allow the liquidator his costs, but, as he does not press for them, I need not give my reasons.

[His Lordship next dealt with the question of unpaid dividends and the claim of Hanumanthappa, a creditor.]

I shall now proceed to deal with the claim of Messrs. R. D. Lakshmi Das & Co., represented by Mr. T. Krishnaswami Aiyangar, their Counsel. They claim Rs. 3,381-13-6 in respect of goods supplied to the Company between the commencement of the winding-up—that is, the presentation of the petition—and the winding-up order. The effect of a winding-up order under

(1) (1919) I.L.R. 1 Lah. 154.

(2) (1920) I.L.R. 1 Lah. 368.

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section 227 (2) is to avoid all dispositions of the property of the Company made between these two dates, unless the Court otherwise orders; that is to say, the winding-up order has a retrospective effect. What are avoided under the section are dispositions by the Company of its property. But even payments by the Company after the commencement of the winding-up are avoided unless sanctioned by the Court. See Lindley on Companies, [6th Ed.], Vol. II, page 899.

Where payments are honestly made and in the ordinary course of business, it is usual for the Court to allow them (Palmer's Company Law, [12th Ed.], page 220).

In regard to dispositions pending petition, the practice of the Court is to allow them if made honestly and in the ordinary course of business. (Palmer, page 426 and Lindley, Vol. II, page 900.)

But what we are here concerned with is neither a disposition of property nor a payment. The Company contracted to purchase goods and actually took delivery of them. Section 227 (2) does not in terms apply to such a transaction; but in *Gosling v. Gaskell* (1) Lord HERSCHELL seems to assume that, once the winding-up order is made, the Company becomes as from the date of the petition incapable of entering into contracts without the sanction of the Court (page 591). In the present case, it is conceded that the goods were purchased by the Company in the ordinary course of trade. I therefore confirm the transactions.

As regards the amount, it is admitted that Rs. 50 must go out from the amount claimed. Out of the balance of Rs. 3,331-13-6, I authorize payment of that sum less Rs. 500 with interest at 9 per cent per annum from the 1st of January 1927. As regards the sum of Rs. 500

(1) [1897] A.C. 575 (H.L.).

shown against the 15th of December 1926, it is described as a hand-loan paid to Mr. Venkata Rao who purported to receive it as the Chairman of the Board of Directors. Whether the liquidator is bound to pay this sum or not, I do not wish to decide at present. Granting that the liquidator is not bound to pay this sum from the assets of the Company, it may be open to the creditor to ask that it should be paid over to him from any amount to be found payable by the Company to Mr. Venkata Rao. This point I must reserve for future consideration. The applicant's costs, which I fix at Rs. 150, shall come from the assets. The liquidator may pay himself Rs. 50 for his costs. I also direct that Mr. Gopalaswami Mudaliar be paid from the assets the costs of his application, which I fix at Rs. 50.

B.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Curgenven and Mr. Justice
Bhashyam Ayyangar.*

M. NAMBERUMAL CHETTI (DEFENDANT), APPELLANT,

v.

M. NAINIAPPA MUDALI (PLAINTIFF), RESPONDENT.*

*Code of Criminal Procedure, 1898, sec. 476B—Court suo motu
making complaint—Appeal against.*

An appeal under section 476B of the Code of Criminal Procedure (as amended by Act XVIII of 1923) lies where the Court *suo motu* makes the complaint, as under section 476 of the amended Act it is for the Court itself in all cases, whether of its own accord or on application made to it, to make a complaint.

* Original Side Appeal No. 39 of 1929.

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APPEAL from the order of BEASLEY J. (now Chief Justice), dated 25th January 1929 filing a complaint under section 476 of the Code of Criminal Procedure charging the appellant under section 193 of the Indian Penal Code in respect of the evidence given by him in the trial of Civil Suit No. 250 of 1926 in the exercise of the Ordinary Original Civil Jurisdiction.

No one appeared for appellant.

M. Subrahmanya Mudaliyar for respondent.

The JUDGMENT of the Court was delivered by

CURGENVEN
J.

CURGENVEN J.—This is an appeal against an order of BEASLEY J., as he then was, under section 476 of the Code of Criminal Procedure, making a complaint under section 195 (1) (b) of the same Code against one M. Namberumal Chetti in respect of an offence punishable under section 193 of the Indian Penal Code. The appellant is not represented before us. We have perused his memorandum of appeal and the order of the learned Judge, and we have heard the learned Advocate for the respondent, who has raised the preliminary point that no appeal will lie in the circumstances of this case.

The complaint was filed not at the instance of any applicant but *suo motu* by the learned Judge, and the learned Advocate's argument is that in such circumstances the terms of section 476B do not provide for an appeal. As an authority for this position he refers us to *Mt. Satto v. Emperor*(1), which is a decision by a single Judge of the Lahore High Court, based upon what he terms the genesis of the present section. He appears to read the words in that section "Such a complaint" as meaning not merely a complaint under section 476 or 476A, but, further, a

(1) (1929) 30 CrL. L.J. 163.

complaint on an application by some person; but we are of opinion that any analogy which is to be drawn between the terms of the present sections and those of the corresponding sections of the old Code is likely to be misleading, inasmuch as the procedure has been radically altered, and whereas, under the old Code, a Court could give sanction to prosecute and that sanction to prosecute on application could be made the subject of an appeal, all that has now been swept away, and it is for the Court itself in all cases, whether of its own accord or on application, to make a complaint. We cannot see accordingly why the appealability of an order should depend upon the special circumstance of an application having been made; nor do we think that the terms of the section itself support that view.

Coming to the merits, the learned Judge has delivered a very detailed and comprehensive order containing all the materials from which the offence in his view, may be established; and the only criticism that we can discover in the grounds of appeal is that under the terms of section 476 there should be not only a finding to the effect that it is expedient in the interests of justice that an inquiry should be made but also a complaint. In the present case it appears that the proceedings are embodied in a single document. But we think that that document itself serves the dual purpose of a finding and also of a complaint, because a mere perusal of it will show that the learned Judge has set forth the particulars in respect of which he considers that false evidence was given and the nature of the proofs that that evidence is in fact false, and, since these particulars serve the double purpose of a finding and a complaint, we see no reason why they should not be held sufficiently to comply with the requirements of the section, although in that form.

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We have been referred to one case, *Bhuban Chandra Pradhan v. Emperor*(1), where the objection was raised that the learned Judge who made the complaint had not recorded a finding that it was expedient in the interests of justice to complain, and this was disposed of with the observation that

"the learned Judge's order shows that in his opinion the appellant had given false evidence before him. That order by itself and in view of the proceedings started under section 476 carries the implication that the learned Judge must have felt that the ends of justice required that an inquiry before a Magistrate should take place."

We think that the same implication is clearly to be gathered from the order which the learned Judge has passed in this case; and we can find no grounds for interfering with it in appeal. The appeal is accordingly dismissed.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan Pandalai.

1930,
July 1928.

IN RE APPASAWMY MUDALI (FIRST ACCUSED), PETITIONER.*

Code of Criminal Procedure, 1898, Ss. 110 (f) and 117—Proceedings against several persons under sec. 110 (f)—Joint enquiry under sec. 117—Legality of.

Where proceedings are taken against several persons under section 110 (f) of the Code of Criminal Procedure, a joint enquiry under section 117 of the Code is legal, provided the evidence of reputation admitted is not against each accused separately but against them all together.

In re Kutti Goundan (1924) 47 M.L.J. 689, *Hari Telang v. Queen-Empress* (1900) I.L.R. 27 Calc. 781 and *Emperor v. Angnu Singh* (1922) I.L.R. 45 All. 109, referred to.

(1) (1927) I.L.R. 55 Calc. 279.

* Criminal Revision Case No. 472 of 1930.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the South Arcot Division in Criminal Appeal No. 3 of 1930 preferred against the order of the Court of the Subdivisional Magistrate of Chidambaram in Miscellaneous Case No. 17 of 1929.

The case came on for admission.

P. Viswanatha Ayyar for petitioner.

JUDGMENT.

It is urged that the joint trial of the petitioner with two other persons, who did not appeal to the Sessions Judge and have not applied to this Court, was illegal.

The allegation against them was that all the three of them were together associates in a course of criminal conduct such as to bring them under clauses (a), (d), (e) and (f) of section 110, Criminal Procedure Code. In such cases section 117 (5) clearly gave the magistrate, if he thought it just, the power to deal with all the accused in the same enquiry. But it is said that joint enquiries under section 117 are not legal where part of the enquiry is under clause (f) of section 110, and for this the decision *In re Kutti Goundan*(1), which itself cites *Hari Telang v. Queen-Empress*(2), is relied upon. There is a sentence in the latter decision which is incorporated into the former to the effect that there can be no connection between them (the accused) in regard to their characters so as to make them dangerous persons. But this was not the ground of decision in those cases, which were decided on the ground that, where several accused are being jointly tried under section 110, evidence of misdeeds against each of them singly should

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(1) (1924) 47 M.L.J. 689.

(2) (1900) I.L.R. 27 Calc. 781.

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not be admitted against the others, as this will naturally prejudice these others. And WALSH J. makes this clear in *Emperor v. Angnu Singh*(1). More than this I think none of the cases cited before me go, and I find myself unable to agree to the general proposition that, where proceedings are taken under section 110 (f), several persons should not be dealt with together. The evidence of reputation admitted against them should, of course, not be against each accused separately but against them all together.

In this case, as the judgment of the learned Sessions Judge shows, the evidence was clear that the petitioner along with the other two men were pursuing a course of extortion and terrorising for which they were all equally responsible and on which they had jointly earned the evil reputation to which several respectable witnesses spoke.

I can see no error or irregularity in the trial. The petition is dismissed.

B.G.S.

(1) (1922) I.L.R. 45 All. 109, 111.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Pakenham Walsh.*

V. ADINARAYANA CHETTI (RESPONDENT-FIRST
DEFENDANT), PETITIONER,

1930,
November 13.

v.

KOPPARAM NARASIMHA CHETTI AND ANOTHER
(PETITIONERS-PLAINTIFFS), RESPONDENTS.*

*Code of Civil Procedure (Act V of 1908), sec. 2—Decree—Order
in substance a decree—Appeal—Maintainability—Order
styled a “decretal order”—Effect of.*

If in substance an order passed in an original suit is a “decree” as defined by section 2 of the Code of Civil Procedure and therefore appealable, the fact that the Court styles it an “order” or “decretal order”, from which the Code allows no appeal, will not make it non-appealable.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Vellore, dated 22nd December 1924 and made in Interlocutory Application No. 107 of 1924 in Original Suit No. 14 of 1923.

A. C. Sampath Ayyangar for petitioner.

S. Varadachari for respondents.

JUDGMENT.

BEASLEY C.J.—Two worshippers of the Sri Kannyakaparameswari temple in Wallajah filed a suit, Original Suit No. 14 of 1913, in the Court of the Subordinate Judge, Vellore, praying for the settlement of a scheme for the proper management of the temple and its

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* Civil Revision Petition No. 1399 of 1925.

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properties, for the appointment of a fit and proper person as the trustee, for an account by the first defendant of his management of the trust properties belonging to the temple, for a direction to the second defendant to hand over the jewels belonging to the temple to the trustee so appointed, and for a direction to the third defendant to hand over the account books relating to the temple and its properties in his possession. It was alleged in the plaint that, in consequence of the irregular and improper conduct on the part of the first defendant and his supporters, the public worship in the temple had ceased to be performed daily. A written statement was filed on behalf of the defendants but the suit was compromised and a compromise decree passed on the 30th November 1923. By that decree, a scheme was settled, approved and annexed to the decree, and by that scheme, two members of the Komati caste were to be elected trustees by the majority at a general meeting of the members of the community, subject to the confirmation of the Court. Two trustees were duly elected and their election was confirmed by the Court on the 26th July 1924. In the decree, there is a direction that either the plaintiffs or the first defendant should apply for the appointment of a commissioner to go into the accounts as between the defendants and the temple, and that the newly elected trustees are to take possession of the temple and its properties only on payment to the first defendant of whatever sum that might be found due by the commissioner to all or any of the defendants. In pursuance of this decree, the plaintiffs filed a petition, Civil Miscellaneous Petition No. 107 of 1924, in the Subordinate Judge's Court asking for the appointment of a commissioner to take the accounts of the defendants, and on the 15th March 1924 by consent a commissioner was appointed. The commission was

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returned on the 18th November 1924, and, both sides having filed objections to the commissioner's report, the Subordinate Judge gave his decision upon it on the 22nd December 1924. It was ordered and declared that no amount was due by the temple to any of the defendants, and that the third defendant owed Rs. 197-2-3 and the first defendant Rs. 2,202-5-5 to it, and it was further ordered that the first defendant was to pay to the temple trustees on behalf of the temple the sum already stated, that the third defendant was likewise to pay the sum found due by him, and that both the first and the third defendants were to pay to the temple trustees on behalf of the temple Rs. 140-4-0, being their costs of the petition, and finally, that the trustees of the temple were to execute the decree on behalf of the temple only on payment of Rs. 217-7-0, being the court-fee on the amounts decreed. It must be mentioned that endorsed on the back of the final order is "decretal order", and that the learned Subordinate Judge's considered decision is headed "order". The first defendant has now filed this civil revision petition against the before-mentioned order of the learned Subordinate Judge.

Mr. Varadachari, on behalf of the respondents to this petition, takes the preliminary objection that no civil revision petition lies, because, in his submission, the order of the learned Subordinate Judge is a "decree" from which there is an appeal, and therefore it is not open to the petitioner to come to the High Court by way of revision. For the petitioner, it is argued that the proceedings in the learned Subordinate Judge's Court were by way of a petition, that his order was an "order" and not a "decree", and that hence, there being no appeal, the petitioner's only remedy is by way of a revision petition to the High Court. In

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support of his argument it is pointed out that the application for the appointment of a commissioner was made by a civil miscellaneous petition, that the learned Subordinate Judge's order is headed "order" and that, when the learned Subordinate Judge's order was drawn up, it was drawn up as a decretal order. These things, it is argued, show that it was not a "decree" but merely an "order." It is further contended that in the mofussil such matters as are left over for determination after the decree is passed, such as the appointment of a commissioner as in this case, are usually dealt with on a petition, and that, even assuming that such a practice is irregular and the learned Subordinate Judge should not have adopted such a practice, he has done so and delivered an order, and that therefore the right of the petitioner to come by way of a revision petition cannot be defeated. A number of cases were referred to by the learned Counsel for the petitioner in support of his argument which, to put it shortly, is that, where the Court purports to act under a certain provision although not entitled to do so, it must be taken to have assumed its jurisdiction under that provision. One of the cases relied upon is *Bilas Singh v. King Emperor*(1), where it was decided that, where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. It must be noted that, in that case, the action of the Court was to deprive the applicant of his right of appeal. In the present case, that is not the position at all. The action of the learned Subordinate Judge in passing the order, if it can be described as an order, does not deprive the petitioner

(1) A.I.R. 1925 All. 737.

of a remedy. In *Khamasa Bewa v. Promotho Nath Roy*(1), the question again was whether the litigant was by excess of jurisdiction deprived of his right to appeal, and it was held that he was not. What happened in that case was that a suit was instituted in a Court the presiding officer of which, at the time of the institution of the suit, had no Small Cause Court powers. It was held nevertheless that an appeal lay to the District Judge. In *Karam Nawaz v. Runka*(2), it was held by a single Judge that the right of appeal is determined not by what the Court should have done but what the Court did or purported to do. Another case relied upon is a Full Bench decision of this High Court, namely, *Muthiah Chettiar v. Govinddoss Krishnadoss*(3). There, an order, which purported to be passed under Order XXII, rule 10 of the Code of Civil Procedure, was held to be an appealable order though on the facts the order should not have been passed under that rule. In *Abdul Rahiman Saheb v. Ganapathi Bhatta*(4), the Judge had no power to pass orders under section 492 of the Code of Civil Procedure, 1882, as regards the issue of an injunction, and, under section 503 of that Code, as regards the appointment of a receiver, and it was held, that as orders under both the sections were appealable, the High Court was not barred from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against those orders. That, again, was a perfectly clear case, because the Judge had passed an order attaching property, in itself an order seriously affecting the property of a person, and had also appointed a receiver, and neither of those orders could be made without such orders being subject to an appeal. Here, again, it was the question of whether or not by

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(1) (1919) 51 I.C. 967.

(3) (1921) I.L.R. 44 Mad. 919.

(2) A.I.R. 1929 Lah. 376.

(4) (1900) I.L.R. 23 Mad. 517.

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the adoption of a wrong procedure by a Court the litigant was to be deprived of his remedy. That is not the case here. In *Nasir Khan v. Itwari*(1), it was held that the right of appeal does not depend on what a Court ought to have done but on what it actually did. In that case the Court dismissed an appeal on the merits, although it ought to have dismissed it not on the merits but for default of appearance by the appellant. No appeal lay from an order dismissing the appeal for default. The matter is quite shortly dealt with on page 670 in the judgment of the Court as follows:—

“The right of appeal does not depend on what the Court ought to have done but on what it actually did. What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal . . . The respondent’s reasoning would deprive the aggrieved party of the right of appeal just in those cases in which it is most needed.”

It is contended that these cases are strong support of the petitioner’s argument. It is argued that the order, the subject of this revision petition, was on the face of it an order, that it does not conform to the form of a final decree passed after a preliminary decree directing the taking of an account, and that, as before mentioned, it is described by the Subordinate Judge as an “order” and is embodied in the decree as a “decretal order”. It is argued therefore that the learned Subordinate Judge purported to pass an “order” from which there is no appeal and which can only be revised by means of a petition, and that, however wrong he may have been in doing so, that is what he has done and not what he should have done. It is further pointed out that the order is stamped as a decretal order under article 7 of Schedule I to the Court-fees Act, that

(1) (1923) I.L.R. 45 All. 669.

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section 96 of the Code of Civil Procedure has no application here as that only gives the right of appeal from a decree but that section 105 applies. In reply, Mr. Varadachari contends that the order of the learned Subordinate Judge by what it does was clearly a “decree” as defined in section 2 of the Code of Civil Procedure, because it conclusively determined the rights of parties with regard to the matters in controversy in the suit and was a final determination of such matters, and with that contention I entirely agree. The order of the learned Subordinate Judge just begins by reciting what the decree provided for, namely, the taking of the accounts, and states “It is to give effect to this direction in the decree that an application was made to the Court by the plaintiffs to appoint a commissioner. The commissioner has now submitted his report. Objections have been filed to it on either side” and so on. He then gives his decision with regard to the commissioner’s findings. It is just as if the learned Subordinate Judge had treated the matter as one where a preliminary decree had been passed. He ends up by stating, “There will therefore be a declaration to the effect that there is no amount due by the temple to any of the defendants and that on the other hand the third defendant owes Rs. 197-2-3 and the first defendant Rs. 2,202-5-5 to it, and a direction requiring the said defendants 1 and 3 to pay the temple trustees on behalf of the temple the sums respectively due by them as aforesaid with costs, subject to this decree being liable to be executed only upon the payment of the adequate court-fee upon the amounts decreed.” There was no mistake here, and it is clear that the learned Subordinate Judge intended to finally dispose of the matter between the parties and that his order was to be a “decree.” On the face of it, it was a decree, and

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no one could possibly have been misled. The mere fact that the learned Subordinate Judge's judgment is headed "order" does not make his judgment any the less a judgment, nor does the fact that the office chose to endorse upon the decree that it was a "decretal order" make any difference. The test to be applied is what it was, and it completely satisfies the definition of a "decree" in the Code of Civil Procedure. In my opinion, paragraph 2 of the learned Subordinate Judge's order is conclusive of the matter, and there can be no ground whatever for saying that he purported to act under a non-appealable procedure. This being so, the authorities referred to by the petitioner have no application whatever. It is probable that no commissioner was appointed by the decree of the 30th November 1923, because that was a compromise decree, and that it was left to the parties to agree upon the commissioner. Otherwise, no doubt, the decree would have directed the taking of the accounts by a named person and not left it to the parties to apply afterwards for the appointment of a commissioner to take the accounts. The learned Counsel for the petitioner has asked the Court to be allowed to alter the petition into an appeal, but I am not disposed to accede to that request, as I think it is clear that the procedure of coming by way of a civil revision petition has been adopted in order to save court-fees.

This civil revision petition must be dismissed with costs.

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

A.S.V.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Pakenham Walsh.*

M. VARADIAH CHETTI AND ANOTHER (PETITIONERS—
TRUSTEES), APPELLANTS,

1980,
November 19.

v.

K. NARASIMHULU CHETTI AND FOUR OTHERS
(PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), sec. 92—Scheme suit—Decree in—Election of trustees directed by—Confirmation by Court of—Provision in decree as to, not ultra vires—Decree in scheme suit directing in substance and effect payment of money to trustees of temple—Execution of—Right of new trustees as to—Addition of such trustees as parties under O. I, r. 10, or O. XXII, r. 10, not necessary.

A decree in a suit for a scheme under section 92 of the Code of Civil Procedure provided for the appointment of new trustees by election and for their confirmation by the Court after election.

Held that the provision for confirmation by the Court being only for the purpose of carrying out the scheme already settled by the Court was not *ultra vires*, as it did not violate section 92 of the Code; *Veeraraghavachariar v. Advocate-General, Madras*, (1927) I.L.R. 51 Mad. 31 (F.B.), followed.

A decree in a suit under section 92 providing in substance for the recovery by trustees by way of execution of any amount that might be found due from the deposed trustees is in effect an executable decree, as soon as the amount is ascertained, in favour of the trust, and therefore in favour of any one who might become the trustee under the scheme, and he can directly execute the decree, as soon as he is confirmed, without the necessity of his being added as a party either under Order I, rule 10, or under Order XXII, rule 10, of the Code.

APPEAL against the order of the Court of the Subordinate Judge of Vellore, dated 22nd October 1925

* Appeal against Order No. 61 of 1926.

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and made in Execution Petition No. 51 of 1925, in Original Suit No. 14 of 1923.

S. Varadachari for appellants.

A. C. Sampath Ayyangar and *T. R. Srinivasa Ayyar* for respondents.

JUDGMENT.

BEASLEY C.J. BEASLEY C.J.—The facts out of which this appeal arises have already been set out in the judgment in Civil Revision Petition No. 1399 of 1925.* On the 19th July 1925, the newly appointed trustees, as petitioners, sought to execute the decree of the Subordinate Judge referred to in Civil Revision Petition No. 1399 of 1925, and they filed Execution Petition No. 51 of 1925. The respondents opposed that petition and raised a number of objections before the then Subordinate Judge of Vellore, who dismissed the petition on the grounds that the newly appointed trustees, the petitioners, were not parties to the decree and had not been added as parties under Order I, rule 10 of the Code of Civil Procedure, that the right to execute the decree was not given to them, that they had not come under Order XXII, rule 10 of the Code of Civil Procedure and were not transferees of the decree, and further that the order that the Court was to approve of the appointment of the newly elected trustees was *ultra vires*, and also that the decree was a variation of the provisions of the consent decree. The learned Subordinate Judge further said that the trustees must come by a separate suit and have their claims as trustees recognized by the Court—this, notwithstanding the fact that an application was made to the Court for the approval of the appointment of the newly elected trustees, and the Court's approval was given. On behalf of the respondents, it is pointed out that the plaintiffs in the suit first sought to

execute the decree by an execution petition, but that, owing to the right of the plaintiffs to execute the decree being questioned in the office, the petition was withdrawn, and the present petitioners, the appellants here, were substituted for the plaintiffs in the suit. This, it is argued on behalf of the respondents, is contrary to all practice, and that the petitioners should have applied to have themselves brought on the record as parties to the suit, and that, not having done so, they cannot execute the decree, nor can they be treated as assignees of the decree and continue the proceedings, because the procedure provided for by Order XXII, rule 10 has not been followed; *Ratnam Pillai v. Annamalai Desikar*(1). Much reliance was placed upon the Full Bench decision in *Veeraraghavachariar v. Advocate-General, Madras*(2), because it was argued that the provision in the scheme that after the new trustees had been elected their appointment was subject to the confirmation of the Court was *ultra vires*. The Full Bench, of which I was a member, held that, if in a decree for a scheme framed under section 92 of the Code of Civil Procedure liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled, such reservation of liberty in the decree will be *intra vires* if the assistance of the Court can be given without offending against section 92 of the Code of Civil Procedure, but, where liberty is given to apply to the Court for alteration or modification of the scheme, such reservation is *ultra vires* as offending against that section. It is very strange to find that the respondents who were parties to the suit and the compromise decree and agreed to the scheme are now here contending that that provision is *ultra vires* and, in my opinion, they have not only shown themselves obstructive but have misapplied

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* See page 337 *supra*.

(1) (1923) 46 M.L.J. 341.

(2) (1927) I.L.R. 51 Mad. 31 (F.B.).

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the Full Bench decision. Dealing with this question PHILLIPS J. on page 44 says :—

“ This principle, therefore, of reserving liberty to apply in temple suits appears to me to be based on wrong premises. It should only be done when the Court is unable, or for good reasons, thinks it advisable not to finally determine any question arising for its decision but to leave such decisions for a future date. Unless there is some ground of this sort, the decision must necessarily be final and therefore an order that such final decision can be altered by a mere application would seem to be *ultra vires*. I may observe here that the question put to us is a double question and the answer to the two parts of the question must be different. The first is ‘ Where liberty to apply is reserved . . . to ask for directions as to carrying out the scheme . . . ’ So far as this is concerned this may well be *intra vires* unless it contravenes the provisions of section 92, Civil Procedure Code, for the assistance of the Court is asked merely to carry out what it has already ordered, and if such assistance can be given without contravening the provisions of section 92, there can be no objection to such a rule being framed.”

In the present case there was no alteration or modification of the scheme provided for. What was provided for was the carrying out of what had already been ordered, namely, the appointment of new trustees. For greater caution it was provided that the election held was to be subject to the confirmation of the Court, and there is no substance in the argument that such an order contravenes the provisions of section 92 of the Code of Civil Procedure. It is further argued that paragraph 2 of the consent decree directs that the amounts found to be owing by the defendants are to be payable to the plaintiffs and not to the newly elected trustees, but that the order made in Civil Miscellaneous Petition No. 107 of 1924 directs such sums to be paid to the trustees; and it is contended that this is a variation of the consent decree and that a consent decree cannot be varied except by consent. In support of this argument, the Privy Council decision in *Charles Hubert Kinch v.*

Edward Keith Walcott(1) is referred to. Here again this argument has no substance. Clause 2 of the decree speaks of what is due to the defendants from out of the temple funds, and directs that what is due to or by any of the parties to the other the same is to be paid by whomsoever it is found payable to the other. This clearly means that the money found to be due by either the plaintiffs or the defendants is due from or to the temple, and it certainly does not mean that the plaintiffs are themselves to pay moneys due by the temple to the defendants out of their own pockets, nor does it mean that the sums found due from the defendants are to go into the pockets of the plaintiffs. The decree clearly contemplates payment to and by the only persons competent to deal with the temple funds, namely, its trustees. Further, clause 3 provides that it is only on payment to the first defendant of whatever sum that may be found due by the commissioner that the newly elected trustees can take possession of the temple and its properties. Clauses 2 and 3 clearly have to be read together; and, when clause 3 of the order in Civil Miscellaneous Petition No. 107 of 1924 is referred to, it is seen that the defendants are to pay sums of money to the temple trustees on behalf of the temple, and that the trustees of the temple can execute the decree on behalf of the temple only on payment of the court-fees on the amounts ordered to be paid by the first and the third defendants to the said temple trustees. Obviously there has been no variation of the consent decree. As there has been, in my view, no variation of the consent decree, *Lachiram v. Jana Yesu Mang*(2) and *Gora Chand Haldar v. Prafulla Kumar Roy*(3) have no application. Even the latter case does not assist the respondents' argument, because there it was held

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(1) (1929) 57 M.L.J. 429 (P.C.).

(2) (1914) 27 I.C. 830.

(3) (1925) I.L.R. 53 Cal. 166 (F.B.).

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that, where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction, and that within these narrow limits the executing Court is authorized to question the validity of a decree. But if, on the face of the decree, there is no want of jurisdiction, the executing Court cannot question the decree. Here the decree directs the trustees to execute the decree, and, if no objection was raised when the final decree was passed, that objection cannot be raised in execution; *Zamindar of Ettiyapuram v. Chidambaram Chetty*(1), *Hari Govind v. Narasingrao Konherrao*(2) and *Kalipada Sarkar v. Hari Mohan Dalal*(3). In *Lakshmibai v. Ranji*(4), the decision in *Gora Chand Haldar v. Prafulla Kumar Roy*(5) was dissented from. It was there held that the executing Court had no jurisdiction to go into the question whether the Court which passed the decree committed any error in the exercise of its jurisdiction. The decree in this case is perfectly clear. It directs the trustees to execute the decree on behalf of the temple, and they are the persons in whose favour the decree has been passed; and the order in Civil Miscellaneous Petition No. 107 of 1924 was the only reasonable way of carrying out the consent decree. A decree which directs the delivery of trust property to new trustees is perfectly correct; *Jai Narain v. Bankey Lal*(6) and *Ghazaffar Husain Khan v. Yawar Husain*(7). In the latter case, at page 117, it is stated as follows:—

“A suit instituted under section 539 is not a suit in which plaintiffs claim or can claim for themselves possession of

(1) (1920) I.L.R. 43 Mad. 675.

(3) (1918) I.L.R. 44 Cal. 627.

(5) (1925) I.L.R. 53 Cal. 166 (F.B.).

(6) (1919) 17 A.L.J. 957.

(2) (1913) I.L.R. 38 Bom. 194.

(4) (1923) 31 Bom. L.R. 400.

(7) (1905) I.L.R. 28 All. 112.

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the trust property. They merely ask the Court to vest the trust property in trustees duly appointed to manage the trust and to take it out of the hands of trustees who have been guilty of mismanagement. No change in the beneficial ownership is sought. The Court has undoubtedly power under the section to vest the trust property in the new trustees, and it seems to me reasonably clear that the Court may direct a trustee who is being removed from the trusteeship to make over the trust property to the new trustee or trustees.”

It is clear that such a decree is an executable one and is not merely declaratory; *Balakrishna Chettiar v. Krishnamurthi Aiyar*(1). In *Miyaji alias Mahomed Ghouse Sahib v. Sheik Ahmed Sahib*(2), it was held that it is competent to the Court, in a suit under section 14 of the Religious Endowments Act, to direct the removal of a trustee and to order a person competent to appoint a new trustee to make such appointment and to direct the trustee removed to surrender possession of property and pay any damages decreed to the new trustee to be appointed. In *Giyana Sambandha Pandara Sannadhi v. Kandasami Tambiran*(3), it was held that, if the power of appointment of a trustee is vested in any person, such person may be directed to make the appointment, and possession may be delivered to him.

In my view, the order of the learned Subordinate Judge was clearly wrong and must be reversed and this appeal allowed with costs. The lower Court will restore the petition to the file and dispose of it according to law.

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

A.S.V.

(1) (1926) 52 M.L.J. 182.

(2) (1908) I.L.R. 31 Mad. 212.

(3) (1887) I.L.R. 10 Mad. 375.

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice Bardswell.*1930,
August 20.SRI RAJA SOBHANADRI APPA RAO BAHADUR
GARU, NUZVID (FIRST DEFENDANT), APPELLANT,

v.

RAJA MUGANTI VENKATARAMA RAO AND OTHERS
(PLAINTIFF AND DEFENDANTS 2 TO 4), RESPONDENTS.**Indian Registration Act (XVI of 1908), sec. 28—Suit to recover possession of lands—Sale of lands belonging to a Hindu minor son by his father and guardian—Sale deed including a small item of father's property with a view to register it in a particular office—If fraud on registration law—Sale, if void or voidable—Suit for possession by son, more than three years after majority but within twelve years of sale, whether barred—Indian Limitation Act (IX of 1908), art. 44.*

To establish fraud on the registration law, there must be a collusion between the parties to the document to practise a fraud upon the registering officer; and as a test of whether the parties had an intention to practise such a fraud, it has primarily to be considered whether there was a property that could be conveyed by the executant, or as to which a genuine belief existed that he could convey it. Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee, though it does not follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention.

The facts that the property is small or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud.

Where, therefore, the father and guardian of a Hindu minor son conveyed certain immovable properties belonging solely to the minor, and included in the sale deed a small item of property belonging to himself with a view to register the document in the registration office within whose registration limits such

* Appeal No. 31 of 1925.

latter property was situate, and registered it in such office, and a suit was instituted by the son to recover the property, more than three years after his attaining majority but within twelve years of the sale, and it was found that there was an intention to convey to the vendee the title to the small item under the sale deed;

Held, that there was no fraud on the registration law under section 28 of the Registration Act, and the registration of the sale deed was not invalid; that the sale was not void but only voidable and should be set aside before possession could be recovered; and that the suit was barred by limitation under article 44 of the Limitation Act.

APPEAL against the decree of the Court of the Additional Subordinate Judge of Bezwada in Original Suit No. 36 of 1923.

The plaintiff sued to recover possession of a one-fourth share in the mokhasa village of Somavaram in the Kistna District, which belonged to him under a settlement made by his maternal grandfather. The lands were sold, during the plaintiff's minority, by his father acting as his guardian, under a sale deed executed on the 14th October 1910 in favour of the father of the first and second defendants. The sale deed included a small bit of land (about one square yard in extent) in the Vundoor Village in the Gōdāvari District, and was registered in the Sub-Registrar's Office in Samalkota in the Gōdāvari District, within whose jurisdiction Vundoor Village was situated. The plaintiff alleged in the plaint, *inter alia*, that the sale was not for any justifiable necessity binding on him, and that, with a view to procure registration of the sale deed in the Gōdāvari District, the item of vacant site in Vundoor Village in the Gōdāvari District was included in it. He alleged that the vacant site of one square yard belonged to the plaintiff's father and not to the plaintiff, that it was never intended to be sold, and that it never had been in

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the possession or enjoyment of defendants 1 and 2 or their father. He contended that the inclusion of the item was a gross fraud on the registration law, and that the sale deed was thus absolutely void. He accordingly instituted the suit on the 6th December 1921 to recover possession of the lands from the defendants 1 and 2. The Subordinate Judge, who tried the suit, held that the vacant site belonged neither to the plaintiff nor to his father, that it was included in the sale deed merely to get the document registered in the Samalkota Sub-Registrar's Office and was never intended to be conveyed to the vendee, that both parties were fully aware of this, that there was a fraud on the registration law, and that the sale deed was void. He accordingly decreed the suit in favour of the plaintiff. He held that, though the plaintiff was twenty-seven years old on the date of the plaint, the suit was not barred by limitation, as he was not bound to set aside the sale deed, as it was void in law. The first defendant preferred this appeal.

S. Srinivasa Ayyangar and P. Satyanarayana Rao for appellants.

Advocate-General (A. Krishnaswami Ayyar), M. Subbaraya Ayyar and M. Venkatasubbayya for first respondent.

Y. Govindarajulu for second respondent.

V. Govindarajachari for third respondent.

JUDGMENT.

BARDSWELL J. — The suit under appeal is one for recovery of possession by the plaintiff from the first defendant of the suit property which consists of a one-fourth share in the mokhasa village of Somavaram in the Kistna District. According to the plaint, the plaintiff's father, professing to act as his guardian during his minority, purported to alienate, on 14th October 1910, under a registered sale deed, the

suit property to the late father of defendants 1 and 2 for a cash consideration of Rs. 27,302 which was quite inadequate, while the sale itself did not purport to be for any justifiable necessity. The suit property was in the possession of the father of defendants 1 and 2 till his death in or about May 1911, and has been in the sole possession of defendant 1 since about September 1918 when there was a partition between him and his brother, defendant 2. The plaint further sets out that there was a fraud on the registration law in that there was included in the sale deed a vacant land, belonging not to the plaintiff but to his father, which item was not intended to be sold, was never possessed or enjoyed by defendants 1 and 2 or their father, and is still in the possession and enjoyment of the plaintiff's father. Its inclusion in the sale deed was, according to the plaint, solely for the purpose of getting the sale deed registered at an office in the Gōdāvari District, instead of in the Kistna District. The idea in getting the document thus registered was to keep the matter from the knowledge of the plaintiff's grandfather and actual guardian, the late Maharaja of Venkatagiri. The learned Subordinate Judge has found that the consideration under the suit sale deed, Exhibit I, was adequate, and cannot say that plaintiff's natural father, who has been joined in the suit as defendant 4, was not his natural guardian at the time of the execution of that document. He has, however, further found that the sale in any case would not be binding on the plaintiff because it was not executed for his benefit, and that it was in fact void as there was a fraud upon the registration law in respect of it. He has, therefore, given a decree to the plaintiff for recovery of possession, together with mesne profits for three years before suit at the rate of Rs. 1,000 per annum. In this

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appeal, which is by defendant 1, the finding as to there having been a fraud on the registration law is attacked, and there are further contentions that the sale, as being one by a guardian, though not one for necessity, should be upheld as being beneficial to the minor's estate, and that the amount of mesne profits that have been allowed is excessive.

The most important point in the case is whether there has been a fraud on the registration law. The importance of the point involved is in the fact that upon its decision depends the decision of the further question whether or no the suit has been brought in time. If the sale is held to be void owing to fraudulent registration, then, of course, there will be no need to set it aside, and it is not disputed that the suit will have been brought well within the period of limitation. It is on these lines that the lower Court has found the suit to be in time. But if the sale deed is not found to be void then the suit has to be regarded as one for setting aside the sale deed, even though no such relief has been sought for, in that possession cannot be obtained unless that document is set aside. That this is the position has been held by this Court in *Raja Ramaswami v. Govindammal*(1). Now, under article 44 of the First Schedule of the Limitation Act, the time allowed to a ward who has attained majority for setting aside a transfer of property effected by his guardian is three years from when he attains his majority. The plaint in this case, which was presented on 6th December 1921, states the age of the plaintiff as about 27, and on that showing, was brought far more than three years after his attainment of majority. In his evidence, indeed, as P.W. 1, he has represented, on 14th July

(1) (1928) 56 M.L.J. 332.

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1924, that he was aged only twenty-seven even then, but he admitted that he could not give his age definitely, while from what he says it would appear that he was making an under-estimate of it. Even, too, if what he said in his evidence could be accepted, he must have been over twenty-three when the plaint was presented, and, as he was not a ward of Court, that would make the presentation over five years after the time when he became a major.

The lower Court has based its decision that there was a fraud on the registration law on its finding that the site at Vundoor, which was added in the sale deed so as to make it registrable at Samalkota in the Gōdāvari District, whereas the registration office for the suit property is Tiruvur of the Kistna District, was a fictitious item which belonged neither to the plaintiff nor to his father. This finding, however, is not in accordance with plaintiff's own pleading which, as set out in the plaint, is not that this Vundoor site was fictitious, but that it belonged to and was being enjoyed by plaintiff's father, and that the fraud consisted in including this item in the sale deed when there was no intention of conveying it. We may also remark incidentally that we are not satisfied on the evidence that the Vundoor site is a fictitious item. Had the case for the plaintiff been that this item was fictitious and had that case been made good, then, no doubt, the learned Subordinate Judge would have been correct in his view that there had been a fraud in accordance with the Privy Council decision in *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1). As things stand, the learned Advocate-General contends, on behalf of the plaintiff, that it is open to him to show and, that being granted,

(1) (1914) I.L.R. 41 Cal. 972 (P.C.).

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that he can establish, that, irrespective of any question of a fictitious entry, there has been a fraud on the registration law. Taking it that he can argue on these lines we have to see whether he has made good his case in this connection.

The law on the subject may first be considered. In *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1), the Privy Council has stated that a fictitious entry

“intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration law, and no registration obtained by means thereof is valid.”

Following this case there is the later Privy Council decision in *Biswanath Prasad v. Chandra Narayana Chowdhury*(2), in which the principle of the earlier decision was extended to the case of a mortgage bond in which property that actually existed was included without the mortgagor having any interest in it or the parties to the instrument having ever any intention that it should form part of the security. There have been a number of cases in this Court in which the principle underlying these decisions has been considered. In *Kunhi Sankaran Nambiar v. Narayanan Tirumunpu*(3), it was held that there was no fraud of the registration law where a second item was added in a mortgage deed, not so much to give an additional security as to enable the mortgagor to get the document registered near where he was living. It was found that, whatever the original intention of the parties, they had deliberately included the second item in the mortgage and that its inclusion was not with the object of effecting a fraud on the registration law. Another case of this Court of

the same year is *Narasimha Rao v. Papunna*(1), in which it was held that, when a cent of land was included purely for the purpose of getting the deed registered by a particular Sub-Registrar, without any intention of passing title to the vendee, there was a fraud on the registration law. This decision, it may be noted, was passed, not with reference to the size of the property in question, but only on a consideration of what was the intention of the parties with reference to it. In *Ramanathan Chettiar v. Muthukumar Pillai*(2), it was held that, where the parties to a mortgage deed intended a particular property, however small in value as compared with the rest, to be part of the security, although the motive for its inclusion might be mainly that the document should be registered by a particular Sub-Registrar, that motive could not be said in any way to be a fraud or violation of the Registration Act. This decision follows that of the Privy Council in *Hari Ram v. Sheodayal Mal*(3), according to which the words “some portion of the property” in section 28 of the Registration Act are not to be read as meaning some substantial portion of the property. In *Rama Rao v. Vedayya*(4), it was held that the inclusion of an item in a mortgage deed merely in order that the registration might be by a particular Sub-Registrar was a fraud on the registration law, but in this case it appears that the item of property in question did not belong to the mortgagor. In *Venkata Lakshmikantaraju Garu v. Peda Venkata Jagannatha Raju Garu*(5), the decision was that the fact that an item of property within the jurisdiction of a registration district where a document of mortgage was registered did not belong to the mortgagor

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(1) (1914) I.L.R. 41 Cal. 972 (P.C.).
(2) (1921) I.L.R. 48 Cal. 509 (P.C.). (3) (1919) I.L.R. 43 Mad. 405.

(1) (1919) I.L.R. 43 Mad. 436. (2) (1920) M.W.N. 487.
(3) (1888) I.L.R. 11 All. 186 (P.O.). (4) (1922) I.L.R. 46 Mad. 435.
(5) (1923) 46 M.L.J. 12.

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would not invalidate the registration of the mortgage as a fraud on the registration law, unless it were shown that the mortgagor and mortgagee colluded to insert the item in the mortgage deed with the knowledge that the mortgagor had no title to it. The decision in *Marina Ammayi v. Sundayya*(1) is to a similar effect, while, in *Chokkalingam Chettiar v. Athappa Chettiar*(2), it has been held that, where a person *bona fide* buys property for the purpose of facilitating registration of a transaction and also *bona fide* includes it in a sale or mortgage, he cannot be held to commit a fraud on registration which would render the whole transaction invalid. Rulings of the Bombay, Patna and Allahabad High Courts have also been cited before us in this connection. In *Vishvanathbhat v. Mallappa*(3), it was held that there could be no enquiry as to an alleged intention of the parties that an item of property which was included in a document so as to give jurisdiction to a particular Sub-Registrar was to be reconveyed. In *Mussamat Jasoda Kuer v. Janak Missir*(4), it is remarked that section 28 of the Registration Act requires no more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to register a document in respect thereof, which remark must be read with the context which shows that the conveyor appeared *bona fide* to believe that he had a title to convey in this property and that it did not seem that there could be any idea of defrauding anyone in having the registration effected in a particular office. The decision in *Durga Prasad Sahu v. Tameshar Prasad*(5) inclined to the view that, even if it was a fact, which it was not found to be, that

(1) A.I.R. 1929 Mad. 482.

(8) (1925) I.L.R. 49 Bom. 821.

(2) (1927) I.L.R. 50 Mad. 800.

(4) (1924) I.L.R. 4 Pat. 391.

(5) (1924) L.L.R. 46 All. 754.

an item which existed and belonged to the vendor was inserted in a document merely for the sake of registration, that would not constitute a fraud on the law of registration.

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The general effect of all these decisions is that, to establish fraud on the registration law, there must be a collusion between parties to practise a fraud upon the registering officer, and that, as a test of whether the parties had an intention to practise such a fraud, it has primarily to be considered whether there was a property that could be conveyed by the party-executant or as to which a genuine belief existed that he could convey it. Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee, though it is not perfectly clear that it will follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention. The facts that the property is small or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud.

[A portion of the judgment is omitted here as it is not necessary for the report.]

The learned Advocate-General admits that the burden is on him to show that there has been a fraud on the law of registration. In the light of what is stated above we do not find that he has discharged the burden. The Vundoor site is one that actually exists; the title to it was in plaintiff's father who seems to have been its actual owner; it is not clear that there was no intention of passing possession of the item; and it is not shown that the parties had any reason that would make them practise a fraud on the registering officer. It follows, then, that Exhibit I is a document

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which the plaintiff had to get set aside, and that, as he did not bring this suit till more than three years after his attainment of majority, the suit fails as being out of time.

[A portion of the judgment is omitted here as it is not necessary for the report.]

In view of our finding on the point of limitation, the appeal is allowed and the suit is dismissed with costs to the appellant against the plaintiff both in this Court and in the Court below. The finding stated above (in portion omitted) will be embodied in the decree.

WALLACE J. WALLACE J.—I agree. I only wish to add a few words on the legal point. Section 28 of the Indian Registration Act is no doubt mandatory, and the question for decision under that section is, "Is any portion of the property to which the document relates situate within the registration sub-district?" When property to which the document relates is non-existent, section 28 has not been complied with; *Harendra Lal Roy Chowdhuri v. Haridasi Debi*(1). And where the document does not relate to certain property because the parties to it did not intend it so to relate, section 28 has not been complied with; *Biswanath Prasad v. Chandra Narayan Chowdhury*(2). In both cases there must be a collusion between both parties to the document to deceive the registration authorities, in fraud or violation of section 28 of the Act; see *Venkata Lakshmi-kantaraju Garu v. Peda Venkata Jagannatha Raju Garu*(3). It is important to note that not intending the document to relate to certain property is not the same thing as not intending to transfer that property or title thereto by means of the document. Otherwise

all documents of benami transfer would be void by force of section 28. However desirable in theory such a conclusion may be, it is not at present the law which has always recognized the validity of benami documents. Section 28 will not invalidate a benami document, because the parties to such a document do intend that it shall relate, so far as it has validity, to the property mentioned in it, and therefore are not colluding to deceive the registration authorities.

When, therefore, the contention is raised that the inclusion in a registrable document of a particular piece of property was merely for the purpose of giving jurisdiction to the Registrar, the true test whether section 28 has not been complied with will be, in cases where the parties intend the document to be a deed of real transfer, did they collude in intending that that piece of property should not pass, see *Narasimha Rao v. Papunna*(1) and *Rama Rao v. Vedayya*(2); and, in cases where the parties intend the document to be nominal or benami, did they collude in intending it not to apply, so far as it has validity, to that piece of property? The test for both cases is, did the parties, in including that property, intend to deceive the registration authorities, and so escape the mischief of section 28? See *Kunhi Sankaran Nambiar v. Narayanan Tirumunpu*(3), *Chokkalingam Chettiar v. Athappa Chettiar*(4) and *Ramanathan Chettiar v. Muthukumar Pillai*(5).

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(1) (1919) I.L.R. 43 Mad. 436.

(2) (1922) I.L.R. 46 Mad. 435.

(3) (1919) I.L.R. 43 Mad. 405.

(4) (1927) I.L.R. 50 Mad. 800.

(5) (1920) M.W.N. 487.

(1) (1914) I.L.R. 41 Cal. 972 (P.C.).

(2) (1921) I.L.R. 48 Cal. 509 (P.C.).

(3) (1923) 46 M.L.J. 12.

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APPELLATE CIVIL:

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1930,
September 4.

THE CORPORATION OF MADRAS (PLAINTIFF IN ORIGINAL SUITS NOS. 546 AND 527 OF 1923), APPELLANT IN BOTH APPEALS.

v.

THE MADRAS ELECTRIC TRAMWAYS, LIMITED
(DEFENDANT IN ORIGINAL SUIT NO. 546 OF 1923),
RESPONDENT IN LETTERS PATENT APPEAL NO. 265 OF 1927.*

THE MADRAS ELECTRIC SUPPLY CORPORATION,
LIMITED (DEFENDANT IN ORIGINAL SUIT NO. 527 OF 1923),
RESPONDENT IN LETTERS PATENT APPEAL NO. 264 OF 1927.

Madras City Municipal Act (IV of 1919), sec. 287—Licence under—Madras Electric Tramways Company's duty to obtain, for casting metal, etc., in their workshops—S. 288 of Act—Licence under—Madras Electric Supply Corporation's duty to obtain, for erecting steam-boiler in their generating station in Madras—Indian Electricity Act (IX of 1910) and licence obtained by Corporation under—Effect of—Indian Tramways Act (XI of 1886)—Construction and effect of.

The Madras Electric Tramways Company are not entitled to cast metal or to break or hammer iron or to beat metal in their workshops without obtaining licences from the Commissioner of the Corporation under section 287 of the Madras City Municipal Act (IV of 1919). There is no inconsistency whatever between the provisions of the Indian Tramways Act and the provisions of the Madras City Municipal Act (IV of 1919) whereby the Commissioner is empowered to require any one to take out a licence before he casts metal, or hammers or breaks iron, or beats metal.

The Madras Electric Supply Corporation are bound to obtain the permission of the Commissioner of the Corporation under section 288 of the Madras City Municipal Act (IV of 1919) for erecting a steam-boiler in their generating station in Madras. There is not in this respect any inconsistency between the

* Letter Patent Appeals Nos. 265 and 264 of 1927.

provisions of section 288 of the Madras City Municipal Act and either the Indian Electricity Act or the licence issued under it to the Madras Electric Supply Corporation.

The Indian Electricity Act is not a complete code making the holders of licences issued thereunder free from the control of any other law or authority in respect of their operations, buildings, machinery and apparatus.

APPEALS preferred under clause 15 of the Letters Patent against the judgment of WALLER J., dated 10th December 1926, in City Civil Court Appeals Nos. 8 and 9 of 1925 respectively on the file of the High Court (Original Suits Nos. 546 and 527 of 1923 respectively on the file of the City Civil Court, Madras).

T. M. Krishnaswami Ayyar for appellant.

Sir C. P. Ramaswami Ayyar for respondents.

JUDGMENT.

REILLY J.—These two appeals relate to suits in which the Corporation of Madras claimed declarations that the Madras Electric Tramways Company and the Madras Electric Supply Corporation respectively were subject to the control of the Commissioner of the Corporation under sections 287 and 288 respectively of the Madras City Municipal Act. The suits were tried by the Judge of the City Civil Court, who dismissed both of them. They came on appeal before WALLER J., whose opinion was that both the companies carried on their operations under special Acts or what were equivalent to special Acts inconsistent with the general Act, the Madras City Municipal Act, and that the Corporation of Madras were not entitled to the declarations for which they sought. He upheld the decision of the City Civil Court; and it is against that decision that these two appeals have been preferred.

I think it will be convenient to deal with the two cases separately, and, if I may say so with great respect,

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I doubt whether WALLER J. would have arrived at his decision in respect of the Tramways Company, if he had treated it separately from the case of the Electric Supply Corporation. The Tramways Company operates under what is called an "order" issued by the Government under the Tramways Act. In the course of their operations they maintain a workshop, we are told, in which they cast metals, break and hammer iron and beat metals. Under section 287 of the Madras City Municipal Act no one is permitted in the City of Madras to use any place for those operations without obtaining a licence from the Commissioner of the Corporation. The Tramways Company contend that by virtue of the "order" issued to them by the Government under the Tramways Act they are not subject to the provisions of section 287 of the Madras City Municipal Act. It was suggested at one stage of the argument by Sir Ramaswami Ayyar, who appears for the Tramways Company, that it would be an impossible position if the Tramways Company were required to take out a licence from the Commissioner of the Corporation for every place in which they might want to repair the lines of their tramways in the public streets by hammering or beating metal. But Mr. Krishnaswami Ayyar, who appears for the Corporation of Madras, has explained that this suit is confined to the workshops of the Tramways Company, and I shall deal with it in that sense.

If we examine the Tramways Act, we find that workshops are nowhere mentioned in it, except in one place, to which I shall refer in a minute. In the "order" issued by the Local Government to the Tramways Company, which purports to be made under the Tramways Act, there is a mention of workshops. In clause 6 of the "order" the Company is empowered to establish workshops: but in that respect the "order" appears to

go beyond the Act, and the mention of workshops in it is of no effect. Sir Ramaswami Ayyar drew our attention to section 7 (2) (i) of the Act, under which such an "order" may provide for "the provision of such crossings, passing-places, sidings, junctions and other works, . . . as may from time to time be necessary or convenient to the efficient working of the tramway", and he suggested that "other works" in that clause would include workshops. If I may say so, that argument appeared to be one of last resort, because it is clear that in that connection we cannot construe "other works" as including workshops without offending against a well-established canon of interpretation. I have mentioned that in one place in the Act there is a reference to workshops. In section 44 it is provided that the Local Government may exempt yards and workshops of the tramway undertaking from local taxation. But the power to exempt the Tramways Company from taxation under that section does not bring workshops within the scope of the Act otherwise.

It is clear I think that the Act is not concerned with workshops. It provides for the granting of the privilege of laying tramway lines along public streets, running tram-cars along them and various other matters, but not for the construction of workshops. Still less could it be supposed to provide for the conduct and management of workshops or operations which might be carried on in them. There is nothing to suggest that in the Act. And it is clear that it is not really essential for a tramway undertaking that those who undertake it should have their own workshops. It is quite conceivable that they should arrange to get their tram-cars and other apparatus repaired, when necessary, either in the workshops of another company or by outside engineering firms or contractors.

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But no doubt for such a tramway undertaking as that of the Tramways Company in Madras it is convenient and economical, and I should say prudent, to have their own workshops; but for that they require no authorization under the Tramways Act. They are quite as much at liberty as anybody else to establish workshops for that purpose. But, if they are as much at liberty as other inhabitants of Madras to establish workshops, why should they have greater liberty than other inhabitants in the matter? Why should they be at liberty to set up, as is suggested on their behalf, workshops wherever they like in the City of Madras and to carry on operations, however offensive to their neighbours, when other people are restrained by the provisions of the Madras City Municipal Act from doing so? If the Tramways Company were free from all control in the matter, they might set up workshops and make the most intolerable din immediately next to a place of worship or a school or a law Court. Why should they have that extraordinary liberty? On the face of it, it is both unnecessary for their purposes and very undesirable in the public interest that they should have such liberty.

Sir Ramaswami Ayyar suggested that there was some indication in the Act that the Tramways Company may be in a privileged position. He pointed out that under section 35 of the Act disputes between the Company and the Corporation on certain matters are to be settled by a referee. But that does not affect the question of workshops, unless workshops come within the scope of the Act. It was also suggested that, if the Tramways Company's workshops are under the control of the Commissioner, the Commissioner might exercise that control so as to prohibit the Tramways Company from using their workshops at all and so

throw their whole undertaking out of order. That does not appear to me to be at all an effective argument. The Commissioner has powers under section 287 of the Madras City Municipal Act over persons who conduct a number of different trades, occupations and operations. But, if we examine that section and Schedule VI, which has to be read with it, I think it is clear that the powers entrusted to the Commissioner are not intended for the prohibition of any of those trades, occupations or operations, but for their regulation in the interests of the people of Madras. If we look at Schedule VI, we find that among operations which cannot be carried on without obtaining a licence under the section from the Commissioner of the Corporation are boiling paddy, washing clothes, baking bread and making soda water. Can it be supposed that it was intended that the Commissioner of the Corporation under the Madras City Municipal Act should have power arbitrarily to prohibit any of those operations from being conducted in any part of the City of Madras? Such a suggestion on the face of it would be absurd. It is possible that, if the Commissioner found that a very large number of persons were applying for licences to carry on one of the more objectionable trades or occupations included in that schedule, he might reasonably say "There are quite enough people in Madras doing that business already, and, if I allow any more to do so, there will be serious nuisance to the public". In such a case he might perhaps use his powers of refusing licences to prohibit any more people starting those particular operations. But, apart from that, I think it is quite clear that the Commissioner's powers are intended for regulation, not for prohibition. And it has to be noticed that, if he refuses to grant a licence under section 287, he has to state his reasons for doing so: he cannot act arbitrarily.

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And any person who applies for a licence which is refused by the Commissioner, or to which the Commissioner attaches conditions, can appeal to the Standing Committee of the Corporation. It is suggested that possibly the Standing Committee might use its powers in conjunction with the Commissioner unreasonably, perversely or for ulterior objects and so prohibit some one, the Tramways Company for instance, from having a workshop anywhere in Madras. If the Standing Committee by any chance used their powers unreasonably, perversely or for ulterior objects in that way, the person concerned would not be without his remedy in the Courts. I think we need not pursue such speculation further in this matter.

Workshops, as I have said, are not provided for in the Tramways Act. They are provided for in the Madras City Municipal Act. There is nothing in the least inconsistent between the provisions of the Tramways Act and the provisions of the Madras City Municipal Act, whereby the Commissioner is empowered to require any one to take out a licence before he casts metal or hammers or breaks iron or beats metal—the processes with which we are concerned. In my opinion the appeal in the Tramways Company's case should be allowed with costs throughout, and a declaration should be made that the Tramways Company are not entitled to cast metal or to break or hammer iron or to beat metal in their workshops without obtaining licences from the Commissioner of the Corporation under section 287 of the Madras City Municipal Act.

The case of the Electric Supply Corporation is not quite so simple. In that case the Corporation of Madras prayed for a declaration that the Electric Supply Corporation, which I shall refer to as the Electric Company, must obtain permission under section 288 of

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the Madras City Municipal Act for erecting a steam-boiler in their generating station in Madras. The predecessors of the Electric Company obtained in 1905 a licence from the Local Government under the Electricity Act for the supply of electricity throughout the municipal limits of Madras subject to certain minor exceptions. The licence was primarily for the supply of electrical energy to consumers. But in the licence there is a statement: "The generating station is to be within the area of supply." The contention for the Electric Company is that their licence in respect of that generating station places them outside the scope of the Madras City Municipal Act so far as their buildings, machinery and other apparatus are concerned and that the Commissioner has no right to assert that they must obtain permission from him before they can have a steam-boiler in that station.

There was a good deal of argument before us on the question whether under the Electricity Act a licence for the supply of electrical energy could include a licence for establishing a generating station. The Act is not at all clear upon that point; but for the purpose of this case I am prepared to assume that the Local Government, when they issued a licence to the Electric Company for the supply of electrical energy within the City of Madras, also issued to them a licence under the Act to establish a generating station. As I have said, the Electric Company contend that over that generating station the Commissioner of the Corporation has no authority whatever. A large part of the case was argued before us on the assumption that a licence issued to a person for the supply of electrical energy under the Electricity Act puts him in the same position as if a special private Act had been made in his favour. I think it would not be difficult to show that a licensee

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under an Act of a general character like the Electricity Act, which extends to the whole of British India, is not in all respects in the same position as a person in whose favour a special Act has been made. But for the purpose of this case I am prepared to assume that the Electric Company by their licence were put into the same position as if a special Act had been made in their favour.

A good deal of time was occupied in the arguments by a discussion of the question how special Acts and general Acts, if they come into conflict, are to be treated. A great deal of that discussion, if I may say so, appeared to me unnecessary. There is the old maxim *Generalia specialibus non derogant*; that is general provisions do not derogate from special provisions. If the Legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless, unless it is clear that in making the general Act the Legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act. If the special Act is made after the general Act, the position is even simpler. Having made the general Act, if the Legislature afterwards makes a special Act in conflict with it, we must assume that the Legislature had in mind its own general Act when it made the special Act and made the special Act, which is in conflict with the general Act, as an exception to the general Act. Those propositions appear to me to be beyond discussion at the present day. But several cases were quoted before us to show how those principles should be applied. The first was *City and South London Railway Company v. London County Council*(1).

(1) [1891] 2 Q.B. 513.

In that case a railway company had by its special Act been empowered to construct buildings necessary for its purposes up to a certain distance from the side of a roadway. The by-laws properly made under the general Act applicable to that neighbourhood required other members of the public, if they were constructing buildings, to keep them at a greater distance than that away from the roadway. It was held that the railway's special Act overrode the by-laws made under the general Act in that matter. *The London and Blackwall Railway Company v. The Limehouse District Board of Works*(1) was a very similar case. In the *London County Council v. School Board for London*(2) land was acquired by the School Board under their special Act, and it was held that the Board was entitled to use the whole of that land for its own purposes, providing a school-house and play-ground, without leaving a strip of land for the purpose of the adjoining roadway, though under the Metropolis Management and Building Act any other person, who had bought that land and raised a building on it, would have had to leave a strip for the purpose of the roadway. Then there is a case, which is not quite so simple, *Surrey Commercial Dock Company v. Bermondsey Corporation*(3). There the Dock Company within the enclosed area of their own undertaking, as defined by their original Act, erected a building necessary in consequence of works carried out by them under a subsequent Act, which gave them power to construct buildings and drains necessary in consequence of those works. It was held that the general control of the Bermondsey Corporation over buildings gave them no power to interfere with what was done by the Dock Company under their special Act. There it will be

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(1) (1856) 69 E.R. 1048.

(2) [1892] 2 Q.B. 606.

(3) [1904] 1 K.B. 474.

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observed that the Dock Company were not only erecting a building which was allowed under their special Act but were doing so within the area which under their original Act was under their control and management.

In each of those cases it was found that the special Act was inconsistent with, and in conflict with, the general Act, and it was held in each case that the special Act overrode the general Act. But can we find any inconsistency here between the terms of the licence issued to the Electric Company, so far as the generating station is concerned, and the provisions of the Madras City Municipal Act? All that is said in the licence is that the generating station must be within the area of supply. There is nothing said about its being erected in any secluded place or any circumscribed area or in any specified place at all except that it must be somewhere within the area of supply, that is somewhere—not specified—within an area which is I believe between 30 and 40 sq. miles in extent. And the licence says nothing as to what the Electric Company may do in respect of that generating station—nothing about what kind of buildings they are to erect or what kind of machinery or apparatus they are to work in them—nothing apart from the one condition that the station has to be within the area of supply. It may reasonably be suggested that the matter was left so vague because it was obvious to those concerned that in erecting the generating station and fitting it up with machinery and apparatus the Electric Company would be subject to the same control as that to which other persons within the municipal limits are subject. Can it be reasonably suggested that the Electric Company were to be left free from all control in regard to the generating station? The original licensees were a firm in London, and it may well be asked whether it is probable that they would have

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been intentionally given by their licence an entirely free hand to construct any kind of building they liked for the generating station subject to no restrictions and fit it up with any machinery or apparatus, however dangerous, within the City of Madras. It will be observed that there was nothing in the licence to tie them to putting the generating station in one part of Madras rather than in another. In that connection the *Metropolitan Asylum District v. Hill*(1) is an interesting case. There the Metropolitan Asylum Board had a duty to build a small-pox hospital somewhere within their area. That they were bound to do under orders properly received from the Government department concerned. But it was held that, when they erected a small-pox hospital, or proposed to erect one, in a neighbourhood where it would be a serious nuisance to the inhabitants, the fact that they erected it under their statutory powers would not exempt them from the control of the Common Law in the matter. Still less would it have exempted them from any general Act affecting that neighbourhood. There was no statutory obligation on them to erect the hospital in any particular place. But it has been suggested that *Municipal Commissioner of Bombay v. G.I.P. Railway Company*(2) is a case which we should follow in this matter. There the Commissioner of the Bombay Corporation attempted to require a railway administration to take out a licence for storing timber in their premises under the Municipal Act concerned, and it was held by the Bombay High Court that he had no power to require that. But the reason of that decision is that the railway company were in a very special position under the Railways Act. They were empowered to do a number of things, which

(1) (1881) 6 App. Cas. 193.

(2) (1909) I.L.R. 34 Bom. 252.

would include the storing of timber, by the Railways Act, which contains the words "notwithstanding anything in any other enactment for the time being in force". And it has also to be observed that section 7 of the Railways Act puts the whole existence and working of railways in this country under the control of the Government of India. Those being the circumstances of the railway company, that particular case appears to me to be of no help to us in the present case.

But Sir Ramaswami Ayyar suggested that, although there is nothing in the licence to control the actions of the Electric Company in respect of the generating station, the Electricity Act provides that, before a licence is given, the local authority, which would be the Corporation of Madras in this case, has an opportunity of raising whatever objections it likes to the issue of the licence; and it may also be observed that, if, after obtaining a licence for the supply of electricity, the licensee wishes to get it extended in any way, so as to enable him to open up any roads which he has no power to open up under the original licence, again the local authority has an opportunity of expressing its objections, if any. No doubt the local authority has under the Act an opportunity, as have other people, of raising objections to the original issue of a licence; and no doubt the local authority has to have an opportunity of expressing its objections before the licence can be extended in the way I have mentioned. But in my opinion it would be quite unjustifiable to infer from that that the Corporation of Madras—I am here assuming that they raised no objections to the issue of this licence—consented to the abrogation of their control under section 288 of the Madras City Municipal Act in respect of the generating station. There is no reason

whatever to suppose that because they consented, or raised no objection, to the issue of a licence for the supply of electricity within the municipal boundaries, they gave up their control over any boiler which might be installed in the generating station. It has not been suggested to us that there is anything to show that they did so.

Then Sir Ramaswami Ayyar suggested that there are provisions about arbitration in the Electricity Act which make it impossible that the local authority should be put in a position of control over the Company. There are provisions that, if the Electric Company opens up roads for its purposes and fails to restore them within a certain time, the Corporation may do the work and recover the cost from the Company, and that, if there is any dispute between the two bodies about the cost, the matter shall be decided by arbitration. From that and one or two similar provisions it is suggested that we should infer that the Electric Company and the Corporation are to be regarded as co-ordinate bodies. An examination of the Act will show that that argument cannot be maintained. There is a provision that the Government may in certain circumstances purchase the Electric Company's undertaking and that, if there is any dispute between them about the amount to be paid for the purchase, the question shall be referred to arbitration. It cannot be suggested that, because that provision appears in the Act, we must regard the Electric Company and the Government as co-ordinate authorities in all matters within the sphere of the Electricity Act or connected with the operation of the Electric Company's works so that the Government cannot exercise any control over them. A subsidiary argument about arbitration was urged, namely that section 19 of the Act provides that "A licensee shall,

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in exercise of any of the powers, conferred by or under this Act, cause as little damage, detriment and inconvenience as may be, and shall make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him," and subsection (2) of that section goes on to provide that save in a particular case "where any difference or dispute arises as to the amount or the application of such compensation, the matter shall be determined by arbitration." It is suggested that that indicates that any dispute between the Corporation and the Electric Company in respect of any matter shall be decided by arbitration and the Corporation can exercise no control under its own Act over the Electric Company. But, if a private person suffers nuisance from anybody who conducts operations such as those which come within section 287 of the Madras City Municipal Act, he has his right of suit; but that does not prevent the Commissioner from exercising his powers of regulation under the Madras City Municipal Act to prevent inconvenience from being caused. If the intention of the Electricity Act is that a person inconvenienced by the Electric Company, instead of having a right of suit, must refer his dispute to arbitration, how can that in any way affect the power of the Commissioner to exercise his control under the Madras City Municipal Act? The two things are not connected in the way suggested.

What at first sight might appear a more powerful argument for the Electric Company is that it is a public utility company operating under a statute with compulsory obligations to the public, which can be enforced by penalties. It has been suggested that such a company performing compulsory duties must be regarded as exempt from the control of the local authority. In that connection several interesting cases were cited

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before us. In *Uckfield Rural Council v. Crowborough District Water Company*(1) the water company under its special Act had been empowered to build a water-tower in a particular place; nevertheless they were held to be subject to the control of the District Surveyor, to whom they had to submit the plans and sections of their proposed water-tower before its erection. There was a public utility company operating under its own private Act and proposing to build a tower in the very place where the Act empowered it to build it, and yet it was held to be subject under the general law affecting the neighbourhood to the District Surveyor, who had his duties to protect the interests of the public by seeing that it was a safe and properly-constructed building. *Moran & Son, Limited v. Marsland*(2) has also been quoted, another water-works case, in which the company were empowered by their special Act, to construct a reservoir in a particular place and yet were held to be subject to the general law in the matter of submitting their plans for the approval of the District Surveyor. That case is interesting because Lord Chief Justice ALVERSTONE, who presided over the Bench, also presided over the Bench which decided *Surrey Commercial Dock Company v. Bermondsey Corporation*(3). *London County Council v. Wandsworth and Putney Gas Co.*(4) is a similar case. *London County Council v. District Surveyors' Association and Willis*(5) is an interesting case. There a building was erected by the local authority itself in discharge of its own statutory duties for the purpose of a school-house, which was approved by the Board of Education, the department concerned; and yet the Court held that the building required also under the general law the

(1) [1899] 2 Q.B. 664.

(2) [1909] 1 K.B. 744.

(3) [1904] 1 K.B. 474.

(4) (1900) 82 L.T. 562.

(5) [1909] 2 K.B. 138.

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approval of the District Surveyor. In that case it was urged that, if the local authority in the matter had to submit to the control of two other authorities, the Board of Education and the District Surveyor, there might be a conflict of authorities. But Lord ALVERSTONE was not moved by the argument and said that there was no reason why the local authority should not satisfy the requirements of both the other authorities. *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe*(1) is perhaps an even more marked case. There the Electric Supply Corporation wished to build a street-box for the purpose of their supply-lines, and they proposed to do so, as required by their Act, in accordance with the regulations of the Board of Trade. They obtained the approval of the Postmaster-General, as required by their Act. They also obtained the approval of the road authority. Nevertheless the Court held that under the general law they were bound also to obtain the approval of the District Surveyor, who had public interests to guard different from those which the other authorities had to protect. There it will be seen that there were four authorities concerned, who might have been in conflict. But WILLS J., when that suggestion was put forward, replied that it might be supposed that the authorities were reasonable men, who would adjust their requirements in the interests of the public. Those cases are interesting because they concerned statutory bodies or public utility bodies working under private Acts of their own, all of which had compulsory duties to perform enforceable except in the case of the School Board by penalties, and in two of the cases there was a possibility of conflict between the various authorities which they had to satisfy. But

in each of those cases it was found that there was no inconsistency between the special Act and the general Act, and therefore the bodies concerned were subject not only to the provisions of their special Acts but also to the provisions of the general Acts.

We need not go so far as England to find cases where persons are required to take out licences from two authorities in regard to the same matter. Under the Arms Act, if a shop-keeper in Madras wishes to sell arms and ammunition, he must get a licence from the Commissioner of Police as representative of the Government; but he must also get a licence from the Commissioner of the Corporation for storing ammunition. If a shop-keeper wishes to sell alcoholic spirits, he must get a licence from the Abkari Department; but he must also get a licence from the Commissioner of the Corporation for storing the spirits. If one of the oil companies which supply this country wishes to have an oil-container for anything over 500 gallons of petroleum, it must get a licence from the Government under the Petroleum Act. But, if it wishes to have a container within the limits of the City of Madras, it must also get a licence from the Commissioner of the Corporation. That instance perhaps illustrates best the necessity for such double control. It is possible that one of the oil companies might acquire a strip of land along the Marina and propose to build there a number of huge oil-containers. The authorities concerned under the Petroleum Act might issue a licence for that, having first assured themselves that the containers and the installation would be safely constructed and would cause no danger to the public. But the Commissioner of the Corporation, if he was asked for a licence for storing oil in those containers, would very properly refuse to grant it, refuse to allow a row of huge and hideous containers to

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be built upon the edge of the Marina and so spoil one of the great attractions for which this city is famous all over the world. He would then be acting under the powers given to him by the Madras City Municipal Act for the general comfort and convenience of the inhabitants of Madras. There is nothing inconsistent in the sanction of two authorities being required in cases such as that.

But, if Sir Ramaswami Ayyar is not able to satisfy us that in this case we have a special Act or anything equivalent to a special Act in conflict with a general Act, he is prepared to go almost to the other extreme and has urged in another part of his argument that, so far from being a special Act, the Electricity Act is a code containing the whole law on the subject of electricity in such a comprehensive way that those who get licences under the Act are free from the control of any other law or authority in respect of their operations, buildings, machinery and apparatus. That, I think, is a contention very difficult successfully to maintain. To begin with, the Electricity Act does not purport to be a code. It does not even purport to be a consolidating Act like the Arms Act, the Abkari Act or the Petroleum Act. It is an Act to amend the law relating to the supply and use of electrical energy. So far from being obviously complete in itself, as I have mentioned, a great deal of time was spent before us in trying to ascertain whether a licence issued under this Act can extend to a generating station and whether, as I have assumed, a licence under the Act can be held to include a licence to generate electricity. It is quite clear that the Act is directed to the supply and use of electricity and not primarily to generation. If we examine the Act, I think it is clear that it is not intended to be a comprehensive Act and to include everything concerning

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the generation, supply and use of electrical energy. If a man wishes to establish a station to generate electricity for his own domestic or industrial purposes or for conducting scientific experiments, he does not require any licence under the Act whatever. In my opinion the Act can in no sense be described as a "code" unless we use that word as meaning an Act including all the provisions which the Legislature has thought it necessary to enact on any particular subject, whether those provisions are very restricted or very comprehensive. Speaking for myself, I see no purpose in using the word "code" in that sense. What is more interesting and noticeable about the Electricity Act is that there are no words in it such as those I have mentioned in the Railways Act—"notwithstanding any other enactment in force" or anything of that sort. There is nothing explicit in the Act to show that it was intended to exclude the operation of any other Act. It will be seen that there is nothing in the Act to show what kind of machinery may be used in the generation of electrical energy, what kind of apparatus may be used in connection with the motive-power selected, or what authority is to control the use of that machinery or the use of that apparatus except section 37 (2) (f), which empowers the Governor-General in Council to make rules for the whole or any part of British India for the protection of persons and property from injury by reason of contact with, or the proximity of, or by reason of the defective or dangerous condition of, any appliance or apparatus used in generation. Sir Ramaswami Ayyar suggests that that rule-making power excludes the control of any local or other authority. I cannot agree with him. The power to make general rules for the whole of British India or any considerable part of it cannot make local control and the consideration of immediate local conditions unnecessary.

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We are asked to suppose that, because in their licence the Electric Company are empowered to have a generating station somewhere within the limits of Madras, they are free from the ordinary control of the local authority in respect of the steam-boiler which they use to provide motive-power for generation. It is the steam-boiler with which we are concerned in this case. We have ascertained that, in spite of this suggestion that the Electricity Act is a code complete in itself, which excludes the operation of all other Acts and authorities, this very steam-boiler is regularly inspected by the Inspector of Boilers under the Boilers Act; and it has not been suggested to us after the discovery of that fact that the Boilers Act does not apply to this boiler. Under the Boilers Act no one is allowed to use a boiler of more than five gallons in capacity until it has been examined by the Inspector of Boilers and a certificate has been obtained from the Chief Inspector of Boilers fixing the pressure up to which it may be used. A licensee under the Electricity Act is subject to the control of the Boilers Act in that way just as every one else is. But that is impossible to fit in with the theory that the Electricity Act and the licence issued under it have the effect that those who get the licence are exempt from the control of any authority under any other Act. Nor can it be supposed that, if the Electric Company now wished to extend their generating station by raising another building, they could ignore the building regulations, to which every one else in Madras is subject, that they could raise the building to any height they liked, could make it overhang a public highway, could ignore all sanitary regulations, or so arrange that the drainage from the building went, not into the municipal system of drains, but into a public road. I can see no reason whatever for supposing that, because the Electric

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Company have got a licence under the Electricity Act, they are free from the building regulations in such matters. Nor can it be suggested reasonably that, if they chose to give up steam as their motive power for generation and to instal petrol-engines for that purpose, they could store petrol to any amount for their engines without obtaining any licence for doing so. Nor can we suppose that, because this boiler is often subject to the inspection of the Inspector of Boilers, the control of the Commissioner of the Corporation under section 288 of the Madras City Municipal Act is excluded. The Inspector of Boilers looks to the safety of the boiler. He has to see that it is in proper working order and has to see that it is not used at an excessive pressure. But the Commissioner of the Corporation in the interests of the public may have other matters to look to. Under the section he may refuse to give permission for the use of a boiler, if in his opinion its position is objectionable. If, for instance, the boiler was put close to a public highway without any wall between it and the road, so that, when the furnace was open, sparks might fly out on to passing carts, the Commissioner might very reasonably say that that position was very objectionable, though the Inspector of Boilers thought it quite safe from his point of view, as the boiler was not likely to explode. Under section 288 (3) the Commissioner is empowered to insist that any chimney in connection with any steam-boiler in the city shall be of such height and dimensions as he may fix. That may be a most important point; as, if the chimney from the furnace of this boiler were too low, it might happen that in the prevailing winds smoke from the chimney would blow regularly every afternoon into a mosque or into a fruit market. The control of the Commissioner would be very necessary in the

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interests of the inhabitants of Madras or those of that part of the town in such circumstances. There is therefore nothing unreasonable in this boiler being subject to the control of the Commissioner under section 288 of the Madras City Municipal Act.

Finally, it has been suggested, as in the other case, that the Commissioner might exercise his powers in connection with this boiler in a perverse and unreasonable way and so bring the operations of the Electric Company to a standstill. In regard to that it may be noticed that, if the Electric Company had proceeded under the Madras City Municipal Act in the first instance, they would have obtained the permission of the Commissioner before the boiler was put up and so there would have been no likelihood of their operations being broken off by any order of the Commissioner. But apart from that the contention that the Commissioner might act in an arbitrary and perverse way so as to bring the operations of the Electric Company to a standstill is in my opinion of no weight whatever. Apart from the facts that his powers are given to him for regulation, not for prohibition, that he has to give reasons for his orders and that there is an appeal against his orders, the possibility that he might act perversely is no reason for questioning his powers. The dhobies of Madras perform services for the citizens of Madras at least as important as the services performed by the Electric Company. Most people, I suppose, would agree that it is more essential to have clean clothes than to have electric light. The dhobies of Madras might very well think that they carry on their occupation by a higher right than a licence from the Government, that they do so by custom, tradition, birth and caste. But, if they were to refuse to submit to the control of the Commissioner under section 287 of

the Madras City Municipal Act on the ground that they feared that the Commissioner might be so perverse as to prohibit them from washing clothes within the City of Madras at all, would any one listen to them for a moment? All of us are subject to various authorities. We cannot escape submission to those authorities by saying that we fear that the powers of the authorities will be abused. If that were allowed, all government and administration would be at an end.

In my opinion there is nothing inconsistent between the Electricity Act or the licence issued under it to the Electric Company and the Madras City Municipal Act in respect of the boiler with which we are concerned, and there is no reason to suppose that the Electric Company are exempt from the control of the Commissioner of the Corporation under section 288 of the Madras City Municipal Act. In my opinion this appeal also should be allowed with costs throughout, and a declaration should be made that the Electric Company are not entitled to use the steam-boiler in their generating station without obtaining the permission of the Commissioner of the Corporation under section 288 of the Madras City Municipal Act.

In each of these appeals the Advocate's fee allowed will be Rs. 250.

Letters Patent Appeal No. 265 of 1927.

ANANTAKRISHNA AYYAR J.—I agree. It is enough for the disposal of this particular appeal to consider the provisions of the Tramways Act. The argument in the lower Court, as far as I could see, did not proceed after having due regard to the special provisions of the Tramways Act. The two cases seem to have been argued on a common basis, namely, whether, when a special Act contains provisions and confers special powers, they could be taken to be in any way affected by the general

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powers conferred upon another body by a later general Act. That is the question which will have to be discussed in detail in the connected appeal. For the purpose of disposing of this appeal, as was pointed out by my learned brother, it is unnecessary to discuss this question. However convenient it might be for the Tramway authorities to own and possess workshops of their own, the Act, for reasons best known to the Legislature, has not provided for workshops to be necessarily owned by Tramway companies as part and parcel of their undertaking. That being so, the basis of the distinction which the learned Advocate for the Tramways Company sought to rely upon fails. It is unnecessary for the purpose of disposing of this appeal to say more on this particular point. I may, however, say, as the question has been very fully discussed before us in the connected appeal, that, even if I should be mistaken in my above view regarding the Tramways Act, there is nothing in that Act which, in my view, would preclude the application of section 287 of the Madras City Municipal Act. There is really nothing inconsistent in the provisions of the two Acts on the point now before us. As I propose to say something on the rules governing the applicability of a special law in relation to a later general enactment in the connected appeal, I do not think it necessary to say more at this stage.

I agree that the appeal should be allowed. I also agree to the form which the decree is to take in this particular case.

Letters Patent Appeal No. 264 of 1927.

ANANTAKRISHNA AYYAR J.—I agree that this appeal should be allowed. The question that arises in this case is whether the Madras Electric Supply Corporation, hereinafter called, for purpose of this judgment, the

Company, should take the permission of the Commissioner of the Corporation of Madras in connection with a steam-boiler which the Company has installed in its workshops and generating stations at Basin Bridge. The learned City Civil Judge, and on appeal the learned Judge of this Court, both held that the Company was not bound to take the permission of the Commissioner under section 288 of the Madras City Municipal Act. It was argued by the learned Advocate who appeared for the appellant—the Municipality—first, as a sort of a preliminary objection, as I understood him, that the Electricity Act deals only with the supply of electrical energy and not with the generation thereof and accordingly the boiler admitted to be installed for the purpose of generating electrical energy could not possibly come within the scope either of the Act or of the licence which the Company has got from the Government under the Indian Electricity Act. If this objection is sustained, then straightway the appeal has to be allowed. I may mention that the objection was not taken either in the lower Court or before the learned Judge on appeal. The provisions of the Electricity Act have to be carefully examined for the purpose of deciding whether there is really anything in the objection. No doubt, the preamble of the Act speaks of the supply and use of electrical energy, but I do not think that that should be taken to be conclusive of the matter. Though I cannot say the Act is very clear, yet, having regard to the various sections of the Act to which our attention was drawn by the learned Advocate for the Company (respondent), I do not think that this appeal should be allowed on such a narrow ground as the one suggested by the learned Advocate for the appellant. Sections 7, 32, 33, 34 and 37, among other sections of the Act, deal with generation of electrical energy, and

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there are provisions in the Act, in cases where the licence is revoked, as to whether the generating station also passes to the purchaser to whom the property may be sold, the policy of the Act being that, in the absence of a declaration that the generating station should not be taken to be part of the undertaking, it would pass. Section 37 which empowers the Governor-General to frame rules also refers to rules that may be made with reference to the generation of electrical energy. Further, there is the definition of the word "works" in section 2, clause (n). "Works" includes any building, machinery, etc., and, though it would have been more satisfactory if the Act had been more explicit regarding generating stations also, I think, having regard to the observations of SCRUTTON L.J. in *Farnworth v. Manchester Corporation*(1), that the word "works" includes buildings, and, therefore, in such cases, should be taken to include generating stations also in the absence of anything to the contrary. The following are the observations at page 541 :—

"(The company could) construct such works (which include buildings, and generating stations) as were necessary and incidental to such supply."

The heading of the English statute which was the subject of discussion in the English case was also similar to the heading and preamble of the Indian Act, namely, for the supply of electrical energy, etc. On the whole, I have come to the conclusion that I should not uphold the preliminary objection and dispose of the appeal on that basis only. I therefore propose to proceed to consider the appeal on its merits.

Another point was raised by the learned Advocate for the appellant, namely, that, as the Electricity Act

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on which the Company relies is an Act of 1910, whereas the Madras City Municipal Act is one of 1919, the later Act should be taken to overrule the provisions of the earlier Act, and that, without considering anything else for the purpose of disposing of this appeal, the earlier Act should, if I understood him properly, be ignored. I do not think that is a proposition to which I can accede. Various decisions were brought to our notice by the learned Advocate for the respondent where Courts had to consider the effect of two Acts, one a special but earlier Act, and a second a general but later Act; and the mere circumstance that the general Act was one of later date has not been held in any of the cases to conclude such a question. I therefore think that the second point on which the learned Advocate for the appellant relied is also not sustainable.

A third point was raised by him, and it turned on the provisions of the Madras City Municipal Act. The learned Advocate drew our attention to various sections of that Act which contains exemptions either in the case of certain persons or in the case of particular kinds of property from taxation. He drew our special attention to sections 101 and 102, and observed that under section 102, the Madras Port Trust, which under a prior Act enjoyed exemption from taxation, has been brought in, though made liable only to pay a lower rate of tax. But I think that such considerations, though relevant, are not in any way conclusive of the real question before us which has to be decided on a reference to the particular provisions relevant to the case. Again, it cannot be said that, because the Electricity Act contains certain provisions authorizing the Company to break open highways for particular purposes, their powers are

(1) [1929] 1 K.B. 538.

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confined only to the same and that they enjoy no other rights under the Act. As I said, all this would be of use in construing the particular provisions of the Acts which are alleged to be consistent or inconsistent with each other, but by themselves these considerations would not be conclusive on the question before us.

On the other hand, on the side of the respondent Company the learned Advocate argued that, because certain obligations were imposed upon them by statute, therefore it must be taken that all incidental and subsidiary rights which they should have for the purpose of properly exercising their operations with a view to discharge their obligations should be taken to have been preserved to them and not in any way affected by any other enactment. He drew our attention particularly to section 3, sub-clause (1), section 4, sub-clause (11), section 22 and section 42—among others—of the Electricity Act. It is true that obligations are imposed on the Company by the Act and by the licence, but the mere fact that certain obligations are imposed and even penalties attached for the non-fulfilment of those obligations does not, in my opinion, free them from obligations imposed by other enactments, if, on a proper construction of such other enactments, the Court comes to the conclusion that they are liable to those other obligations also. The existence of such obligations does not necessarily give them a free exemption from provisions of other Acts which have operation over a particular locality or over the people inhabiting or carrying on operations in a particular place. No doubt in construing any particular provisions on which the decision of a case might turn, it would be legitimate to have this consideration also in view, but it should not be taken to be in any way conclusive of the question.

Similarly, another argument was advanced by the learned Advocate for the respondent that the Electricity Act should be taken to be a code in itself, and that the rights and liabilities of the parties should be adjudicated upon only on the basis of the provisions contained within the four corners of the code and the rules framed thereunder. I am unable to agree. It is not necessary for me to go through the ground covered by the judgment of my learned brother on this point. The admitted existence of control under the Boilers Act appealed to me in this connection. On going through the Electricity Act, I find that the Act does not make provisions for many things for which one would expect provision to be made in the Act if it was intended to be a code, for the essence of a code is to be exhaustive. As I said, this was a new argument suggested by the learned Advocate for the respondent before us, and, for the other reasons given by my learned brother, I do not think that we must proceed on the footing that the rights and liabilities of the parties are governed only by the provisions of the Electricity Act and the rules framed thereunder and by no other enactments outside the same.

Having now noticed the preliminary arguments—so to speak—urged by the learned Advocates who appeared in the case for either side, I proceed to discuss the real question that arises for decision. Before doing so, I may state that the general rule of construction of statutes contended for by the learned Advocate for the respondent is not open to question. The learned Advocate for the appellant does not question the rule and a reference to legal authorities makes it absolutely clear that the rule contended for by the respondent has been taken to be the rule in existence from very early

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times. The learned Advocate for the respondent referred us to a case in *Barker v. Edger*(1), the particular passage he referred to being at page 754. It is a judgment of the Privy Council; Lord HOBHOUSE remarked as follows:—

“The general maxim is, ‘*Generalia specialibus non derogant.*’ When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms.”

The rule seems to be a very ancient and settled principle of law. Speaking with reference to this principle, TURNER L.J. observed as follows in *Birkenhead Docks, Trustees of v. Birkenhead Dock Co.*(2):—

“That appears to be the rule as laid down by the learned Judge JENKINS in Sir Foulke Grevil’s case reported in his work called ‘Eight Centuries of Reports’—‘the Third Century, case 41, page 120’.”

Although the principle of law is not open to any doubt, difficulty often arises in its application to particular cases. In this case, no reference is made to any steam-boiler in the Act, or in the licence granted to the Company. Reliance is placed by the Company on clause 7 of its licence which is to the following effect: “The generating station is to be within the area of supply.” If I understood correctly the argument of the learned Advocate for the respondent on this point, his argument seems to be this: The Electricity Act is a special Act; the licence is given under that Act; the licence must be taken to incorporate all the relevant portions of the Act

into it; the licence states that the generating station is to be within the area of supply. Under rule 4, the area of supply is practically the whole of the City of Madras; therefore it was argued that this gives the Company an unrestricted right to erect a generating station anywhere within the twenty or thirty square miles of Madras, and for that purpose to install steam-boilers anywhere it liked within that area. In support of this position, certain English and Indian decisions were referred to.

On behalf of the respondent, great reliance was placed on three English decisions, *City and South London Railway Company v. London County Council*(1), *London County Council v. School Board for London*(2) and *Surrey Commercial Dock Company v. Bermondsey Corporation*(3). In the first of the above cases, a railway company had obtained statutory powers to make an underground railway with all necessary works connected therewith and to take and use such of the lands delineated on the deposited plans as might be required for that purpose. The Company built a station which was found necessary for the purposes of the railway within the limits of deviation, a part of which projected beyond the general line of buildings in the street. It was held that section 75 of the Metropolis Management Act of 1862 did not apply. LINDLEY L.J. observed at page 521 as follows:—

“Upon the true construction of the special Act it is impossible to read the special and the general Acts together in such a way as to make them harmonise. . . . The limit set by the Act of Parliament is set geographically by the lines delineated on the plan, and is set also by the condition that every structure shall be necessary for the purposes of the undertaking.”

(1) (1853) 23 L.J. Ch. 457; 43 E.R. 694.
(2) [1898] A.C. 748.

(1) [1891] 2 Q.B. 513.

(2) [1892] 2 Q.B. 606.

(3) [1904] 1 K.B. 474.

FRY L.J. observed at page 525 :—

“It is obvious, therefore, to my mind that that clause (in the special Act) is inconsistent with the general statute.”

Similarly, LOPES L.J. remarked at page 526 :—

“I think that the construction which I put upon this section makes it inconsistent with the general statute.”

Holding therefore that the provisions of the special Act were inconsistent with the provisions of the general Act, the Court held that the special Act prevailed.

In *London County Council v. School Board for London*(1), it was held that the statutory power to erect a school on a particular site was inconsistent with the application to that building of the provisions of the Metropolis Management and Buildings Act (Amendment Act), 1878, forbidding the erection, without the consent of the Metropolitan Board of Works, of any building, wall or fence, within twenty feet of the centre of a highway. There, too, the Court held that, where there was an inconsistency between a special Act and a general Act, the special Act should prevail.

In the third case, *Surrey Commercial Dock Company v. Bermondsey Corporation*(2), it was held that, where a dock company obtained statutory authority to make certain alterations in their dock premises, and it became necessary as ancillary to those alterations to demolish a certain workshop and erect another in its place, it was not necessary to give notice to the local authority of their intention to erect the new workshop. The Court held that the interference and control involved in section 76 of the Metropolis Management Act was inconsistent with the powers conferred upon the dock company under their special Act.

(1) [1892] 2 Q.B. 606.

(2) [1904] 1 K.B. 474.

These cases were considered in a later case *Moran & Son, Limited v. Marsland*(1). A water company was empowered by a special Act to make and maintain, in the lines and situation and according to the levels shown on the deposited plans and sections, the reservoirs and other works for collecting and distributing water. The company built two big reservoirs under powers given to them by the Act. Under the London Building Act the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work. The district surveyor was bound to supervise any building or work affected by the provision of the Act for securing the due observance of the provisions of the Act and by-laws. Some particular buildings were exempted from the operations of the Act. The question arose whether it was the duty of the district surveyor to supervise the construction of these reservoirs and whether he was entitled to the fees specified by the London Building Act for such supervision. The Magistrate observed as follows, at page 748 :—

“I have arrived at this conclusion in consequence of the decisions of the Judges of the High Court in the cases of *London County Council v. Wandsworth and Putney Gas Co.*(2), *Charing Cross and Strand Electricity Supply Corporation v. Woodthorpe*(3), and *Whitechapel Board of Works v. Crow*(4). I do not see anything inconsistent between the powers of the defendant (water-works) company and the powers of the surveyor under the Building Act, and I accordingly make an order for payment of the sums claimed (by the district surveyor)”.

On a case stated by the Magistrate, the Court upheld his view. Lord ALVERSTONE C.J., after noticing

(1) [1909] 1 K.B. 744.
(3) (1903) 88 L.T. 772.

(2) (1900) 82 L.T. 562.
(4) (1901) 84 L.T. 595.

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City and South London Railway Company v. London County Council(1) and *London County Council v. School Board for London*(2), and distinguishing them, proceeded to observe as follows with reference to *Surrey Commercial Dock Company v. Bermondsey Corporation*(3):—

“There the question arose under section 76 of the Metropolis Management Act, 1855, which provides for notice to be given to the local authority before beginning to lay or dig out the foundation of any new house or building or to rebuild any house or building. The dock company had special statutory powers to construct certain works, and I will assume that the deposited plans did not specify in detail the mode in which those works were to be constructed. In carrying out those works it became necessary, as ancillary thereto, to demolish a workshop and to erect a new workshop in its place. I was a party to that decision, and we held that the interference and control involved in section 76 of the general Act were inconsistent with the powers conferred upon the dock company by their special Act, and that therefore the dock company need not give notice to the local authority of their intention to erect the new workshop. We did not rely solely upon the section of the special Act which gave the company power to construct the works, but, taking that section with other sections in the Act, we thought that the provisions of section 76 of the general Act were inconsistent with the powers conferred upon the company by their special Act. The question therefore before us is whether section 5 of the special Act of 1894, which gives power to the water company to ‘make and maintain’ the reservoirs, is inconsistent with the supervision of the district surveyor under the London Building Act, 1894. In my opinion it is not.”

The learned Chief Justice made the following further observations with reference to the other English cases quoted before him :

“It cannot be put higher than the provisional order authorizing the construction of the street box under the

(1) [1891] 2 Q.B. 513.

(2) [1892] 2 Q.B. 606.

(3) [1904] 1 K.B. 474.

footpavement in the street in the three cases I have mentioned in the earlier part of this judgment (Law Times cases), where the requirements of the Board of Trade and of the Postmaster-General had to be complied with. In those cases this Court was of opinion that there was nothing in the control given to the Board of Trade and to the Postmaster-General which ousted the right of supervision given to the district surveyor. We are bound by those cases, and they seem to me to be indistinguishable from the present case.”

BIGHAM J. remarked at page 758 as follows :—

“(Under section 138 of the London Building Act, 1894) ‘every building or structure’ shall be subject to the supervision of the district surveyor. I do not feel disposed to place any limitation upon those words unless the provisions of the special Act are inconsistent with the supervision of the district surveyor over the particular work. I cannot find anything in the special Act which is inconsistent with the application of that section to the construction of these reservoirs. As, therefore, there is nothing inconsistent therewith in the special Act, and as the London Building Act applies to all buildings and structures, it is the duty of the district surveyor under the Act to supervise the construction of the reservoirs, and he is entitled to fees for the work of supervision”.

WALTON J. agreed, and made the following observations at page 759 :—

“It is then that even if there are certain requirements of the London Building Act, 1894, which will *prima facie* apply to these reservoirs still the provisions of the special Act, under which the reservoirs were constructed, are inconsistent with the supervision of the district surveyor, and that therefore the sections of the general Act relating to the supervision of the district surveyor do not apply. I have not myself seen anything in the special Act which is inconsistent with the requirements I have referred to. There seems to me to be nothing in the special Act which prevents the sections of the general Act relating to supervision from applying to the construction of these reservoirs. It is not our province to consider whether the supervision of the district surveyor in a case like the present is useful or necessary for the protection of

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the public. We have only to consider whether the case comes within the Act, and, in my opinion it does."

On behalf of the appellant we were referred to *Uckfield Rural Council v. Crowborough District Water Company*(1), *London County Council v. Wandsworth and Putney Gas Co.*(2), *Galbraith Brothers v. Dicksee*(3), *Moran & Son, Limited v. Marsland*(4) and *London County Council v. District Surveyors' Association and Willis*(5).

In *Uckfield Rural Council v. Crowborough District Water Company*(1), a water-works company by a special Act was empowered to erect and maintain a water tower in a specific place. Under section 157 of the general Public Health Act, by-laws were made by which any person intending to erect a building should give the local authority notice of his intention and of the date on which the building was to be commenced, and also deliver to them plans and sections of it, and a description of the materials with which it was to be constructed. The Court held that the water-works company were bound to comply with the by-laws made by the local sanitary authority. RIDLEY J. was one of the members of the Court which decided this case and some of the other cases relied on by the appellant. A few sentences from the judgment of the learned Judge, RIDLEY J., show the reasoning of the learned Judge for his decision:—

"(The Crowborough Water Company under section 25 of the special Act had authority to put up a water tower in a particular field.) The question for our determination is whether they were entitled to do it without submitting plans and sections to the district council, and giving the council notice before beginning the work, in accordance with the by-laws 93 and 94 made by the district council under the Public Health Act, 1875.

(1) [1899] 2 Q.B. 664.

(3) [1910] 102 L.T. 890.

(2) [1900] 82 L.T. 502.

(4) [1909] 1 K.B. 744.

(5) [1909] 2 K.B. 188.

I am of opinion that the water company were not so entitled. It was contended on their behalf that when once they had authority, under their special Act, to put up the tower they might put it up as they chose. I cannot accept that view. The precise effect of the special Act is to give them power to put up in another person's field a water tower—that is, they had power to put up the tower in that field as though the land was their own. They required a statutory power in order to enable them to take and use the land. When they had got as far as that they were, in my opinion, in no better position than the private owner who, along with them and all others, must, unless specially exempted by some statutory provision, comply with the provisions of the Public Health Act, 1875, under which Act the local authority may make by-laws with respect to the commencement and construction of new buildings. It was contended for the respondents that they were not bound by the by-laws, and that the Public Health Act, 1875, did not apply to them because it was not incorporated with their special Act . . . But it does not follow that, because the Public Health Act, 1875, is not incorporated with the special Act, the water company are not bound, like everybody else, by the provisions of the earlier Act. If the directors of the water company were, in putting up their water tower, to commit a breach of the criminal law, it could not be contended that the criminal law did not apply to them; yet the argument put forward on their behalf must mean that no Act of Parliament bears upon them at all unless specially mentioned in their special Act. The real question is whether, under section 93 of the Waterworks Clauses Act, 1847, the water company are protected against the provisions of the Public Health Act, 1875, or are subject to those provisions. I am of opinion that the water company are not exempted from those provisions."

Again at page 671 the learned Judge proceeded to observe as follows:—

"The principle laid down in them (the cases cited) comes to this: that if there is an inconsistency between a special Act and a general Act the provisions of the special Act are not overridden by those of the general Act."

His Lordship quoted *City and South London Railway Company v. London County Council*(1) (the Railway

(1) [1891] 2 Q.B. 518.

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case), and observed with reference to that case as follows at page 672:—

“The Court of appeal held that the powers given by the special Act were inconsistent with those given by the general Act, and on that ground they held that the county council could not interfere with the building. I think it is clear that but for that inconsistency the decision would have been otherwise. There is no such inconsistency in the present case. The power given to the water company is to put up a water tower in a particular field—nothing more. If the district council had required that it should be put up in another field they would have required something inconsistent with the power given to the water company by their special Act. What the county council did in fact require did not affect the powers of the water company under their special Act.”

It must be noted in connection with this case that the water company in question was bound to supply a certain quantity of water to the area concerned, and yet it was held that that the water company was subject to the provisions of the Public Health Act, and bound to give notice as required by the by-laws and supply plans, etc., to the local authority in connection with any building which the water company might put up in carrying out its work and discharging its obligations.

In my opinion, this last case is very similar to the case we have to decide, and, adopting the reasoning of RIDLEY J., we have to hold that the respondent is subject to the provisions of section 288 of the Madras City Municipal Act. The decision in *Uckfield Rural Council v. Crowborough District Water Company*(1) has been followed in the two cases reported in the English Law Times mentioned already.

Having examined the provisions of the Indian Electricity Act, the licence given to the respondent, and the provisions of the Madras City Municipal Act, it

(1) [1899] 2 Q.B. 664.

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seems to me that there is no inconsistency in applying section 288 of the Madras City Municipal Act to the respondent. I do not understand that the plans deposited by the respondent mentioned anything about any steam-boiler, or about the position in which it was to be installed. The reasoning adopted by the English Court in the cases cited on behalf of the respondent does not, in my opinion, apply to the present case. The position of a Railway Company, authorized by its special Act to put up any buildings necessary for their purpose in the place covered by the lines marked in the plan deposited, is different from the position of the respondent who is only bound to have the generating station within the City of Madras (a rather wide area), and not on any specified plot. The respondent's case is also different from the case of an authority entitled to put up a school building on a particular plot. The present case would seem to be similar to the class of cases decided by RIDLEY J. referred to above. I may also observe that the circumstance that the plan deposited might show the necessity for a building and even its position would not necessarily lead to the inference that all outside supervision under the general Act is necessarily excluded. I may in this connection quote the following passages from the judgment of Lord ALVERSTONE C.J. in *Moran & Son, Limited v. Marsland*(1). At page 755, it was observed,

“It was suggested that the deposited plans gave such a description of the reservoir as to render the supervision of the district surveyor unnecessary, inasmuch as they indicated how the work was to be carried out. We have seen the deposited plans, and they seem to us to contain nothing more than what ordinarily appears upon such plans, such as the site, levels, and size of the reservoirs. They do not prescribe, for instance, how

(1) [1909] 1 K.B. 744.

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the reservoirs are to be constructed, the quality of the bricks, stone or other materials, or how those materials are to be bonded or put together, nor do they contain any provisions for the safety of the public. Therefore the case raises the simple question whether the mere statutory power to construct a work such as a reservoir is of itself sufficient to oust the application of those provisions of the London Building Act, 1894, which relate to the supervision of the district surveyor. Speaking for myself, I have no doubt that some of the things which have been mentioned to us—such, for instance, as the thickness of the concrete, the quality of the mortar, and the mode of binding the materials together—require careful supervision, and I have no doubt that proper supervision is given by competent engineers. But I can see nothing in the special Act to shew that the supervision which must be exercised by the engineers is to supersede the supervision of the district surveyor”.

In *Verrall, In re: National Trust For Places Of Historic Interest or Natural Beauty v. Attorney-General*(1), ASTBURY J. observed:—

“A private Act cannot exclude the application of prior public general statutes unless and to the extent that their provisions are expressly excluded or rendered impossible of application by necessary implication from the language and effect of the later Act”.

In Halsbury's Laws of England, Volume 27, the law on the point is stated as follows in paragraph 322, at page 169:—

“Where in the same or a subsequent statute a particular enactment is followed by a general enactment and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment is operative, and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply”.

In paragraph 362, at page 186, it is stated:—

“A special statute containing no provisions inconsistent with a general statute is, however, controlled by the latter, even if this is not expressly incorporated”.

(1) [1916] 1 Ch. 100, 108.

It is clear that similar cases have arisen in England with reference to disputes arising between companies which are in the position of the Electric Company here and local authorities, and Courts have come to the conclusion that, unless there be real inconsistency between the two Acts, such companies come under the supervision imposed by the local Acts also. Now, in the present case, all that we have got in the licence granted to the respondent is that the generating station should be within the City of Madras. Further, as I have already remarked, there is nothing in the Act or the licence about erecting any steam-boiler. Electricity can be generated either by the aid of steam-boilers or otherwise. If the Company's present contention be upheld, it would necessarily follow that, if to-morrow they should make up their minds to generate energy by other means, then they should have the same privileges attached to them with reference to the new machinery and apparatus which they might like to bring into existence for the purpose. Again, how is the existence of a power in the Commissioner under section 288 of the Madras City Municipal Act in any way inconsistent with the exercise of such rights by the Company? It was argued that the Commissioner might in his discretion refuse permission and that such an order might be upheld by the Standing Committee on appeal. If there were proper grounds for such refusal, the Commissioner would be right in his view, as also the appellate authority. But, if the suggestion is that the power is likely to be misused by the Commissioner, then the answer should be that the Court has no business to assume misuse of power by any officer in whom it is vested by law. If in any particular case a person invested with such authority be found to have exercised it on irrelevant grounds or to have brought to

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bear upon his decision considerations which should not have been brought to bear upon the same, then Courts are available to persons who feel themselves aggrieved thereby. I do not think that such an argument should be allowed to have undue weight in the matter of the construction of these two Acts.

Then something was mentioned with reference to the admission said to have been made in the lower Court on the side of the Municipal Corporation. All that I understood that the admission was really meant to amount to was this:—Having regard to the way in which the Electric Company is at present carrying on its operations a steam-boiler is necessary for the purpose of generating electrical energy. As I said, nothing really turns upon the admission. We have to construe the provisions of the two Acts; and, having regard to the way in which Acts similar in scope have been construed by Courts in England, I do not feel any difficulty in coming to the conclusion that the provisions of the two Acts are not in any way inconsistent and that the two can stand together and have operation so far as the point before us is concerned.

Then, two Bombay cases were quoted before us, and it was argued that the same construction should be placed on the Electricity Act. The cases are, in *Municipal Commissioner of Bombay v. G.I.P. Railway Company*(1) and *G.I.P. Railway Company v. Municipal Corporation of the City of Bombay*(2). Section 7 of the Indian Railways Act contains the following provision “Notwithstanding anything in any other Act for the time being in force and etc.” With these words occurring in a particular enactment, it is impossible to say that any other general enactment should be allowed to have

(1) (1909) I.L.B. 34 Bom. 252.

(2) (1913) I.L.B. 88 Bom. 565.

operation against the positive wordings and specific provisions of that particular enactment.

Section 288 of the Madras City Municipal Act enacts as follows:—

“(1) No person shall, without the permission of the Commissioner, erect anywhere any steam-boiler or machinery by the use of which smoke, smell, noise, vibration, dust or floating particles of combustible or other matter are produced, or danger is likely to arise to the inhabitants of the neighbourhood.

“(2) The Commissioner may refuse to give such permission if he is of opinion that such boiler or machinery in the proposed position is objectionable by reason of the density of the population in the neighbourhood or will be a nuisance to the inhabitants of the neighbourhood, or may grant such permission under such restrictions and regulations as he thinks fit.

“(3) All chimneys in connection with any steam-boiler or machinery erected within the City shall be of such height and dimensions as the Commissioner may determine.”

Under that section it will be noticed that the Commissioner may refuse permission if any steam-boiler in the proposed position is objectionable. He may determine the height of the chimney of any steam-boiler. He may grant permission under such restrictions and regulations as he thinks fit. As I have already mentioned, this power on the part of the Commissioner is not inconsistent with the powers conferred on the Company under the licence granted to the Company under the Electricity Act.

In this connection, I think it is also relevant to consider that, if we allow the contention raised by the Electric Company, it would follow that several other provisions of the Madras City Municipal Act would not be applicable to them at all. There are provisions relating to buildings contained in sections 232, 235, 243 and 245 of the Act, and with reference to some of them similar questions have arisen in England and Courts have there

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held that such companies are bound by similar provisions relating to buildings. In the absence of more definite provisions in the Electricity Act, I do not see any reason for adopting a construction of the Act which will make many of the salutary provisions designed for public safety and benefit practically a dead letter with reference to such companies, if the Company's contention be upheld.

Finally, it was argued that the existence of two authorities on a particular matter is always irksome and would lead to friction and that such a position should not be accepted unless the Act compels us to do so. Here again, certain English authorities have been cited to us where not merely two, but even three, authorities were held entitled to enforce their respective supervision with reference to works carried on by companies like the Electric Company before us. It is not necessary for me to refer at length to those cases here. All that I am now concerned to say is that the existence of two, or even more, authorities is not by itself conclusive in favour of the contention raised by the learned Advocate for the respondent. In my view, various powers conferred upon public authorities are conferred for the purpose of enabling them to see that certain aspects of public health, safety, convenience, etc., are not interfered with or ignored by persons proceeding under special Acts. I think therefore that the mere existence of supervision on the part of a plurality of authorities does not by itself necessitate the view suggested by the learned Advocate for the respondent.

For these reasons, I think that the provisions of section 288 of the Madras City Municipal Act are not inconsistent with either the Electricity Act, or with the provisions of the licence granted to the respondent to

which our attention was drawn; and it follows that the Electric Company is bound by the provisions of that section. I agree with the form of the decree proposed by my learned brother.

Appellant's Advocate's fee will be fixed at Rs. 250 in each appeal, having regard to the nature of the questions involved in these cases.

Attorneys for respondents: *Moresby and Thomas.*

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APPELLATE CIVIL.

*Before Mr. Justice Curgenvven and Mr. Justice
Bhashyam Ayyangar.*

THE OFFICIAL ASSIGNEE OF MADRAS (APPLICANT),
APPELLANT,

v.

FRANK JOHNSON SONS & Co., LTD., AND ANOTHER
(RESPONDENTS), RESPONDENTS.*

*Contract in writing—Construction—Stipulation not expressed in
contract—When may be implied—Construction not depend-
ent on nature of consideration.*

A Court, in construing a written contract, should not imply a stipulation not expressed therein, merely because it thinks it would be reasonable to imply it; such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made.

Whether a stipulation should or should not be implied is a question relating to the construction of the agreement and does not depend on the nature of the consideration supporting the agreement.

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Hamlyn & Co. v. Wood & Co. [1891] 2 Q.B. 488, *Lazarus v. Cairn Line of Steamships, Ltd.* [1912] 106 L.T. 378, and *Rhodes v. Forwood* (1876) 1 App. Cas. 256 followed.

APPEAL from the judgment of WALLER J., dated 6th February 1928, in the Insolvency Jurisdiction in Application No. 431 of 1924 in Petition No. 267 of 1923.

S. Duraiswami Ayyar (*V. Varalaraja Mudaliyar* with him) for appellant.

R. N. Aingar for first respondent.

O. T. Govinda Nambiyar for second respondent.

The JUDGMENT of the Court was delivered by

BHASHYAM
AYYANGAR J.

BHASHYAM AYYANGAR J.—This is an appeal by the Official Assignee and as such the assignee of the estate and effects of one Kancherla Krishna Rao, an insolvent, against an order of WALLER J. dismissing an application made by him in the said insolvency, for an order directing both or either of the two respondents, namely, Frank Johnson Sons & Co., Ltd., and the United Refineries, Burma, Ltd., to pay him damages for breach of an agreement. The United Refineries, Burma, Ltd., the second respondent, was an incorporated company formed in 1920 by the Indo-Burma Oilfields, Ltd., and Yomah Oil Co., Ltd., who were both engaged in the production of crude oil in Burma, for erecting, maintaining and operating a refinery for crude petroleum and marketing the products of such refinery, and it had its registered office in Burma. Frank Johnson Sons & Co., Ltd., the first respondent, who apparently did business both at Rangoon and Calcutta, had been appointed the sole selling agents in India of the petrol and other products which might be produced by the second respondent. The agreement which we have to consider was in writing and entered into on the 12th of December 1921 between the present insolvent and the first respondent, the latter acting as selling agents of

the second respondent. It consisted of two memoranda, by the first of which Kancherla Krishna Rao undertook to purchase debenture stock in the Indo-Burma Oil Fields, Ltd., for £20,000, and the first respondent, in consideration thereof, appointed him as the sole distributing agent for the sale of the products of the second respondent, in the Presidency of Madras including its Native States, French Possessions and the Colony of Ceylon, for a period of ten years. The second memorandum laid down and defined the terms of this agency and fixed the rights and liabilities of the parties thereto in detail. It is common ground that Kancherla Krishna Rao paid for the debentures undertaken to be purchased by him, but no products of the second respondent were sent to him for sale. It was alleged on behalf of the second respondent, and not disputed by the appellant, that, for some reason, the second respondent was unable to produce and did not produce any petrol or other products on any commercial scale. The question now emerges, and it is the only one argued before us, whether Kancherla Krishna Rao was, and the appellant, who now represents him, consequently is, entitled to hold both or either of the respondents liable in damages for their omission or failure to supply him with the products for the sale of which he obtained the sole agency.

Now, the primary question of liability undoubtedly turns on the construction of the written agreement above referred to. And that agreement, notwithstanding its formal and detailed nature, does not contain any clause imposing any obligation on either respondent to supply any products to Kancherla Krishna Rao, the agent for sale. If there was no undertaking or promise by the respondents to supply goods or products, it is obvious that no damages could be claimed by Kancherla

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Krishna Rao, or the appellant, against the first respondent or, much less, the second respondent, for any omission or failure to supply them. The learned Advocate for the appellant has contended that, although the written agreement is silent on the point, a promise for the supply of products should be read into it by implication under the circumstances of this case. When he was pressed to particularize the promise which he wanted to have implied in the agreement, with reference to the quantity of the various products and the time of their supply, he could only say that a reasonable quantity of the products produced by the second respondent should have been supplied to Kancherla Krishna Rao.

Whether an implication should or should not be made in a particular case depends on and must be answered with reference to the special facts and circumstances thereof, but the principles which should guide us in the matter have been laid down in several leading cases. The judgment of the learned trial Judge refers to the most important of them. The principle is well settled that a stipulation not expressed in a written contract should not be implied merely because the Court thinks that it would be a reasonable thing to imply it. Such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made. See *Hamlyn & Co. v. Wood & Co.*(1) and *Lazarus v. Cairn Line of Steamships, Ltd.*(2). Is it possible in the present case to say that, when the present insolvent and the first respondent entered into the contract in question, the former neces-

(1) [1891] 2 Q.B. 488.

(2) [1912] 106 L.T. 378.

sarily bargained for, or the latter held out, any definite obligation that the second respondent should refine and send out to the insolvent any products of the kind referred to in the agreement? It seems impossible to answer this question in the affirmative. It will be observed that the implications sought for will be inconsistent and collide with one of the important terms in the agreement, namely, that either party was at liberty to cancel or terminate the agency by merely giving three months' notice in writing. The agreement must, no doubt, have proceeded on the expectation that the second respondent would produce a large quantity of refined products and be in a position to supply Kancherla Krishna Rao with any required quantities thereof for commission sale, but the question is whether there was any and what bargain on these matters. It is not suggested that there was any negotiation or understanding as to the quantities of the products which the second respondent should supply or the present insolvent should receive, or as to any other particulars regarding their consignment. This omission, no less than the absence of any stipulation in the formal agreement on such an important point, clearly cuts at the root of the implication urged on behalf of the appellant.

Going to the authorities, it may at once be mentioned that *Ogdens, Limited v. Nelson. The Same v. Telford*(1), cited by the learned Advocate for the appellant, does not really help us. The facts of that case were essentially different, and, although there is a reference to the principle of implication in the judgment of COLLINS M.R. in the Court of Appeal, the decision really turns on the construction of an express stipulation, as explained and made clear by the judgments delivered by the House of Lords in the same

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(1) [1904] 2 K.B. 410.

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case on further appeal, see 1905 A.C. 109. Damages were granted in that case only for the breach of an express stipulation.

The other material cases are *Turner v. Goldsmith*(1) and *Rhodes v. Forwood*(2). It was argued for the appellant that the facts of the present case more nearly resemble those in *Turner v. Goldsmith*(1), which the trial Judge has distinguished in his judgment, than *Rhodes v. Forwood*(2), which has been followed by him, but we are not prepared to accept this argument. It seems to us that the present case is entirely on all fours with *Rhodes v. Forwood*(2). Here, as there, the contract was one of sole agency; the agency was confined to a specified area; the agent was to sell for commission; the contract was for a fixed period determinable earlier by either party on notice; and there was no express term obliging the principal to send any goods to the agent for sale in his area. The House of Lords held under these circumstances that no implied contract binding the principal to supply the agent with goods could be discovered. In the other case, *Turner v. Goldsmith*(1), the facts are materially different. In the first place, the relationship between the principal and the agent appears to have there approximated more to that of an employer and a servant than a manufacturer and a local commission agent for sale; compare the observations of PHILLIMORE J. in *Northey v. Trevillion*(3). Secondly, although the contract in that case resembles that in *Rhodes v. Forwood*(2) and the present case in being for a fixed term of years, there is this essential difference that, whereas in the latter the parties provided for the termination of the agency by notice even within the prescribed period, there was no such provision in the

(1) [1891] 1 Q.B. 544.

(2) [1876] 1 App. Cas. 256.

(3) [1902] 18 T.L.R. 648.

former and the contract was terminable by notice only as from the expiry of the period. Thirdly, the principal in *Turner v. Goldsmith*(1) employed the agent for sale not merely of the goods manufactured by him but of those which he could have procured by purchase or otherwise. It appears to us, therefore, that the present case is dissimilar to *Turner v. Goldsmith*(1) and falls within the scope of the decision in *Rhodes v. Forwood*(2).

It was pressed on behalf of the appellant that the purchase of the debentures of the Indo-Burma Oil Fields, Ltd. for £20,000, which is recited in the agreement in question as consideration for the appointment of the present insolvent as agent, makes an essential difference, but we think it has no bearing as to whether or not a stipulation to supply goods should be implied. Whether a stipulation should or should not be implied is a question relating to the construction of the agreement and does not depend on the nature of its consideration.

It must be held in the result that the order appealed against is right. The appeal is dismissed with costs (one set).

Attorneys for both respondents: *King and Partridge*.
B.C.S.

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(2) [1876] 1 App. Cas. 256.

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*Before Mr. Justice Sundaram Chetti.*1930,
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SREE RAJAH VENKATA RANGIAH APPA RAO
BAHADUR AND ANOTHER (PLAINTIFFS), APPELLANTS
IN ALL THE SECOND APPEALS

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
REPRESENTED BY THE COLLECTOR OF KISTNA AND
SIX OTHERS (DEFENDANTS 1 TO 3 AND 5 AND LEGAL
REPRESENTATIVES OF THE FOURTH DEFENDANT), RESPONDENTS
IN SECOND APPEAL NO. 317 OF 1927*.

Code of Civil Procedure (Act V of 1908), sec. 80—Suit by two plaintiffs, one of whom alone gave notice required by section—Maintainability of, against Secretary of State—Maintainability of, against other defendants—Partial rejection of plaintiff—Permissibility of, under O. VII, r. 11 of Code of Civil Procedure.

Under section 80 of the Code of Civil Procedure there should be identity of the person who issued the notice with the person who brings the suit.

Two plaintiffs instituted a suit against the Secretary of State and others seeking for reliefs on behalf of both of them, but only one of them had given the notice required by section 80.

Held that the suit was not maintainable against the Secretary of State as regards either plaintiff, that it could not be proceeded with against the other defendants also even though notice to them was not necessary under section 80 of the Code of Civil Procedure, and that either the suit was liable to dismissal or the plaintiff was liable to rejection.

Bhagchand Dagadasa v. Secretary of State for India, (1927) I.L.R. 51 Bom. 725 (P.C.), followed.

* Second Appeals Nos. 317 to 319 of 1927.

Under Order VII, rule 11 of the Code of Civil Procedure, there cannot be a partial rejection of a plaintiff in respect of a portion of the claim or as regards some of the parties.

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Quaere, whether non-compliance with the requisites of section 80 is a ground covered by clause (d) of rule 11 of Order VII of the Code of Civil Procedure.

SECOND appeals against the decrees of the Court of the Subordinate Judge of Ellore in Appeal Suits Nos. 38, 39 and 40 of 1925 respectively, preferred against the orders of the Court of the Additional District Munsif of Ellore, dated the 22nd December 1924, and made in Original Suit Nos. 124, 125 and 119 of 1924 on its file.

A. Venkatrayaliah (with *M. Appa Rao*) for appellants.

Government Pleader (*P. Venkatramana Rao*) for first respondent.

K. Kameswara Rao for other respondents.

JUDGMENT.

These three are connected appeals arising out of three suits brought by the plaintiffs (appellants) against the Secretary of State for India in Council as the first defendant and some other defendants in possession of the suit lands, in order to establish the plaintiffs' right to resume the suit inams and for a declaration that the first defendant had no right to enfranchise these inams and also for the recovery of possession of these lands after ejecting the other defendants therefrom. Both the Courts below have rejected the plaintiffs in these cases under Order VII, rule 11 of the Code of Civil Procedure on the ground that notice under section 80 of the Code of Civil Procedure was not given to the first defendant in the manner required by that section. The only question now arising for consideration is whether the view taken by the Courts below is correct.

The village in which the suit inams are situate belonged to the first plaintiff. It is admitted in the plaintiff

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that the first plaintiff has sold the suit village to the second plaintiff and that under the contract of sale the second plaintiff has been put in possession of the village also. The plaint seeks for a declaration of the right set forth therein in favour of both the plaintiffs, and the suit is clearly framed in such a manner as to make it one in which the reliefs mentioned therein are sought for on behalf of both the plaintiffs. Exhibit I, which is dated the 22nd of July 1921, is the notice sent by the first plaintiff alone to the Government under section 80 of the Code of Civil Procedure. The question is, whether the present suit brought by the two plaintiffs in the manner above set forth, is maintainable when the notice required by section 80 of the Code of Civil Procedure was given by the first plaintiff alone; in other words, whether such a notice can be deemed to be a sufficient compliance with the requisities of section 80. That section lays down that no suit shall be instituted against the Secretary of State for India in Council, unless two months before the institution of that suit a notice in writing is given stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. There should also be an averment in the plaint that such a notice was delivered or left as stated in the aforesaid section. As regards the provisions in section 80 being strict and mandatory or not, it would appear there was some difference of opinion expressed in some of the rulings relating to this section. In some decisions, a strict view was taken, but, in other cases, a liberal construction was placed upon this section and any defect or irregularity was condoned if it was found to be immaterial or unsubstantial. My attention was drawn to those decisions, but, in view of the latest pronouncement by their Lordships of the Privy Council in

Bhagchand Dagadasa v. Secretary of State for India(1), it seems to me that the dictum so clearly laid down by the Privy Council will have to be followed in deciding a question of this kind. At page 747, their Lordships have observed thus:

"The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions."

Later on, their Lordships further state thus:

"To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while section 80 is mere procedure, is fallacious, for section 80 imposes a statutory and unqualified obligation upon the Court."

In view of such a clear pronouncement, it is no longer open to argue that the Courts can make exceptions or qualifications to the explicit terms of section 80 of the Code of Civil Procedure on account of considerations of hardship and absence of prejudice or detriment to the interests of the Government. If the requisites of section 80 should be literally complied with, I must say that the giving of notice about the suit claim by one plaintiff would not be a strict compliance with the mandatory provisions of section 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person that gave the notice. There should be identity of the person who issued the notice with the person that brings the suit. In this view, it has been held that a suit brought by the legal representatives of a deceased man and a suit brought by a transferee would offend against section 80 of the Code of Civil Procedure, if the notice required by that section was given by the deceased man or by the transferor; *vide Bachchu Singh v. Secretary of State for India in Council*(2) and *Mahadev*

(1) (1927) I.L.R. 51 Bom. 725 (P.C.).

(2) (1902) I.L.R. 25 All. 187.

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v. *Secretary of State*(1). As the dictum of the Privy Council indicates that it is no longer left to the discretion of the Court to hold in favour of the maintainability of a suit in spite of non-compliance with some of the requisites of the section, I have to find against the maintainability of the present suits on the ground that the notice as required by section 80 of the Code of Civil Procedure was not given.

It is argued by the learned Advocate for the appellants that, even if a strict interpretation of section 80 is made, the plaint, as a whole, should not be rejected, but only so far as the second plaintiff is concerned. If it is a case of rejection of the plaint owing to non-compliance with section 80, it is not clear how there can be a partial rejection of the plaint in respect of a portion of the claim or as regards some of the parties. A similar question was considered by the Allahabad High Court in *Raghubans Puri v. Jyotis Swarupa*(2). Referring to section 54 of the old Code of Civil Procedure, the learned Judges state that the section only provides for the rejection of a plaint in the event of any matters specified in that section not being complied with and that it does not justify the rejection of any particular portion of a plaint. Section 54 corresponds to Order VII, rule 11 of the present Code of Civil Procedure. The plain meaning of that rule seems to be that, if any of the defects mentioned therein is found to exist in any case, the plaint shall be rejected as a whole. It does not imply any reservation in the matter of the rejection of the plaint. Non-compliance with the requisites of section 80 of the Code of Civil Procedure was taken to be a ground covered by clause (d) of rule 11 above referred to. Even if it should be taken that that clause does not strictly apply to the present cases, I must hold that the suits are liable to dismissal

(1) (1930) 32 Bom. L.R. 804. (2) (1907) I.L.R. 29 All. 325.

on account of non-compliance with section 80 of the Code of Civil Procedure.

It is urged on behalf of the appellants that, if it should be taken that the suits have to be dismissed, then, so far as the defendants other than the first defendant are concerned, the suits may be allowed to be proceeded with. There is real difficulty in acceding to this argument advanced on the appellants' side. If these suits should stand dismissed as against the first defendant, it means that the Government's right to resume these inam lands stands unaffected and the plaintiffs have no right as against the Government to resume the same. That being so, their claim to recover possession of these lands from the other defendants should fall to the ground for the simple reason that they have no right to resume these inams. In this connection I may also refer to an observation made by the Privy Council in the said *Bhagchand Daqadasa v. Secretary of State for India*(1). It was contended in that case that, even if the non-compliance with section 80 defeated the action as against the Secretary of State, it could be proceeded with as against the other defendant. To meet this argument, their Lordships have observed thus :—

"Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but without the presence of the Secretary of State before the Court, the Notification could not be assailed, and, if it stands as valid, the Collector's own action could not be successfully impugned."

Similarly, in the present case, if the claim put forward by the plaintiffs against the first defendant fails, it cannot succeed against the other defendants. However, the above observation in that ruling was sought to be distinguished on the ground that, in that case, there was

(1) (1927) I.L.R. 51 Bom. 725, 748 (P.C.).

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a necessity of giving notice under section 80 even in respect of the second defendant, and, in the present case, there was no necessity to issue any such notice to the other defendants. But I do not think the observation of their Lordships as to the non-maintainability of the action against the second defendant depended on this circumstance, namely, the necessity of a notice even to the second defendant.

The defect pointed out above being fatal to the maintainability of the suits, either the suits are liable to dismissal, or the plaints are liable to rejection. In either view, the order of the lower appellate Court seems to be correct. I therefore dismiss these second appeals with costs (two sets).

A.S.V.

APPELLATE CRIMINAL.

Before Mr. Justice Krishnan Pandalai.

1880,
September 2.

In re THOMULUR ANANTAPADMANABHIAH
(ACCUSED), PETITIONER.*

Code of Criminal Procedure (Act V of 1898), ss. 107, 112 and 548—Order on a person under sec. 112 to keep peace under sec. 107—Right of such person to grant of copy of Police information—Whether information part of the record within meaning of sec. 548.

A person against whom a Magistrate has drawn up an order under section 112 of the Code of Criminal Procedure, calling on him to show cause why he should not be bound over to keep the peace under section 107 of the Code, is not entitled to the grant of a copy of the written information given by the Police and on which the order is based, as such information is not part of the record within the meaning of section 548 of the Code.

* Criminal Revision Case No. 516 of 1930.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Subdivisional Magistrate of Nellore in Miscellaneous Case No. 39 of 1930.

C. Rama Rao Sahib for *G. Sivaramakrishna Sastri* for petitioner.

N. S. Mani for *Public Prosecutor (L. H. Bewes)* for the Crown.

JUDGMENT.

The question raised in this case is whether a person against whom a Magistrate has drawn up an order under section 112 of the Code of Criminal Procedure, asking him to show cause why he should not be bound over to keep the peace under section 107, is entitled to obtain a copy of the written information given by the Police on which the order is based. The Magistrate refused to grant the copy holding that it is not a charge-sheet, as the petitioner described it in his application. That it is not a report under section 173 of the Code of Criminal Procedure, a copy of which should under clause 4 of that section be furnished on application and payment to the accused, is clear enough, because the section is in terms confined to reports made on investigation under Chapter XIV of the Code. But this does not dispose of the matter. Section 548 (leaving out the immaterial words) provides that, if any person affected by an order passed by a Criminal Court desires to have a copy of " . . . other part of the record", he shall, on applying for such copy, be furnished therewith. The petitioner was clearly affected by the order under section 112 requiring him to show cause. If the information by the Police on which the Magistrate founded his order can be brought within the words "part of the record", he is entitled to a copy. No direct decision on the point has been brought

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to my notice. But there are observations of more or less indirect application. In *Ranga Reddi v. King-Emperor* (1), where the point for decision was whether and to what extent the order under section 112 should set out particulars of the information and whether evidence of repute was admissible on a charge under section 110, clause (f), SESHAGIRI IYER J., after pointing out that it is of the utmost importance that the information communicated to the accused under section 112 should be clear and specific, says at page 451 :—

“The accused is to be put on his trial on information received behind his back. In the case of a complaint the accused may be entitled to a copy, if he applies for it, but in the case of an information of this kind, which *ex necessitate* is a confidential one, the accused is entitled to be told the nature and extent of the information on which the Magistrate intends to take the action against him.”

This passage is cited by MADHAVAN NAIR J. in *Kutti Goundan, In re* (2), another similar case where the question for decision was whether the order under section 112 contained sufficient particulars to enable the accused to prepare for his defence and to summon witnesses on his side before the actual enquiry commences. In both cases, the learned Judges assumed that the accused is not entitled to a copy of the information to the Magistrate, and it may also be pointed out that the insistence on particulars in the order under section 112 would, to a great extent, be superfluous, if the accused were entitled to obtain copies of the information on which that order is based. At the same time, it cannot be denied that in neither case was section 548 under consideration, nor were the learned Judges considering whether the report of the Police on which the order under section 112 is based is part of the record in which that order is made.

(1) (1919) I.L.R. 43 Mad. 450.

(2) (1924) 47 M.L.J. 689, 692.

On the other side, there are observations of at least three learned Judges in a contrary sense in the well-known Full Bench decision in *Queen-Empress v. Arumugam* (1). That case was decided in 1897 before the amendment of section 173 enabled accused persons to get copies of charge-sheets under Chapter XIV. The question related to copies of Police reports under sections 157, 168 and 173 of the then Code. Of the four learned Judges who constituted the Court, three held that reports under sections 157 and 168 were not public documents and consequently the accused were not entitled to copies of them. The Court was equally divided as to reports under section 173, two Judges holding that they were, and the other two that they were not, public documents of which the accused, could get copies. The two referring Judges at page 192 say with reference to the argument founded on section 548 that, if an order has been made on a Police occurrence—report or charge-sheet affecting the person accused, such as an order for his arrest or for his remand to custody, he is *ipso facto* entitled to a copy of that document under the express terms of section 548 of the Code of Criminal Procedure. At page 206 BENSON J. refers to the argument based on section 548. He was of opinion that the argument would succeed if the Magistrate making the order is at the time a criminal Court. He rejected the argument as he thought that a Magistrate is not a Court when enquiring into offences which he is not empowered to try. This distinction between Magistrates and Courts is no longer valid after the decision of the Privy Council in *Clarke v. Brajendra Kishore Roy Chowdhury* (2), and there can be no doubt that a Magistrate acting under section 112 is a Court. It would therefore seem that, but for this distinction which did not exist,

(1) (1897) I.L.R. 20 Mad. 189 (F.B.). (2) (1912) I.L.R. 39 Cal. 953, 966 (P.C.).

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BENSON J. would have upheld the view of the referring Judges as to section 548. There is, however, no denying the fact that these were observations, not decisions, and that they were made with respect to Police reports made under Chapter XIV and not to Police reports or information to a Magistrate with a view to his taking action under Chapter VIII.

In this state of authority, I have to decide the point before me on a consideration of the words of section 548 and such considerations as may be based on the nature of proceedings under section 107 of the Code of Criminal Procedure. In brief, what is meant by "the record" and when does "the record" begin in proceedings under section 107? On the best consideration I can give to the matter, I think the record intended is the magisterial record, and such record in proceedings under section 107 begins usually with the order under section 112, except where a Magistrate not empowered under section 107 wishes to have proceedings taken under it and issues a warrant under clause 3 of that section. The information which leads to action under section 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be from any source, official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the source or the nature of the information received, *In the matter of the petition of Mithu Khan*(1). I am, therefore, of opinion that the information or report of the Police in this case was not part of the record within the meaning of section 548 of the Code of Criminal Procedure and that the petitioner is not entitled to a copy of it. The petition must be dismissed.

B.C.S.

(1) (1904) I.L.R. 27 All. 172.

PRIVY COUNCIL.*

PAKALA VENKANNA AND OTHERS (DEPENDANTS),
APPELLANTS,

1931,
February 1.

RAJA OF BOBBILI (PLAINTIFF), RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Prescription—Irrigation rights—Long user—Implied grant—Construction of chapakattus in channel—Whether right claimed sufficiently definite.

The appellants were inamdars of cultivated lands abutting on an irrigation channel which served a village of the respondent's zamindari. About 1864, the zamindar had made in the irrigation system an alteration which could have been made only with the inamdars' consent, and thereupon they had constructed a smaller channel communicating with the zamindar's channel at a point at some distance from their land. The water flowed naturally through the inamdars' channel so as to water their first crop. For a long period, probably ever since the above alterations, the inamdars during the drier season constructed a *chapakattu* (or temporary dam) in the zamindar's channel so as to raise the level of the water therein and cause it to flow down their channel; by this means they raised a second crop. In 1917, the zamindar, while admitting that the inamdars were entitled to use the natural flow of the water for their first crops, claimed a declaration that they were not entitled to use the water for their second crops by the means above stated. The appellants claimed the right to do so either by an agreement made when their channel was constructed, or by long user; whether there had been any agreement had not been investigated in the suit.

Held, that the long continued user must be ascribed to a lawful origin either by a grant actually made when the alterations took place or to be implied from the circumstances and relations then existing. The appellants consequently had a right to take

* Present:—Lord MACMILLAN, Sir JOHN WALLIS and Sir GEORGE LOWNDERS.

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from the zamindar's channel such water as was reasonably required for a second crop of the character customary on their land, and for that purpose to construct, whenever necessary, a *chapakattu* of the required length. That right was sufficiently definite to be acquired by prescription. Even if the Indian Easements Act would have applied otherwise, its application was excluded by section 2 (c) thereof.

Beeston v. Weate, (1856) 5 El. & Bl. 986; 119 E.R. 748 and *Pullbach Colliery Co. v. Woodman*, [1915] A.C. 634, 646, applied. APPEAL (No. 70 of 1928) from a decree of the High Court (November 17, 1925) modifying a decree of the District Judge of Vizagapatam (July 27, 1922).

The suit was instituted in 1917 by the respondent's predecessor against the appellants, inamdars owning 150 acres of cultivated lands to the south of an artificial irrigation channel, the Sayanna Batte, which served Regidi, a zamindari village of the respondent, situated on its other side, and other villages.

The principal question for determination in the appeal was the extent of the appellants' right to take water from the Sayanna Batte for the irrigation of their land, and whether they were entitled to exercise the right in the manner in which they did.

The District Judge held that the appellants were entitled to take as much water as they required to irrigate their land, either by the natural flow of the water through a small channel which they had constructed, or in times of low water, by constructing a *chapakattu* (or dam) in the Sayanna Batte to raise the level of the water and cause it to flow down their channel.

The High Court (PHILLIPS and ODGERS JJ.) modified the decree, by declaring only that the appellants were entitled to take water from the Sayanna Batte into their channel by its natural flow; they granted an injunction restraining the appellants from constructing *chapakattus* for the purpose stated above.

The facts and the grounds of the decisions appear from the judgment of the Judicial Committee.

The arguments were directed principally to the evidence.

DeGruyther K.C. and *Narasimham* for appellants.—The evidence shows that for at least 50 years the inamdars have raised a second crop, and that for that purpose they had no source of water other than the Sayanna Batte. As the water could be obtained only by constructing a *chapakattu*, it follows that the right now claimed has been exercised for at least that period. A legal origin of the right is to be inferred. It being now admitted that the inamdars were entitled to use the Sayanna Batte for their first crop, the alteration of the irrigation system about 1864, and the making of the Uppaya Batte, must have been the subject of agreement with the zamindar. From the circumstances, and the relation of the parties, then existing there is to be implied a grant of the right since exercised, limited to the crop cultivated and by the size of the Uppaya Batte: *Pullbach Colliery Co. v. Woodman*(1) and *Keewatin Power Co. v. Lake of the Woods Milling Co.*(2). The right claimed by the inamdars is sufficiently definite to be established by prescription: *Beeston v. Weate*(3). In India a right of the present nature can be established by prescription and apart from the Indian Easements Act; *Rajrup Koer v. Abdul Hossein*(4). The Indian Easements Act, 1882, provides by section 2 (c) that the Act is not to derogate from any right acquired, or arising out of a relation, before the Act came into force.

Dunne, K.C. and *Dube* for respondent.—The evidence showed that the Sayanna Batte was not the sole source of irrigation which the inamdars had for their second crop, that the erection of *chapakattus* had been occasional and not continuous, and had been objected to by the zamindar. Consequently, even if the principle of a lost grant applies in India, it cannot be applied in this case: The *Keewatin Power Co. case* (2) and the observation of Lord PARKER in *Pullbach Colliery Co. v. Woodman*(1) related to cases in which there had been an express grant and the question was what was to be implied in it. In the present

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(1) [1915] A.C. 634, 646.

(2) [1930] A.C. 640.

(3) (1856) 5 E. & B. 986; 119 E.R. 748.

(4) (1880) I.L.R. 6 Calc. 394; L.R. 7 I.A. 240.

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case there was no evidence of any grant or agreement when the irrigation system was changed; in the suit brought by the inamdars against the Government it was found by both Courts that there was no agreement. In India prescription is governed by the Indian Easements Act; no case of a lost grant was made below. The nature of the acts relied on were not sufficiently definite to establish a grant by prescription.

DeGruyther, K.C. replied.

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The JUDGMENT of their Lordships was delivered by SIR GEORGE LOWNDES.—The dispute in this appeal is as to the rights of the parties over an irrigation channel known as the Sayanna Batte in the Vizagapatam District of Madras.

The plaintiff, the respondent before the Board, is the Raja of Bobbili within whose zamindari is situated the village of Regidi which is served by the Sayanna Batte together with other villages dependent upon the same supply. The plaintiff instituted his suit on the 25th June 1917 against the appellants who are inamdars of the village of Amidalavalasa. They own 150 acres of cultivated land abutting on the south side of the Sayanna Batte. The Raja claimed a declaration that the appellants had no right to take water from the Sayanna Batte for irrigating their land, and a perpetual injunction.

The array of defendants originally included also the inamdars of the neighbouring village of Rajayavalasa, but, on objection that the suit so framed involved a misjoinder of parties, their names were struck off.

The Sayanna Batte is fed by a cut from the Nagavalli river which lies to the north. Owing, it is said, to a change in the course of this river an old channel communicating with it became ineffective, and in or about the year 1864 the Raja opened a new cut some way to the west of the old communication, and brought the river water into the bed of a hill stream called the Desura Gedda which, running from west to east, joined

up with the old Sayanna Batte. The bed of this stream was enlarged to take the additional flow, and the whole channel from the Nagavalli river onwards is now known as the Sayanna Batte. A considerable portion of the new cut and the enlarged bed ran through the village lands of Rajayavalasa which are immediately to the west of Amidalavalasa. The work was carried out by the Raja, and the channel has ever since been repaired and maintained by him.

The appellants alleged that the Desura Gedda had previously been a source of irrigation to their lands, but this question was not put in issue in the suit, and the trial Court expressed no opinion upon it. It is, however, their Lordships think, clear that the cut from the river and the eastward extension and enlargement of the bed of this stream could only have been carried out with the consent and goodwill of the inamdars of Rajayavalasa and Amidalavalasa, and upon the understanding at least that they would acquire some benefit from it. Subsequent events seem to show that this was in fact the case.

There has been ever since the extended Sayanna Batte came into operation a second and smaller channel called the Uppaya Batte, which takes off from the Sayanna Batte at some point in the Rajayavalasa lands, and carries water down to the lands of the appellants. This was admittedly constructed and kept up by the appellants, and was their only source of supply from the Sayanna Batte. The off-take was at such a level that when the larger channel was fairly full (which would ordinarily be the case between September and December) a natural flow to the appellants' lands was ensured. It was during this season that what has been generally spoken of in the case as the "first crop" was raised on the appellants' lands. In February and March, when

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the "second crop" was due, the level of the water in the Sayanna Batte would ordinarily be below that of the off-take, and when this occurred no water would flow into the Uppaya Batte unless means were taken to raise the water-level above the sill of the smaller channel. The desired result was then attained by the erection in the bed of the Sayanna Batte of a *chapakattu* or temporary groyne which was carried up-stream to such a point as would ensure a flow down the Uppaya Batte. The length of the *chapakattu* would obviously vary with the height of the water in the Sayanna Batte at the time when the irrigation flow was required. In lean years a length of 400 yards or even more seems to have been necessary; when the river supply was more abundant a much shorter length would be sufficient; or it might be in exceptional seasons that no *chapakattu* at all would be needed. The result in every case in respect of the flow to the appellants' lands, as their Lordships understand the position, would be the same, the extent of the artificial dam being only what was required to produce a reasonable flow of water through the off-take into the Uppaya Batte, and the measure of the water so taken being in effect a constant one, viz., the amount of water required for the appellants' second crop cultivation.

In the course of the hearing of the suit, the Raja seems to have realized that he could not hope to maintain his exclusive right to all the water which came down the Sayanna Batte, and he accordingly conceded to the appellants the right to take so much water as would naturally flow over the sill of the off-take into the Uppaya Batte, which meant the water for their first crop, and the dispute before their Lordships is confined to the appellants' right to erect a *chapakattu* to induce an artificial flow when the level of the Sayanna Batte

was below the sill of the off-take. The real dispute therefore is as to what may be called the second crop water.

The appellants claimed a right, based upon an agreement come to when the enlarged Sayanna Batte was constructed, or alternatively upon long user, to take sufficient water for both their crops, and their Lordships have no doubt that, if they had this right in fact, the erection of the *chapakattu* was a reasonable and customary method of exercising it when the natural flow down their own channel ceased. It is in evidence that similar means were regularly adopted by the Raja to produce the necessary flow from the Nagavalli river (which is the property of Government) into the Sayanna Batte.

It is, perhaps, unfortunate that the question of agreement was not gone into in this suit. There was another suit filed by the appellants against the Secretary of State complaining of the levy upon them of watercess. In that suit the appellants claimed free right to the water under the Raja from whose zamindari their *agraharam* tenure was originally derived. It was there held that no right by agreement was proved, but this finding would clearly not be binding as between the present parties. Subsequently to the decision of this issue, which was confirmed on appeal, the Raja was joined as a party and the suit was remanded for trial on the alternative claim by prescription. From that time onward both suits were heard together and the evidence as to prescription was by consent treated as common to both. The issue as to agreement was not gone into as between the appellants and the Raja, but, in the words of the High Court's judgment in the present case, it was regarded as "finally negatived" in the suit against the Secretary of State. Their Lordships think that

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once the right is conceded to the appellants to take *some* water from the Sayanna Batte the question of the agreement pleaded might well assume a different aspect. The point, however, has not been pressed before the Board and it is not necessary to pursue the question further, except in so far as concerns the user of the water by the appellants for a second crop, which they assert has been so long continued that it ought to be presumed to have had a lawful origin. In their Lordships' opinion, this question must depend upon the establishment by the appellants of two facts, viz.: (1) that they have regularly grown a second crop, and (2) that no other source of water was available to them for this purpose than that of the Sayanna Batte. If both these facts are proved, their Lordships think that the somewhat tardy admission by the Raja of a prescriptive right to water in the case of the first crop would go far to support a similar right in the case of the second crop.

The District Judge delivered his judgment in the present suit on the 27th July 1922. He said that the main question before him was as to the prescriptive right of the appellants to the water of the Sayanna Batte. Upon a careful consideration of the evidence his conclusion was as follows:—

"It is fully established, both by the plaintiff's witnesses and the documents exhibited by the defendants, that water has been regularly taken for the raising of a second crop. Apart from the Uppaya Batte, there is no other source from which water could have been taken in the dry season."

In the Appellate Court, PHILLIPS J. was of opinion that there was "really no evidence to show that second crops were raised every year", but their Lordships are satisfied upon the examination of the evidence before them that the conclusion of the District Judge upon this point is correct. That second crops were regularly

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grown is admitted by several of the Raja's witnesses; the case made by them was not that no second crops were raised, but that the water for them was taken by permission of the Raja. References to a second crop are to be found in documents forming part of the record which go back to 1870, and there is no reason to suspect their genuineness. It is also not disputed before the Board that from 1907 onwards the appellants' lands were assessed by Government for a second crop.

The same learned Judge suggests further that water for the second crop might have come from certain tanks on other land of the appellants, or possibly from a hill stream running from south to north, which, though it at one time discharged into the Uppaya Batte, was for many years before the suit carried over it by an artificial duct. With regard to the tanks, their Lordships think that it is established that they would ordinarily be dry in the second-crop season. The District Judge visited the site and was satisfied that this would be so. With regard to the hill stream, it is clear that from about the year 1895 it could not have been used for irrigation purposes, and there is no evidence that it had ever been an effective source of second-crop water. It would also seem reasonably clear that, if there were other sources of water available for the second crop, they would have been at least equally available for the first crop, and there would have been no reason for the construction of the Uppaya Batte at all.

Their Lordships are, therefore, of opinion that it has been satisfactorily established that for a long period of years—probably ever since the Uppaya Batte was constructed—second crops have been grown by the appellants upon the 150 acres in question with water taken from the Sayanna Batte, and it is admitted that

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this could not have been effected in ordinary years without the erection of a *chapakattu* to cause a flow down the smaller channel. Such long continued user must, in their Lordships' opinion, be ascribed to a lawful origin, the probability of which is supported by the circumstances under which the two channels were constructed, and the relations between the parties. The only evidence upon the present record of an arrangement having been come to in the sixties is, no doubt, the evidence of user, but that, on the view which their Lordships take, is sufficient to raise the necessary presumption in the appellants' favour. The right may well depend not on the terms of the grant but upon the circumstances under which it was made [see *per* Lord PARKER in *Pullbach Colliery Co v. Woodman*(1)].

The right which the appellants' claim was, their Lordships think, acquired, or in any case the relation out of which it arose was created, before the passing of the Indian Easements Act, 1882. Accordingly, even if it be assumed, which their Lordships are not to be taken as in any way deciding, that the Easements Act would otherwise have been applicable, the rights of the parties here do not depend upon the provisions of that Act [see section 2 (c)], and it is unnecessary to discuss the various problems which it is suggested would arise under it.

The learned Judges of the High Court, founding upon the Act, seem to have thought that the right claimed by the appellants was of too indefinite a character to be capable of acquisition by prescription. Their Lordships do not feel this difficulty. The right which they hold to be established is the right to take from the Sayanna Batte such water as is reasonably required for the cultivation of a second crop of the

(1) [1915] A.C. 684, 646.

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customary character upon the 150 acres to which the dispute refers, and for this purpose to construct, whenever necessary, a *chapakattu* of the required length in the bed of the Sayanna Batte. An equally indefinite right was established in *Beeston v. Weate*(1). There the plaintiff had been in the habit of going on the defendant's land for the purpose of damming a brook "at such times as the lowness of the water in the brook rendered it necessary," so as to force the water into an artificial channel which ran across the defendant's land to the plaintiff's land. The water was used for the plaintiff's cattle, but it was not always available, as at certain seasons of the year it was used by the occupiers of the defendant's land for irrigation. The indefiniteness of the right to dam the brook when necessary and to take the water when available was not considered to be any bar to its acquisition by prescription.

Much has been made in argument of certain occurrences which took place in 1888 and 1907, respectively. In 1888 the Raja's agents dammed the off-take of the Uppaya Batte. The appellants complained and the dam was removed. Their Lordships do not think that this incident throws any light on the question before them seeing that the appellants' right to the natural flow down the smaller channel is now admitted.

In 1907 water was apparently short and objection was taken to the *chapakattu*. The Raja's people removed it twice; each time it was re-erected by the appellants; the Raja's agent applied to the civil authorities to allow him police assistance to remove it again, but this was refused: the Raja was referred to a civil suit to establish his right, but no suit was filed, and the *chapakattu* remained. Their Lordships cannot think that this incident in any way weakens the case of the

(1) (1856) 5 E. & B. 986; 119 E.R. 748.

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appellants. Ineffectual opposition to the exercise of what is claimed to be a right is evidence rather in support of the right than of its non-existence.

Much of the judgment of the High Court is devoted to a consideration of the evidence as to the erection of the *chapakattu*. Accounts were produced by the appellants in which the costs of maintaining the Uppaya Batte appeared. Only one item in these refers specifically to a *chapakattu*, viz., a debit in 1897 of 12 annas for the purchase of weeds (or grass) "for *chapakattu* at the head of the channel." The learned Judges thought that the absence of other entries militated strongly against the regular erection of these dams. Their Lordships do not agree. It is not the case of the Raja that a *chapakattu* was only erected in 1897: it is admitted that it was erected in many other years (notably, for instance, in 1907), but, as his witnesses say, by permission. The explanation would rather be that this was the only occasion on which it was found necessary to purchase materials for it. Having regard to the temporary character of the dam, it is, their Lordships think, clear that the main item would be for labour and this is regularly debited, though not specifically in respect of the *chapakattu*. Such materials as would be required would ordinarily be available on the spot.

With regard to the plea of permissive user, the only documentary evidence by which it is supported is a petition, dated the 26th February 1888, to which some of the appellants were parties. Their Lordships think that this document was rightly discounted by the District Judge for the reasons given in his judgment. The principal appellant, the owner of the Chidikada Estate, was not a party to it. The oral evidence for the Raja is vague and unconvincing.

A question was also raised as to certain *tampara* or low-lying lands which formed part of the appellants' 150

acres, and it was urged that for these irrigation was unnecessary. Their Lordships do not think that any special exception should be made in respect of them. It is obvious that if the channel water is not required for their cultivation in any particular year it will not be used.

The only remaining matter with which their Lordships need deal is a question of boundary. The Raja in his plaint claimed a declaration that the boundary between his village of Regidi and the appellants' village of Amidalavalasa was the south bank of the Sayanna Batte, which meant in effect that the whole bed of the channel was in his estate. The District Judge decided against him, holding, in accordance with the result of a recent Government survey, that his boundary was the north bank. The High Court, by way of compromise, fixed the boundary line as the middle of the channel. This decision was challenged by the appellants before the Board, but at their Lordships' suggestion the point was not pressed, and it was eventually agreed that this part of the judgment of the High Court, which, in their Lordships' opinion, does substantial justice between the parties, should stand.

For the reasons given, their Lordships are of opinion that the appeal should be allowed: that only so much of the decree of the High Court, dated the 17th November 1925, as declares the boundary between Regidi and Amidalavalasa, should stand, and that for the rest, the respondent's suit should be dismissed, and they will humbly advise His Majesty accordingly. The respondent must pay the costs in India and before this Board.

Solicitors for appellants: *Chapman-Walker and Shephard.*

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

A.M.T.

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PRIVY COUNCIL.*

1931,
February 11.

KRISHNA RAO (DEFENDANT No. 2), APPELLANT,

v.

SUNDARA SIVA RAO AND OTHERS (PLAINTIFFS), RESPONDENTS.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Hindu will—Document executed in mufassal—Construction of document—Testamentary effect—Registration—Registration in book not appropriate for will.

A Brahman, four months before his death and when he was ill, executed a document in favour of the son of his wife's sister as follows: "As I have had no issue I have brought you up while you were young and have adopted you and celebrated your upanayanam, etc., and have chosen you as a son; so I have communicated this fact to the Revenue authorities and got your name registered for the office of the karnam held by me. Further, you shall be my son and you shall be entitled to my entire property as a son." The deceased presented the document for registration and it was registered in Book IV (Miscellaneous Register). The execution being in the mufassal, the Hindu Wills Act did not apply and formalities were not necessary for validity as a will. No valid adoption had taken place.

Held, that the document had testamentary effect; the fact that the document had not been registered in Book III, that appropriate in the case of a will, was insufficient to outweigh its terms and the circumstances in which it was executed.

APPEAL (No. 33 of 1929) from an order and decree (October 1, 1924 and October 12, 1926 respectively) of the High Court, reversing a decree of the Subordinate Judge of Masulipatam (November 15, 1920).

The question for determination in the appeal was whether a document, dated December 16, 1912, had, as the appellant contended, testamentary effect.

* Present:—Lord ATKIN, Lord THANKERTON, Lord MACMILLAN, Sir GEORGE LOWNDEN and Sir DINSHAH MULLA.

The terms of the document, and the circumstances in which it was executed, appear from the judgment of the Judicial Committee, which states also the effect of the judgments delivered by the trial Judge, and on appeal by COUTTS TROTTER C.J. and RAMESAM J.

Subba Row for appellant.

The respondents did not appear.

The JUDGMENT of their Lordships was delivered by

LORD THANKERTON.—This appeal relates to the succession to the immovable property of the late Krishna Rao, a Brahman and a karnam, who died on the 20th April 1913, without issue, but leaving a widow.

The suit was instituted on the 16th December 1918 by Kruttiventi Surayya, who admittedly is the nearest reversioner to the estate after the death of the widow, against the widow, as defendant No. 1, Vempati Satyanarayanamurti, as defendant No. 2, and other defendants, who were the purchasers under two deeds of sale and the mortgagee under a mortgage deed executed by defendant No. 2 in the years 1914 and 1916. Defendant No. 2 is now dead, and is represented by the appellant.

A few months before his death the late Krishna Rao, while he was ill, executed a document in favour of defendant No. 2, who was a son of his wife's sister, and whom he had brought up. The material part of that document (Exhibit I), which is dated the 16th December 1912, is as follows:—

"As I have had no issue I have brought you up while you were young and have adopted you and celebrated your upanayanam, etc., and have chosen you as a son; so I have communicated this fact to the Revenue authorities and got your name registered for the office of the karnam held by me.

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Further, you shall be my son and you shall be entitled to my entire property as a son."

The deceased presented the document for registration, and it was registered in Book IV, "Miscellaneous Register", on the 23rd December 1912, under the Registration Act (XVI of 1908).

After the death of Krishna Rao mutation was effected in the name of defendant No. 2, and he entered on possession of the properties of the deceased. In 1914 defendant No. 2 sold two portions of the properties and in 1916 he borrowed money on mortgage; it has been held by both Courts below as established that the proceeds of these sales and the mortgage were applied by him in discharge of the debts of the deceased.

In this suit, the plaintiff asked for a declaration (a) that the adoption alleged by defendant No. 2 was not true and valid, and (b) that the sale deeds and mortgage were not valid and could not bind the plaintiff's right.

It is now undisputed that there was in fact no valid adoption of defendant No. 2 by the deceased, but the Subordinate Judge of Masulipatam, who tried the case, appears to have held that the document was valid and operative to convey the properties to defendant No. 2 and that, as the plaintiff had failed to have it set aside within three years from 1913, when he came to know of it, he was barred by limitation from maintaining the present suit. He, therefore, on the 15th November 1920, dismissed the suit. The learned Judge does not express any view as to whether the document is of a testamentary character.

On an appeal by the plaintiff, the High Court of Judicature at Madras held, on the 1st October 1924, that the document was neither a will nor a *de presenti* conveyance of the properties, but was merely an "adoption deed", which conferred no title on defendant

No. 2, and remitted to the Subordinate Judge to submit findings as to whether the deeds of sale and the mortgage deed were binding on the plaintiff and whether the alienees were entitled to compensation for any improvements made by them on the properties. The learned Subordinate Judge on the 8th July 1925 pronounced findings to the effect that the deeds were not binding on the plaintiff and that the alienees were not entitled to any compensation. By formal decree, dated the 12th October 1926, the High Court accepted the findings, and ordered and declared that the alleged adoption of defendant No. 2 was not true and valid, and that the deeds were not binding on the deceased plaintiff's representatives after the death of the widow, defendant No. 1, the question of any equities that might arise when the deceased plaintiff's representatives should seek to obtain possession of any of the lands sold under these sale deeds being left open.

The present appeal is taken by the appellant as representing defendant No. 2 against the decree of the 12th October 1926. At the hearing before their Lordships, the respondents were not represented, and the main contention of the appellant was that the document of the 16th December 1912 was of a testamentary nature and entitled the appellant to the succession, irrespective of the question of adoption, although the upbringing of the appellant by the late Krishna Rao was a circumstance to be regarded in considering whether the document was intended to have testamentary effect.

In their Lordships' opinion, the document does not purport to convey anything *de presenti*, and, further, it cannot be read either as being itself intended as an act of adoption or as being an authority to adopt. The writer, a Brahman and a karnam, must have been well aware that the document could not of itself constitute

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the adoption—a formal ceremony being essential for that purpose—and its terms refer to adoption in the past tense and cannot be read as an authority to adopt in the future. Moreover, it is reasonable to assume that the writer must have been fully aware of the fact, now admitted, that no actual adoption had taken place, and also to assume that his anxiety was to do all he could to secure the succession of defendant No. 2, whom he had brought up and treated as a son, to his office as karnam, which would open on his death. The writer was ill at the time and died about four months later. Their Lordships are of opinion that the last sentence of the document clearly refers to succession to the writer's entire property on his death, and has testamentary effect in favour of defendant No. 2, who is now dead, and is represented by the appellant. The document, having been executed in the mufassal, is outside the Hindu Wills Act, and requires no formalities. While it is true that a will should be registered in Book No. III, this point is insufficient, in their Lordships' opinion, to outweigh the terms of the document itself and the other surrounding circumstances.

Accordingly their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the Subordinate Judge of the 15th November 1920 should be restored, the appellant's costs in this appeal, and in the High Court, to be paid by respondents 1 to 3 in this appeal.

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

A.M.T.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Pakenham Walsh.*

SESHAYYA CHETTI AND SEVEN OTHERS (DEFENDANTS,
RESPONDENTS IN SECOND APPEAL), APPELLANTS,

1930,
August 15.

v.

ROLLA SUBBADU AND FOUR OTHERS (PLAINTIFFS, APPELLANTS
IN SECOND APPEAL), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), ss. 19 and 31 and art. 132
—"Period prescribed" in sec. 19—Meaning of.*

The right to sue on a mortgage expired by the end of March 1909, but an acknowledgment of liability was made in May 1909. On a suit on the mortgage filed in February 1921, held (1) that the words "period prescribed" in section 19 of the Indian Limitation Act (IX of 1908) meant not only the period prescribed in the first schedule of the Act but included also the "two years" provided by section 31 of the Act, which came into force in August 1908, and that the suit was, therefore, not barred under article 132 of the Act.

Courts in dealing with questions of limitation should, as far as possible, place upon the Limitation Act a construction favourable to plaintiffs.

APPEAL under clause 15 of the Letters Patent against the judgment of MADHAVAN NAIR J., dated 26th April 1929, in Second Appeal No. 966 of 1925 preferred to the High Court against the judgment of the District Court of Nellore in Appeal Suit No. 227 of 1924 (Original Suit No. 4 of 1923 on the file of the Court of the Subordinate Judge of Nellore).

The plaintiffs filed a suit on 22nd February 1921 on a hypothecation bond executed on 31st March 1897 by the father of defendants and his coparceners, and, to

* Letters Patent Appeal No. 99 of 1929.

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avoid the plea of limitation, relied on an acknowledgment of liability made on 6th May 1909 and on section 31 of the Indian Limitation Act (IX of 1908), which gave an additional period of two years for suits mentioned in the section, stating that the acknowledgment was made within those two years. The defendants pleaded *inter alia* that the suit was barred by limitation. Both the lower Courts held that the suit was barred. On a second appeal filed by the plaintiffs, MADHAVAN NAIR J. held that it was not barred and reversed the judgments of the Courts below and remanded the suit for trial of the issues not tried by the lower Appellate Court. The defendants then preferred this appeal under clause 15 of the Letters Patent.

S. Varadachari (with him *S. V. Venugopalachari*) for appellants.—The suit is barred by limitation. Section 3 of the Limitation Act enacts that all suits filed after the period of limitation prescribed by the first schedule shall be dismissed. The word “prescribed” occurring in section 19 and other sections of the Act means only prescribed in the first schedule. Section 31 does not prescribe any period of limitation for a suit of this nature, but gives only an extra two years as a matter of grace; similarly, section 4 allows a suit, which becomes barred when the Court is closed, to be filed on the reopening of the Court. The acknowledgment in this case having been made after the expiry of the twelve years is of no avail though it was made within the two years given by section 31; see *Shevdas Daulatram v. Narayan*(1), *Bai Hemkore v. Masamalli*(2), *Debendra Nath Roy v. Kartic Prasad Das*(3) and *Dayaram v. Laxman*(4).

P. Chenchiah for respondents.—Section 31 came into force even in August 1908 and it prescribes a period of limitation which has to be added to the period prescribed by the first schedule. Though the periods mentioned by section 3 are specifically restricted to those mentioned in the first schedule,

(1) (1911) I.L.R. 36 Bom. 268.
(3) (1928) I.L.R. 55 Cal. 1210.

(2) (1902) I.L.R. 26 Bom. 782.
(4) (1911) 18 Bom. L.R. 284.

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section 19 has only the words “the period prescribed” without the addition of the words “in the first schedule.” Section 31 allows an additional period of two years for a suit of this nature. Hence, if an acknowledgment is made within the two years allowed by section 31, it will be valid. This is the view that has been adopted by all the High Courts except Bombay, not only with regard to section 19 but also with regard to other sections which have merely the words “period prescribed”. Whether the view with regard to other sections is or is not correct or uniform, there has been no divergence of opinion with regard to the meaning to be given to the word “period prescribed” in section 19; see *Sheo Partab Singh v. Tajammul Husain*(1), *Hira Singh v. Musammat Amarti*(2), *Harish Chandra v. Kastola Kunwar*(3), *Abdul Ghani v. Chiranjil Lal*(4), *Murugesu Mudali v. Ramasami Chettiar*(5) and *Narasayya v. Krishnamurthi*(6).

JUDGMENT.

The defendants in the suit are the appellants here. This was a suit based upon a hypothecation bond, dated the 31st March 1897, executed by the father of defendants 1 and 2 and his coparceners. Admittedly article 132 of the Limitation Act is the appropriate article in such cases and that provides for a twelve years' period of limitation. The suit in this case was filed on the 22nd February 1921, and the twelve years' period of limitation provided by article 132 of the Limitation Act expired on the 31st March 1909, but, in order to get over the bar of limitation raised against the plaintiffs by article 132, an acknowledgment of liability, dated the 6th May 1909, is relied on by the plaintiffs. It must be noted that this acknowledgment was after the period of limitation provided by article 132 had expired, but the plaintiffs' case is that by virtue of section 31 of the Limitation Act, 1908, which came into force together with section 1 on the 7th August

(1) (1926) I.L.R. 49 All. 67.
(3) (1924) 80 I.C. 743.
(5) (1918) 26 M.L.J. 28.

(2) (1912) I.L.R. 34 All. 375.
(4) (1927) I.L.R. 49 All. 728.
(6) A.I.R. 1928 Mad. 1255.

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1908, the period of limitation was in this case extended by two years from the date of that Act. The appellants' case is that section 31 does not prescribe a period of limitation and that therefore in the case of suits already time-barred when the Act came into force, no acknowledgment made within the two years provided by section 31 can be availed of by the plaintiffs in such suits. If the plaintiffs' contention is correct, the present suit was filed within time, because they would have, under section 19 of the Limitation Act, a fresh period of limitation of twelve years from the date of the acknowledgment.

We have to consider the effect of sections 19 and 31 of the Limitation Act, and, in doing so, it must be stated that it is beyond question that section 31 was enacted on account of a conflict of opinion between the Allahabad High Court and other Courts with regard to what was the period of limitation in suits on simple mortgages. The Allahabad High Court as well as some other High Courts had taken the view that the article applicable was article 147 which gave a period of sixty years' limitation, and certain other High Courts thought that the period of limitation was only twelve years under article 132. All doubts on the matter were finally set at rest by the decision of the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai*(1), which decided that the period of limitation was twelve years under article 132. The result of this decision was that mortgagees in the United Provinces, through a wrong interpretation of the law which had prevailed there, had lost the right of suit and it was in order to prevent this hardship that section 31 was enacted. That section allows mortgagees to bring suits on their mortgages within two years from

the date of the passing of the Act or within sixty years from the date when the money became due whichever period expires first. That section applies to cases where the mortgagee's right to sue had become time-barred before the Act was passed. It may also have been intended to apply to suits not already time-barred but on the point of being so. That section also applies to suits time-barred and dismissed on that account and also to pending suits. It will be seen, therefore, that section 31 was designed to embrace only a special class of cases.

Mr. Varadachari, for the defendants-appellants, contends that section 31 is purely remedial and gives a period of two years from the passing of the Act for the institution of the special class of suits more as a concession or an act of grace and that section 31 does not prescribe any period of limitation. There is certainly much force in this contention very ably presented to us by Mr. Varadachari. In support of it he has referred to sections 3 and 4 of the Limitation Act. The former says that every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed. That section is perfectly clear and does not give rise to any confusion whatever. Section 4 provides that, where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court reopens. His contention is that section 4 does not extend the period of limitation at all, that expires on the last day of the period set out in the schedule, but gives the mortgagee a day or days of grace in which to institute the suit. He contends that section 19, which is the acknowledgment section saving

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(1) (1907) I.L.R. 30 Mad. 426 (P.C.).

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limitation, limits the acknowledgment to the period set out in the schedule. The opening words of the section are—

“Where, before the expiration of the period prescribed for a suit . . . an acknowledgment of liability in respect of such property or right has been made . . .”

He contends that “the period prescribed for a suit” means the period prescribed in the schedule. Mr. Chenchiah, on the other hand, for the respondents, in his very able argument, contends that the words “the period prescribed for a suit” mean not only the period of limitation given in the schedule but such further days as are given to persons by other sections of the Act, and that the words in section 19 do not mean “prescribed in the schedule” but in their relation to section 31 mean the further period of two years provided for in section 31. He points out that in section 3 the words used are “every suit instituted after the period of limitation prescribed therefor by the first schedule”, that there is a definite reference to the schedule and that in section 4 the words are “the period of limitation prescribed for any suit”, the words “in the schedule” being omitted. Our attention was also drawn to section 5 where the words are “the period of limitation prescribed therefor” and other sections and pointed reference was made by him to section 19 where the words are “period prescribed for a suit”.

This question has been considered by the High Courts of Bombay, Allahabad, Madras and Calcutta. The Allahabad High Court has consistently held the view that section 31 does prescribe the period of limitation and I think that the respondents’ contention that the Madras High Court has taken the same view as that held in Allahabad is correct. The Calcutta

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High Court also, in the one case to which we were referred in that High Court, shared the Allahabad opinion. The Bombay High Court on the other hand has taken a different view.

In *Shevdas Daulatram v. Narayen*(1), the question arose as to whether a suit for which provision is made under section 31 (1) of the Limitation Act, 1908, if instituted on a Monday, one day after the period of two years from the date of the passing of the Act has expired, could be taken to have been instituted within the period of two years, and it was held that section 31 of the Limitation Act did not prescribe a period of limitation and that the suit could not be taken to have been instituted within the period of two years. That Court had not to consider section 19 of the Limitation Act and the case is on that ground certainly distinguishable from the present case. An earlier case in the Bombay High Court under the old Act, *Bai Hemkore v. Masamalli*(2), was a case of an acknowledgment by the defendant. That was a case of a suit to recover money due under a bond. The defendant made an acknowledgment of liability during the time that the Courts were closed for the vacation. When the acknowledgment was made, the three years’ period of limitation provided in the Act had expired, although the plaintiffs’ right to institute the suit on the date was subsisting under section 5 of the old Act which is the same as section 4 of the present Act. In *Sheo Partab Singh v. Tajammul Husain*(3), a case, like the one now under appeal, of acknowledgment of liability, it was held that section 4 does not prescribe any special period of limitation for any kind of suit, but only lays down that, when, the prescribed period of limitation expires on a day when

(1) (1911) I.L.R. 36 Bom. 268.

(2) (1902) I.L.R. 26 Bom. 782.

(3) (1926) I.L.R. 49 All. 67.

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the Court is closed, then, the suit must be instituted on the day when the Court reopens, and, whilst in full agreement with the view taken by the Bombay High Court in *Bai Hemkore v. Masamalli*(1) last referred to, they held that case was distinguishable from the case then before them. On page 70, GRIMWOOD MEARS C.J. and KING J. state as follows :—

“ It has been argued for the respondents that in section 19 the words ‘ before the expiration of the period prescribed ’ must be taken as meaning before the expiration of the period prescribed in the schedule. We see no reason for limiting the meaning of the words in the manner suggested. A period for a suit can be prescribed by a section of the Act as well as by an article of the schedule, and in the present case the period of limitation is specially prescribed in section 31 of the Act.”

A contrary view to that contended for here by the appellants was also taken by the Allahabad High Court in *Hira Singh v. Musammat Amarti*(2). There the special period of limitation of two years prescribed by section 31 of the Act of 1908 expired on a Sunday, and it was held that a suit for sale to which section 31 applied instituted upon the following Monday was within time. In the opinion of the Bench, the time fixed for the institution of suits under section 31 was as much “ prescribed ” as if suits instituted under that section found place in the schedule. Another Allahabad case is *Harish Chandra v. Kastola Kunwar*(3), where it was held that the words “ prescribed in section 19 of the Limitation Act ” mean “ prescribed by any law for the time being in force ” and not limited to the period prescribed in the first schedule of the Act. Again, in *Abdul Ghani v. Chiranjilal*(4), a decision of a single Judge, it was held that an acknowledgment of a debt, made after the expiration of the three years’ period prescribed by schedule 1

(1) (1902) I.L.R. 26 Bom. 782.
(3) (1924) 80 I.C. 743.

(2) (1912) I.L.R. 34 All. 375.
(4) (1927) I.L.R. 49 All. 726.

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of the Limitation Act, 1908, for a suit upon a promissory note, but made before a suit on the note is actually barred by limitation, is a good acknowledgment, and there was no reason to limit the sense of the expression “ period prescribed ” to the period prescribed in the schedule alone. I now turn to the decision of RANKIN C.J. in *Debendra Nath Roy v. Kartic Prasad Das*(1). In that case there had been a payment of interest on a simple money bond after the expiration of the three years from the date limited for payment when the Court was closed, but it was held that it could not save limitation under section 20 of the Act if a suit on the bond was not brought on the day the Court reopened after the vacation. In his judgment RANKIN C.J. dealt with the case *Bai Hemkore v. Masamalli*(2), and he found himself in agreement with what was there laid down. The case in *Sheo Partab Singh v. Tajammul Husain*(3), which is exactly in point here and which distinguished *Bai Hemkore v. Masamalli*(2), was also dealt with by him. He states at page 1214 as follows :—

“ That section was really intended for a limited class of people to amend the schedule to the Limitation Act and substitute for them a longer period than the period which the schedule really mentions.”

This case clearly supports the view of the Allahabad High Court. The view expressed by the Bombay High Court in *Shevdas Daulatram v. Narayen*(4) was dissented from in Madras in *Murugesu Mudali v. Ramasami Chettiar*(5), where it was held that the benefit of section 4 of the Limitation Act could be invoked in computing the period prescribed by section 31 of the Limitation Act. The reasoning in the judgment in *Hira Singh v. Musammat Amarti*(6) was adopted but that in *Shevdas*

(1) (1928) I.L.R. 55 Calo. 1210.
(3) (1926) I.L.R. 49 All. 67.
(5) (1918) 26 M.L.J. 23.

(2) (1902) I.L.R. 26 Bom. 782.
(4) (1911) I.L.R. 26 Bom. 268.
(6) (1912) I.L.R. 34 All. 375.

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Daulatram v. Narayen(1) was not followed. In *Subbarayan v. Natarajan*(2), a decision of SPENCER and RAMESAM JJ. on section 48 of the Code of Civil Procedure, in the opinion of SPENCER J., the word "prescribed" used in section 15 of the Limitation Act means "prescribed by the first schedule to the Act," though the words "in the schedule" do not appear in the section as in sections 3 and 6 of the Act. In *Ummathu v. Pathumma*(3), a case not really in point, RAMESAM J. appears to think that *Bai Hemkore v. Maszmalli*(4) was correctly decided, but here again that case is distinguishable from this for the reasons already given. In *Narasayya v. Krishnamurthi*(5), reference is made to *Murugesu Mudali v. Ramasami Chettiar*(6), where *Shevdas Daulatram v. Narayen*(1) was dissented from, but REILLY J. had not to consider section 31 at all but the effect of section 4 of the Act, and he held that the period of limitation mentioned there must be understood not only as prescribed in the schedule but also as qualified by sections 5 and 22.

In our opinion, the correct view of the effect of section 31 has been taken by the Allahabad High Court in *Hira Singh v. Musammat Amarti*(7) and *Sheo Partab Singh v. Tajammul Husain*(8), by this Court in *Murugesu Mudali v. Ramasami Chettiar*(6), and by the Calcutta High Court, and therefore section 31 of the Limitation Act does prescribe a period of limitation. Courts in dealing with questions of limitation should, as far as possible, place upon the Limitation Act a construction favourable to plaintiffs, and, adopting that principle here, this Letters Patent Appeal must fail and be dismissed with costs.

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(1) (1911) I.L.R. 36 Bom. 268.

(3) (1921) I.L.R. 44 Mad. 817.

(5) A.I.R. 1928 Mad. 1255.

(7) (1912) I.L.R. 34 All. 375.

(2) (1922) I.L.R. 45 Mad. 785.

(4) (1902) I.L.R. 26 Bom. 782.

(6) (1913) 24 M.L.J. 23.

(8) (1926) I.L.R. 49 All. 67.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice
Krishnan Pandalai.

PEER AMMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 4),
APPELLANTS,

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November 19

v.

N. S. NALLUSWAMI PILLAI AND SEVEN OTHERS (PLAINTIFF
AND DEFENDANTS NOS. 2, 3 AND 6 TO 10), RESPONDENTS.*

*Indian Limitation Act (IX of 1908), art. 156—Ex parte decree
—Appeal from—Limitation—Starting point—Ex parte
decree set aside by trial Court within appealable period, but
subsequently restored by High Court in revision.*

When an *ex parte* decree has been set aside by the Court which passed it within the appealable period, and therefore no appeal against it is thereafter competent to the defendant, but the order setting aside the *ex parte* decree is subsequently set aside in revision and the original *ex parte* decree restored, the period of 90 days allowed by article 156 of the Indian Limitation Act of 1908 for an appeal from the original *ex parte* decree runs, not from the date of the said decree, but from the date when it is restored in revision.

STAMP REGISTER No. 711 of 1930 since registered as Appeal No. 532 of 1930 sought to be preferred against the decree of the Court of the Subordinate Judge of Madura, dated 8th August 1928, in Original Suit No. 128 of 1926.

K. Bhashyam Ayyangar (with T. R. Srinivasan) for appellants.

K. S. Jayarama Ayyar (with K. Swaminatha Ayyar) for first respondent.

* Stamp Register No. 711 of 1930 since registered as Appeal No. 532 of 1930.

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The JUDGMENT of the Court was delivered by
KRISHNAN PANDALAI J.—The question is whether this
appeal was presented in time. The material dates are
as follows :—

The appeal is from a preliminary decree on a mortgage passed *ex parte* by the Subordinate Judge of Madura in Original Suit No. 128 of 1926 first on 8th August 1928. The appellants (defendants 1 and 4) applied under Order IX, rule 13 of the Code of Civil Procedure on 9th August 1928 to set aside the *ex parte* decree, and the Court set it aside on 12th October 1928. Meanwhile the appellants had also on 9th August 1928 applied for copies of the judgment and decree, and they were ready for delivery on 27th September 1928 so that, had the appellants wanted to appeal, they had out of the 90 days available about $1\frac{1}{2}$ months more after 12th October 1928. As the decree was set aside by the Subordinate Judge himself, no appeal was preferred. But the plaintiff (respondent) applied in Civil Revision Petition No. 116 of 1929 to this Court to revise the order of the Subordinate Judge setting aside the *ex parte* decree, and this Court on 22nd November 1929 set aside that order thus restoring the preliminary decree to effect. This appeal was presented on 6th January 1930.

The provision of the Limitation Act applicable is article 156 which prescribes a period of 90 days from the date of the decree or order appealed from. The appellants contend that the date of this decree for the purpose of appeal must be taken as 22nd November 1929 when this Court by its order in Civil Revision Petition No. 116 of 1929 restored force and effect, including appealability, to the original decree which it had lost by its being set aside. The respondent contends that the date of the decree is 8th August 1928, the date when it was originally passed, and that its subsequent

vicissitudes have no effect on the period of appealability and that the only course open to the appellants is to induce this Court to excuse the delay under section 5 of the Limitation Act. No application under section 5 being now before us, we have to decide between the two above contentions as to the starting point of limitation.

No decision exactly in point has been brought to our notice. But we entertain little doubt that the appellants' contention must be accepted. It is not only in consonance with the principle underlying the law of limitation that suits, appeals and other legal proceedings are possible only when there is some cause of action, or ground of appeal or other grievance on which the plaintiff, appellant or applicant has a right to come to Court and ask for relief, but the opposite view would lead to the absurd result that an appellant's right to appeal and the decree-holder's right to execute the decree are both barred before the decree to be appealed from or to be executed came into legal being.

In *Muthu Korakkai Chetty v. Madar Ammal*(1), a Bench of five Judges dealt with the question whether, for an application for delivery of properties sold in Court auction, limitation ran from the date of an *ex parte* confirmation of the sale (26th April 1913) or from the termination of proceedings taken by the opposite party to set aside that confirmation (25th June 1915). It was held by four of the learned Judges that the latter date was the *terminus a quo*, although the result of the proceedings in respect of the properties subsequently sought to be recovered was that the order of 26th April 1913 was confirmed by that of 25th June 1915. The other learned Judge contented himself with answering the question put in the negative as it was put in the

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form whether the cause of action for the application was suspended during the pendency of the proceedings. The decisions of the Judicial Committee bearing on this question, an apparent conflict between which was the cause of the reference to a Full Bench, were so fully gone into in that case, that it is needless to refer at length to them again. To understand the ground of decision of the Court, it is sufficient to refer to the citations from the Privy Council decisions in *Baijnath Sahai v. Ramgut Singh*(1) and *Bassu Kuar v. Dhum Singh*(2). In the former case, which was one of a revenue sale by the Collector in 1882 confirmed by the Commissioner in 1884 and set aside by the Board of Revenue in 1884 and confirmed by the Board in review in 1886, their Lordships said that for the purpose of limitation there was no final or definitive confirmation of the sale till the final order on review by the Revenue Board in 1886. In *Bassu Kuar v. Dhum Singh*(2), it was held that money due on an account stated, which would, as such, have been barred in three years from the statement, became for purposes of limitation a debt of a new character when, it having been retained by the debtor as part of the consideration for a proposed sale of land, that arrangement failed, the sale not being specifically enforceable and so declared by decree between the parties. Their Lordships said, as to the defence that the suit for the money should have been brought while the arrangement for setting it off against the purchase-money was still in force:—

"It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor, who for years had been insisting that his creditor

shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time had relieved him from paying at all."

Reading the judgments pronounced in *Muthu Korakkai Chetty v. Madar Ammal*(1), it becomes clear that, while on the one hand no "suspension", in the proper sense, of a period of limitation which has begun to run is permissible except as provided in sections 14, etc., of the Limitation Act, the Courts will place a liberal or, in the language of OLDFIELD J., an accurate construction on the somewhat loosely expressed words in column 3 of the first schedule which prescribe the starting point of the period of limitation by not requiring parties to start legal proceedings in circumstances when it would be futile for them to do so. As SESHAGIRI AYYAR J. put it:—

"Subject to the exemptions, exclusion, mode of computation and the excusing of delay, etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party"—page 213.

The respondent's Advocate relied on *Ammathayi Ammal v. Sivarama Pillai*(2) and the Privy Council decision referred to in it, *Mani Singh Mandhata v. Nawab Bahadur of Murshidabad*(3). In that case, the plaintiff had obtained a preliminary decree on a hypothecation under which the time for payment of the mortgage money was fixed for 6th March 1917. Meanwhile the mortgagor's (defendant's) husband brought a suit in 1916 against the mortgagor and mortgagee for a declaration that the mortgaged property belonged to himself and that the mortgage was therefore not binding on the property. That suit was decreed in the first

(1) (1896) I.L.R. 23 Calo. 775 (P.O.). (2) (1888) I.L.R. 11 All. 47 (P.O.).

(1) (1919) I.L.R. 43 Mad. 185 (F.B.). (2) (1924) 43 M.L.J. 74.
(3) (1918) I.L.R. 46 Calo. 694 (P.O.).

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Court in favour of the husband on 26th April 1917 and by the first appellate Court, but was dismissed in second appeal by the High Court on 29th April 1920. The plaintiff applied for a final decree on 10th September 1920, more than three years after the date fixed for payment but less than three years after the defendant's title to the mortgaged property was affirmed in second appeal. The argument put forward for the plaintiff in this Court was that he had lost the right to apply for a final decree by the decisions of the first Court and the first appellate Court in the husband's suit that the property belonged to him, and that it revived on the decision in the second appeal that it belonged to the mortgagor. The Court did not accept this on the ground that the Court when it sells property in execution of a mortgage decree does not guarantee the title of the judgment-debtor as against strangers, and that article 181, which prescribes the starting point of limitation for such an application as the time when the right to apply accrues, does not say (mean) that the right to apply accrues only when the mortgagor's title as against strangers is clear. Therefore it was held that the right to apply for a final decree accrued on the date fixed for payment, and that, as no ground of suspension of limitation could be urged under the Limitation Act and no other ground of suspension was available according to *Mani Singh Mandhata v. Nawab Bahadur of Murshidabad*(1), the application was barred.

This decision has, in our opinion, no application to this case. It merely decided that under article 181 the right to apply for a final decree in a mortgage suit accrues, not when the disputes between the decree-holder and strangers to the decree about the title to the mortgaged property terminate and the mortgagor's title as

against such strangers is established, but from the date fixed in the decree for payment of the debt. In this case, we have to deal with a different article, namely, 156, and the question is, what is the meaning to be given to the words "date of the decree or order appealed from", when the decree has been set aside by the Court which passed it within the appealable period, and therefore no appeal is thereafter competent to the defendant, and the decree is afterwards restored by a higher tribunal. In our opinion, the case clearly falls within the class of cases when a fresh starting point of limitation for appealing has necessarily to be found. The opposite view would lead to the absurd result that the defendant would be deprived of the right of appeal because he did not appeal against a decree which had ceased to exist and against which therefore he could not have appealed after it was set aside. But it was suggested that he ought to have appealed before the decree was set aside under Order IX, rule 13 of the Code of Civil Procedure. Assuming he had done so, as soon as the decree was set aside under Order IX, rule 13 of the Code of Civil Procedure, the appeal would become infructuous and would necessarily have to be dropped, and the position after the decree was restored in revision by the High Court would be the same as if he had not appealed at all. It is not to be supposed that the appeal should be kept pending in contemplation of the double uncertainty that the plaintiff might take the order setting aside the decree to the High Court in revision and that this Court might interfere in revision. If we look at the matter from the point of view of the decree-holder, it becomes still more absurd if we have to suppose that his right to execute the decree under article 182 is, in the circumstances of the present case, to begin from the date of the first decree which was

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subsequently set aside and later restored. If between the date of the original decree and the restoration in revision a period of more than three years has expired, it would follow that, as there is no allowance for the intervening period according to the Act or any of the clauses of article 182, his application for execution would be barred before he succeeded in getting his decree restored. A construction which leads to such results could not have been contemplated by the legislature. We think, therefore, that the date of the decree appealed from must be taken as the date when the decree was restored in revision by this Court. On this footing, we hold that the appeal was presented in time, and it will be admitted.

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APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

AMMANI AMMAL (RESPONDENT), APPELLANT,

v.

M. NARAYANASWAMI NAIDU (PETITIONER—APPLICANT),
RESPONDENT.*

*Original Side Rules, High Court, Madras, O. XXXIV, r. 57
(Form No. 124) and r. 62—Application for calling in of
letters of administration granted on footing of intestacy—
Citation—Issue of—Appropriate rule.*

On an application for the calling in of a grant of letters of administration which has been made upon the footing of an intestacy, citation ought to be issued only under Order XXXIV, rule 57 (Form No. 124) of the Madras High Court Original Side Rules, and not under rule 62 of the said Order.

* Original Side Appeal No. 87 of 1929.

APPEAL from the orders of EDDY J., dated 27th September and 3rd October 1929, and passed in the exercise of the Original Testamentary and Intestate Jurisdiction in Application No. 2919 of 1929 in Original Petition No. 106 of 1924 (Testamentary Original Suit No. 9 of 1929).

Rules of the High Court (Original Side), Madras :

Order XXXIV, rule 57.—If subsequent to the grant of probate or letters of administration with the will annexed any person interested in the property of the testator, other than the grantee, desires that the will may be proved, in solemn form, or that the said grant may be revoked, he shall file an affidavit setting forth the grounds therefor, and applying for the issue of a citation to the grantee. The Registrar shall appoint a day for the hearing of the petition, and shall issue a citation in Form No. 123 or 124; and the petition for probate or letters of administration with the will annexed, shall be registered and numbered as a suit in which the petitioner shall be the plaintiff, and the person issuing the citation shall be the defendant. The case shall be posted for first hearing on the day so appointed, and the petition and the said affidavit shall be taken as the plaint and the written statement of the defendant respectively.

Rule 62.—In cases not provided for by this order, or by the rules of procedure laid down in the Indian Succession Act, or by the Civil Procedure Code, the practice and procedure of the Probate Division of the High Court of Justice in England shall be followed so far as they are applicable and not inconsistent with this Order and the said Acts.

G. Ramakrishna Ayyar and C. Srinivasachari for appellant.

P. Tiruvengadaswami Mudaliar for respondent.

JUDGMENT.

RAMESAM J.—This appeal raises an important question of procedure. The facts out of which the matter arises may be stated. One Perumal Naidu died in Madras in 1924, leaving his sister Ammani Ammal. A brother of his named Ramaswami Naidu predeceased him. One M. Narayanaswami Naidu, who is a brother

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of Govindammal, widow of Ramaswami Naidu, applied for letters of administration to the estate of Perumal Naidu. The application was Original Petition No. 106 of 1924. Letters of Administration were granted to him on the 5th of February 1925 after notice to Ammani Ammal and to Govindammal.

The present application was filed on the 17th of August 1929 praying that the letters of administration granted to Narayanaswami Naidu should be recalled. The grounds disclosed in the affidavit accompanying this application are that Narayanaswami Naidu in his application of 1924 claimed to be the adopted son of Ammani Ammal but as a matter of fact he was not the adopted son, that Ammani Ammal was made to appear to consent to the former order by being induced to put her mark to certain papers the contents of which she was not able to understand clearly, and that, in short, her consent was procured fraudulently. This application was filed under section 263 of the Indian Succession Act and Order XXXIV, rule 54 of the Original Side Rules by means of a Judge's summons and a citation. Narayanaswami Naidu appeared on the Judge's summons and filed an application with an affidavit on the 27th of August 1929 and opposed the application on the merits, and also contended that the application by way of Judge's summons and citation under rule 54 did not lie. The matter came on before our brother KRISHNAN PANDALAI J. on the 6th of September and he passed an order to this effect: "Issue citation under Order XXXIV, rule 62. Number as a T.O.S." And on the defendant's application, he passed the following order: "The applicant has now taken out a citation under Order XXXIV, rule 62, and does not press this Judge's summons. Costs to be provided for in costs in the T.O.S. in citation." The matter again came on before

our brother EDDY J. on the 27th of September, when he passed the following order: "Leave to amend and reserve citation. Adjourned until October 3rd." On the 3rd of October further orders were passed as follows: "citation having been amended by consent, no order except that the applicant do have the costs of this application." It is against this last order that the present appeal is filed.

The learned Advocate for the respondent takes a preliminary objection that this appeal does not lie. As the order of the learned Judge finally disposes of the application of Narayanaswami Naidu and awards costs, we think that this is a final order and an appeal lies. We overrule the preliminary objection.

The amendment ordered by EDDY J. and made pursuant to his order amends the citation into a form similar to No. 99 at page 923 of the 16th edition of Tristram and Coote's Probate Practice. This order was passed apparently on the ground that there is no form in the Original Side Rules expressly providing for a matter of this kind and that therefore Order XXXIV, rule 62, applies. This brings in the practice and procedure of the Probate Division of the High Court of Justice in England. That is why Form No. 99 already mentioned has been adopted. It is now contended before us that there is no need for bringing in the English practice and for relying on rule 62. Rule 54 applies to a case where a person to whom the grant of probate or letters of administration has been made desires to have the same revoked. The case where a person other than the grantee of the probate or letters of administration desires that the grant may be revoked has got to be provided for, and, as I will presently show, rule 57 was intended to provide for such a case. Reading the opening words of the rule, "If,

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subsequent to the grant of probate or letters of administration with the will annexed any person interested in the property of the testator, other than the grantee, etc.", one would think that rule 57 was intended to apply only to cases where probate or letters of administration *with the will annexed* has been granted and a person other than the grantee desires revocation of the grant. But, continuing to read the rule, we find it contains a provision that the Registrar shall issue a citation in Form No. 123 or 124. Form No. 123 refers to a case where probate was granted and where it is desired that the grant should be revoked. Form No. 124 refers to a case where letters of administration were granted, but a will had been discovered afterwards or some other reason existed why the letters of administration should not be granted and it was desired that the grant should be revoked. It does not refer to a case where letters of administration without a will were granted. Thus it appears to directly conflict with the rule referring to it. Reading rule 57 with Form No. 124, we have only two alternatives before us so far as letters of administration are concerned: (1) the rule and the form contradict each other, which is meaningless, or (2) the rule was intended to apply to cases of all letters of administration either with the will annexed or without the will, and the form illustrates one of the cases where letters of administration were granted without any will. The latter mode of construction commends itself to us. The omission of the case of a grant of mere letters of administration without a will in rule 57 seems to be a slip. Rule 54 provides for the grant of probate or letters of administration, but, where the grantee desires revocation of the grant, rule 57 was obviously intended to apply to cases of

grant of probate or letters of administration but where a person other than the grantee desires revocation of the grant. That this was the general object of rule 57 is shown by Form No. 124 and we ought to construe the rule in the light thrown by the Form. So read, we think that rule 57 of Order XXXIV taken with Form No. 124 applies to this case, and there is no need to bring in Order XXXIV, rule 62. We invite the attention of the Registrar to this fact so that proper steps might be taken to make the language of rule 57 clear.*

The learned Advocate for the respondent does not object to the citation. His anxiety seems to be that if the citation is issued under rule 57 the burden of proof would be on him, but if the citation is issued under the English form the burden of proof will be upon the appellant, and he wants to avoid the onus on himself. I do not think that the burden of proof necessarily changes with the form adopted. On this matter, I agree with the observations of my learned brother, and the respondent's burden may be lightened by the conduct of the appellant in the former proceedings and other considerations and may be even shifted, and I do not propose to say anything further on this matter. At present we hold that the citation ought to be issued under Order XXXIV, rule 57. The order of Eddy J. is set aside and a citation in Form No. 124 with the necessary changes will now issue.

Having regard to the considerable doubt resting in the matter and the way in which the rules are drafted, we do not think this is a matter in which Narayanaswami Naidu ought to have costs of the application.

* The rule has since been amended.

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Costs of the parties including court-fee will abide the result of the enquiry.

CORNISH J.—I do not think that there was any need to have had recourse to rule 62, Order XXXIV. Form No. 124, which is the form of citation directed to be used by rule 57, specifically applies to the calling in of a grant of letters of administration which has been made upon the footing of an intestacy. Reading the rule with the form, therefore, it appears that the rule was intended to embrace proceedings to revoke grants of letters of administration, although in terms the rule mentions probate and letters of administration with the will annexed only. There is no reason why a different procedure should be followed in the case of revoking a grant of letters of administration to that which is prescribed by the rule for the revocation of a grant of probate. In the one case, the object is to compel the party who has obtained the probate to propound the will, and, in the result, the suit becomes one for proving the will in solemn form of law. And in the other case, the object is to compel the party who has obtained the grant of administration to establish such a degree of relationship with the deceased as will entitle him to the grant, and, in the result, it becomes an interest suit. (See Tristram and Coote's Probate Practice, 16th edition, page 427.) As there was some discussion by the learned Counsel upon the question of the onus of proof in the testamentary suit which follows upon the issue of a citation under the rule, it may be pointed out that where a will has to be proved in solemn form "the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator"; *Barry v. Butlin*(1). But when, as

(1) (1888) 2 Moore P.C.C. 480.

here, the deceased died intestate and was a Hindu, the party whose grant of administration has been called in must satisfy the Court that a grant can be made to him under section 218 (1), Indian Succession Act, that he is, in the words of the section, "a person who, according to the rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the estate or any part of such deceased's estate".

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APPELLATE CIVIL.

Before Mr. Justice Anantakrishna Ayyar and Mr. Justice Sundaram Chetti.

MUTHYALA NARAYANAPPA (PLAINTIFF), APPELLANT,

1930,
August 28.

v.

MUTHYALA RAMACHANDRAPPA (DEFENDANT),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sch. II, paras. 17, 18 and 19—Arbitration by named persons—Reference to—Agreement outside Court as to—Death of one of named persons pending arbitration proceedings and prior to matter being brought before Court—Suit ignoring agreement in case of—Maintainability—No provision in agreement for filling up vacancy.

In a case where parties privately agreed to refer their disputes to certain named arbitrators and to abide by their unanimous decision, but the agreement did not contain any provision as to what should be done in case any of the arbitrators died in the course of the arbitration proceedings, and one of them died in the course of such proceedings and prior to the matter being brought before the Court,

Held, that the agreement became inoperative and came to an end on the death of the arbitrator and that it could not thereafter be filed in Court under paragraph 17 of Schedule II of

* Appeal against Order No. 272 of 1930, and Civil Revision Petition No. 1034 of 1930.

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the Code of Civil Procedure, for the Court could not thereafter make an order of reference "in accordance with" the agreement, within the meaning of clause 4 of paragraph 17, and "consistently" with it, within the meaning of paragraph 19 of that Schedule.

Provisions contained in paragraphs 1 to 16 of Schedule II of the Code can be applied to cases falling under paragraph 17, only in so far as they are "consistent" with such agreement, and paragraph 5 (1) (b) (1) of that Schedule cannot be invoked for filling up the place of the deceased arbitrator, for to do so would be inconsistent with the agreement which did not contain any provision for such a contingency.

Hence, a suit instituted, after the death of one of the named arbitrators, by one of the parties to the agreement, in respect of any matter agreed to be so referred, cannot be stayed under paragraph 18 of Schedule II of the Code.

Death of the arbitrator is "sufficient cause", within the meaning of paragraph 17, for not ordering the agreement to be filed.

APPEAL against the order of the Court of the Subordinate Judge of Bellary dated 10th March 1930 and made in Original Suit No. 27 of 1929, and Civil Revision Petition under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the decree of the District Court of Bellary in Miscellaneous Appeal No. 19 of 1929, preferred against the Order of the Court of the Subordinate Judge of Bellary in Interlocutory Application No. 96 of 1929 in Original Suit No. 8 of 1929.

P. Venkaturamana Rao (with *V. S. Narasimhachari*) for appellant.—In spite of the death of one of the arbitrators the agreement can be filed in Court and the Court has the power to substitute another arbitrator in his place, as the main object is to have the matter decided by arbitration and not by the Court; *Sadiq Husain v. Nazir Begam*(1); *Bala Pattabhirama Chetti v. Seetharuma Chetti*(2); *Bhagwan Dass v. Gurdayal*(3);

(1) (1911) I.L.R. 38 All. 748 (P.C.). (2) (1894) I.L.R. 17 Mad. 498.
(3) (1921) 19 A.L.J. 828; 64 I.O. 458.

Fazal Ilahi v. Prag Narain(1); *Pestonjee Nussurwanjee v. Manockjee & Co.*(2) and *Perumalla Satyanarayana v. Perumalla Venkatarangayya*(3).

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B. Somayya (with *Kasturi Seshagiri Rao*) for respondent.—The agreement is to refer to three named arbitrators and to abide by their unanimous decision. It is a case of personal confidence. If one of them dies, the agreement becomes inoperative, and the Court cannot substitute another arbitrator in his place, as such a course would not be in accordance with, but would be inconsistent with, the agreement of the parties. Whatever might be the power of the Court in a case where there is a reference made pending a suit, such a power cannot be exercised in a case where the agreement is one made outside Court and is to refer to specified arbitrators. Death of one of the arbitrators is a "sufficient cause" within the meaning of paragraph 17 of the second Schedule of the Code of Civil Procedure. This case is governed by paragraphs 6 to 19, and paragraphs 1 to 5 would not be applicable in such a case. There is no general intention to refer to arbitration, whoever be the arbitrators. *Ramayya v. Bapayya*(4), *Jaitum Bi v. Nabi Saheb*(5), *Mohan Lal v. Damodar Das*(6), *Ahmad Nur Khan v. Abdur Rahman Khan*(7), *Ma Ba U v. Maung Pe Lan*(8), *Laxman v. Manjunath*(9), *Brooke v. Surdyal*(10) and *Shasimukhi Debi v. Parbaty Sunkar Roy*(11) were referred to.

P. Venkataramana Rao replied.

JUDGMENT.

ANANTAKRISHNA AYYAR J.—The parties to these cases before us are brothers. By an agreement dated 31st October 1926, the parties agreed to have their disputes relating to partition settled by three specified arbitrators. During the course of the arbitration proceedings one of the arbitrators died. One of the brothers filed Original Suit No. 8 of 1929 on 22nd

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(1) (1922) I.L.R. 44 All. 528. (2) (1868) 12 M.I.A. 112.
(3) (1908) I.L.R. 27 Mad. 112. (4) (1926) 51 M.L.J. 440.
(5) (1912) 24 M.L.J. 15. (6) (1918) 44 I.O. 868.
(7) (1919) I.L.R. 42 All. 191, 192. (8) (1917) 42 I.O. 911.
(9) (1921) I.L.R. 45 Bom. 1181. (10) (1874) 12 Ben. L.R. App. 13.
(11) (1918) 50 I.O. 878.

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March 1929 against his brother. The first defendant in Original Suit No. 8 of 1929 applied under paragraph 18 of the second Schedule of the Code of Civil Procedure to have the suit stayed. The Court held that the arbitration could go on with a fresh arbitrator that might be appointed by the Court. The plaintiff in Original Suit No. 8 of 1929 preferred an appeal against that order, and the learned District Judge set aside that order, holding that the arbitration agreed to between the parties could not go on, as one of the arbitrators was dead, and as there was no provision in the agreement regarding the appointment of a substitute in the place of the arbitrator who was dead. Against the decision of the learned District Judge directing the suit to proceed, the first defendant has preferred Civil Revision Petition No. 1034 of 1930.

The first defendant in Original Suit No. 8 of 1929 subsequently filed Original Suit No. 27 of 1929 in August 1929 for enforcing the arbitration after the appointment of a fresh arbitrator in the place of the deceased one. Having regard to the view taken by the learned District Judge in Civil Miscellaneous Appeal No. 19 of 1929 (which is the subject-matter of the revision petition before us already referred to), the learned Subordinate Judge dismissed the suit. Civil Miscellaneous Appeal No. 272 of 1930 has been filed by the plaintiff in Original Suit No. 27 of 1929 against the decision of the learned Subordinate Judge in Original Suit No. 27 of 1929.

The substantial question for decision in the two cases being the same, they were heard together in this Court.

The decision of the dispute between the parties turns on the construction of the particular agreement, dated 31st October 1926, entered into by them, and on

the proper meaning to be attached to paragraphs 17 to 19 of the second Schedule of the Code of Civil Procedure.

From a perusal of the provisions contained in the second Schedule of the Code of Civil Procedure, it seems to me that, when a suit is referred to arbitration when all parties interested agree to the same, the Court has got larger powers, in some respects, in order to complete and effectuate the matter of arbitration. Paragraph 1 of Schedule II enacts that, where in a suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before the judgment is pronounced, apply to the Court for an order of reference. The underlying idea in paragraph 1 of Schedule II is that the parties interested are anxious to have the suit settled by arbitration, and not by Court. The details regarding the personnel, etc., of the arbitrators in such a case are all taken to be merely secondary and incidental to the matter—the main intention being settlement by arbitrators and not by Court. Seeing that the parties are entitled to apply, at any time in the course of the suit, even after the trial has been closed and the matter is pending judgment, to have the suit referred to arbitration, it seems reasonable that the attempt at arbitration should not prove futile and abortive simply because one of the arbitrators declined to act, or one of the parties declined to appoint an arbitrator or to proceed with the same. Settlement by arbitration being taken in such a case to be the dominant idea of the parties, the matter of details, regarding appointment of arbitrators, etc., are left to be worked out by the Court in case parties do not agree. Of course, if the parties agree as to the manner in which the arbitrators are to be appointed, the Court is bound to adopt that procedure

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(paragraph 2). The Court is entitled to make provisions for various matters referred to in paragraphs 4 and 5. Where an arbitrator or an umpire dies, or where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or where the person appointed refuses to accept the office of arbitrator or refuses to act, etc., provision is made for the Court to appoint an arbitrator after giving notice to the parties. In the case of reference to arbitration of matters in a pending suit, therefore, there is no question of reference to specified arbitrators only, in the sense that, if any of such arbitrators declines to act or dies, the arbitration comes to an end.

Where, however, parties agree to refer their differences to arbitration,—there being no proceedings in Court at that time,—then power is given to the parties to the agreement or to any of them to apply to the Court to have the agreement filed in Court; whereas, in the case of a pending suit, the consent of all the parties interested is necessary before an application could be made to the Court for an order of reference. In the second class of cases mentioned above, such application may be made either by all the parties to the agreement, if they join in the application, or by any of them. In the latter case, notices should be issued to the other parties to the agreement to show cause why the agreement should not be filed. When no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement; and it is only in cases where there are no such provisions and the parties cannot agree that the Court could appoint any arbitrator. Thus the provisions contained in the agreement regarding the arbitrators have to be followed, and the Court is not entitled to go behind such provisions. This, it seems to me, is made clear by

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clause 4 of paragraph 17 of Schedule II. Paragraph 18 relating to stay of suit enacts that the Court should be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration before a suit filed after such agreement could be stayed. Paragraph 19 makes it clear that the provisions of Schedule II shall apply only so far as they are consistent with any agreement filed under paragraph 17. Thus, if the provisions of the second Schedule of the Code of Civil Procedure are not consistent with the agreement of the parties, such provisions of the Schedule shall not be applicable to such arbitration. In a case coming under paragraph 1 of the Schedule, the Court passes an order of reference to arbitration. In a case coming under paragraph 17 of the Schedule, the Court orders the agreement to be filed, and makes an order of reference to the arbitrator appointed in accordance with the provision of the agreement, etc. The provisions of the agreement thus govern the arbitration all through under paragraph 17, and the provisions contained in the second Schedule of the Code come in so far as they are consistent with the agreement filed under paragraph 17; whereas, under paragraph 1 of the Schedule, the agreement between the parties brings about the order of reference, the subsequent proceedings being left to Court, the Court being directed to respect the unanimous wish of the parties in certain respects only. It should also be noticed that agreements to refer to arbitration future differences also come within the scope of paragraph 17.

One can understand the reason for the difference in the policy underlying the distinction that exists between the two classes of cases mentioned above.

The question of construction of the particular agreement of the parties is one for the Court before

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which the question is raised. The Court should decide whether any, and which, of the provisions in Schedule II of the Code of Civil Procedure are consistent with the terms of the agreement.

In the case before us, the reference is to three specified persons. We are not able to gather that the main intention of the parties to the present case was to have their disputes settled by arbitration in any event, and that the question of the personnel of the arbitrators was only a subsidiary and incidental matter. As I understand the agreement before us, it is a reference to three specified persons only, with a further provision that the award to be binding should be the unanimous award of all the three.

In this view, seeing that one of the arbitrators in the present case died prior to the commencement of these proceedings in Court, I think that the present is not a case where the proceedings in the suit (Original Suit No. 8 of 1929) should be stayed under paragraph 18 of the second Schedule of the Code of Civil Procedure, or where the agreement should be ordered to be filed, or any order of reference made, under paragraph 17, since the Court could not make an order of reference to the arbitrators appointed in accordance with the provisions of the agreement when one of such arbitrators died prior to the commencement of proceedings in Court.

Coming to the decided cases, it seems to me that the decision in *Sadiq Husain v. Nazir Begam*(1) does not touch this exact point. It is a decision of the Privy Council, and, if the question now before us has been decided directly or even indirectly by the Privy Council, then there would be an end to all discussion. But, after having carefully read that decision, I am not able

(1) (1911) I.L.R. 33 All. 743 (P.C.).

to say that their Lordships have expressed any opinion on the question now before us. All that was decided in that case is this:—that the expression “refusal to act”, occurring in the Code, includes also a case where an arbitrator never accepted the arbitration and refused to have anything to do with the arbitration, and is not confined to the case of an arbitrator accepting the arbitration but subsequently refusing to act. If I understand the facts of the case correctly, a decree already passed by Court on compromise was to be worked out by arbitrators, who were to allot to the parties properties in a compact block, if possible, appertaining to their shares. There was a reference to arbitration regarding proceedings in a matter of which the Court had seized already, and which should be taken only through Court. Substantially, there was an order of reference by Court. It is not a case coming under paragraph 17 of Schedule II.

The case of *Bala Pattabhirama Chetti v. Sretharama Chetti*(1) decided that the words “so far as they are consistent with any agreement so filed”, occurring in section 524 of the Code of 1882 corresponding to paragraph 19 of Schedule II of the present Code, do not mean that the agreement must contain in every case an express provision as to what ought to be done, if any arbitrator is unwilling to act, in order that a Judge may act in conformity with it. The learned Judges held that the reasonable construction of the said provision was that the action of the Judge under section 510 (of the Code of 1882) should not be inconsistent with the agreement. A Bench of this Court, in *Ramayya v. Bapayya*(2), on the other hand, laid down that the provisions of the Schedule would apply only so far as

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(1) (1894) I.L.R. 17 Mad. 498.

(2) (1926) 51 M.L.J. 440.

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they are consistent with the agreement filed under paragraph 17. In that case, one of the parties who referred their disputes to the arbitration of three named arbitrators applied to the Court under paragraph 17 (2) of Schedule II of the Code of Civil Procedure to have the agreement filed in Court. This was done, but, in making the order of reference under sub-clause (4), the Court added a further direction that, in case of disagreement among the arbitrators, the opinion of the majority should prevail. The question arose whether the said direction was legal or not, as it was not consistent with the agreement which was construed to require the unanimous decision of all the three arbitrators (and not simply of a majority) in order that the award may be binding on the parties. The learned Judges held that the Court could not give any directions which were not consistent with the agreement to refer to arbitration. The reasoning of this decision directly applies to the case before us, and the provisions of paragraphs 1 to 17 of Schedule II would apply only so far as they are consistent with the agreement filed under paragraph 17 of the Schedule. As we construe the agreement before us, the provisions of the second Schedule are not consistent with the agreement, regarding the appointment of fresh arbitrators by Court. The agreement was to refer to the arbitration of three specified persons. There is no provision as to what is to happen in case any of the three died. In such a case, the Court has no jurisdiction to appoint an arbitrator in lieu of one who died, and, consequently, a suit filed by a party to the agreement should be tried by the Court. See *Ramayya v. Bapayya*(1) and the English decisions referred to therein, and *Jaitum Bi v. Nabi Saheb*(2).

(1) (1926) 51 M.L.J. 440.

(2) (1912) 24 M.L.J. 15.

The decisions in *Mohan Lal v. Damodar Das*(1), *Ma Ba U v. Maung Pe Lan*(2) and *Brooke v. Surdyal*(3) were also referred to as supporting the above view.

The decisions of the Allahabad High Court do not seem to be uniform; see *Ahmad Nur Khan v. Abdur Rahman Khan*(4), *Bhagwan Dass v. Gurdayal*(5) and *Fazal Ilahi v. Prag Narain*(6).

The only decision of the Bombay High Court to which our attention was drawn, *Laxman v. Manjunath* (7), supports the view I am inclined to take. There, the agreement provided for arbitration by two specified persons. Subsequently, one of the arbitrators expressed his unwillingness to act. A suit having been instituted by one of the parties, an application for stay of the suit was made to the Court under paragraph 18 of the second Schedule. The lower Court, having held that the suit was barred by the agreement to refer to arbitration, stayed the suit. The High Court reversed that order, being of opinion that the lower Court should have removed the stay, and decided the suit on its merits. Sir NORMAN MACLEOD C.J. and SHAH J. observed as follows:—

"The other arbitrator . . . stated that he refused to act as an arbitrator. A case, therefore, had arisen for an application to the Court to remove the stay of the suit if the parties did not come to an arrangement to remove the difficulties which had arisen, so as to enable the arbitration to proceed . . . Here the suit was stayed to enable the arbitration to proceed. Facts were proved to show that there were difficulties in the way of the arbitration proceedings. . . . However, it is obvious that the Court ought to have proceeded to deal with the suit and decide it on its merits, as the arbitration had become impossible owing to the parties failing to agree to any particular course being followed after one arbitrator refused to act."

(1) (1918) 44 I.C. 866.

(2) (1917) 42 I.O. 911.

(3) (1874) 12 Ben. L.R. App. 13.

(4) (1919) I.L.R. 42 All. 191.

(5) (1921) 19 A.L.J. 828; 64 I.C. 459.

(6) (1922) I.L.R. 44 All. 523.

(7) (1921) I.L.R. 45 Bom. 1181.

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The High Court accordingly directed that the suit should not be stayed but tried by the lower Court and disposed of in accordance with law. The case before us is substantially on all fours with the case before the Bombay High Court, though the question is not discussed in that case.

The only decision of the Calcutta High Court to which our attention was drawn is that reported in *Shasimukhi Debi v. Parbaty Sunkar Roy*(1). The facts are not fully clear from a perusal of the report; but, so far as one could gather, the Court would seem to have been of the opinion that the agreement of the parties should prevail in such cases. However, too much reliance cannot be placed on this case for the reasons stated already.

The present is not a case where one of the parties to the agreement revoked the agreement without just and sufficient cause. So the decisions reported in *Pestonjee Nussurwanjee v. Manockjee & Co.*(2) and *Perumalla Satyanarayana v. Perumalla Venkatarangayya*(3) do not in my view apply. No doubt, a mere arbitratory revocation by one party of the authority conferred by the agreement of all the parties will not be permitted. Further, the death of the arbitrator in this case occurred before any proceedings were taken in Court, and before any order of reference was made by Court. The basis of the decision of the Privy Council in the case of *Pestonjee Nussurwanjee v. Manockjee & Co.*(2) seems to be that the agreement of the parties in that case was taken really to incorporate the provisions of section 326 also of the Code of Civil Procedure (Act VIII of 1859) relating to arbitration, though it expressly referred only to section 327 of that Code.

(1) (1918) 50 I.C. 879.

(2) (1886) 12 M.I.A. 112.

(3) (1908) I.L.R. 27 Mad. 112.

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In my view, the balance of authority is in favour of the view that the provisions of paragraphs 1 to 16 of the second Schedule could not be applied to an arbitration outside Court, except in so far as they are consistent with the provisions of the agreement between the parties filed under paragraph 17.

We have already come to the conclusion that, on a proper construction of the agreement before us, it is a reference to the arbitration of three specified persons. One of the said three specified persons having died, the Court could not refer the matter to the arbitrators as provided in the agreement of the parties; and the Court had no power itself to appoint an arbitrator in such a case in the place of the arbitrator who is dead. The suit filed by the other party to the agreement in the ordinary Civil Court could not in such a case be stayed under paragraph 18 of Schedule II, as the arbitration could not go on in the circumstances as the parties declined to appoint an arbitrator in the place of the one who died.

We therefore uphold the order of the lower Court for the reasons mentioned above, and dismiss the Civil Revision Petition No. 1034 of 1930. For similar reasons the Civil Miscellaneous Appeal No. 272 of 1930 will also be dismissed. We make no order as to costs in these cases in the circumstances. Civil Miscellaneous Petition No. 2495 of 1930 is dismissed.

SUNDARAM CHETTI J.—The appellant and the respondent are brothers. They executed an agreement (muchilika), dated 31st October 1926, in favour of three specified arbitrators, referring their disputes regarding the partition of their joint family properties to the arbitration of the said three persons, and agreeing to abide by their decision. The arbitration was proceeded with to some extent, but before its completion one of the

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arbitrators died. Thereupon the respondent (Muthyala Ramachandrappa) filed Original Suit No. 8 of 1929 for partition of the joint family properties, impleading his brother, the present appellant, as the first defendant. In the course of that suit, the first defendant put in an application under paragraph 18 of Schedule II of the Code of Civil Procedure for a stay of the suit (Interlocutory Application No. 96 of 1929). The learned Subordinate Judge passed an order on 13th August 1929 directing the stay of the suit for a specified time. Against this order an appeal was preferred by the present respondent (the plaintiff in the suit), and the learned District Judge set aside the order staying the suit and dismissed the application, holding, on the strength of the decision in *Jaitum Bi v. Nabi Saheb*(1), that the reference to arbitration became inoperative and of no effect on the death of one of the arbitrators, there being no provision in the agreement to appoint a substitute, if some such contingency should arise. Against this order the present civil revision petition has been filed. In view of this order of the learned District Judge, the application by the first defendant under paragraph 17 of Schedule II of the Code of Civil Procedure to have the agreement filed and a reference made to the arbitrators (which was numbered as a suit) was also dismissed by the Subordinate Judge. Against that order of dismissal the first defendant has filed the present civil miscellaneous appeal. In both, the questions involved are substantially the same.

Exhibit I is the agreement to refer the disputes to the three arbitrators specified therein for effecting the partition of the joint family properties. The parties agree to abide by their decision. There is no provision

(1) (1912) 24 M.L.J. 15.

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in the muchilika for the appointment of substitutes, in case of death of any of them, or if any of them refuses to act. In this case, it is admitted that one of the arbitrators named in Exhibit I had died before the application was made, under paragraph 17 of Schedule II, for an order that the agreement be filed in Court.

The question involved in both these cases is almost the same. In order to direct the stay of trial in Original Suit No. 8 of 1929, under paragraph 18, the Court must be satisfied that there is no sufficient reason to decline to refer the matter in accordance with the agreement (Exhibit I) to refer to arbitration. With respect to the application under paragraph 17, if no sufficient cause is shown why the agreement should not be filed, the Court should order the agreement to be filed, and make an order of reference to the arbitrator or arbitrators appointed in accordance with the provisions of the agreement. Now that one of the arbitrators named in the agreement is dead, is the application, under paragraph 17, for an order contemplated therein sustainable, and is the Court bound to make an order staying Original Suit No. 8 of 1929?

Learned arguments have been addressed by the Advocates on both sides, and the difficulty of deciding this question is enhanced by the conflict of views expressed in judicial decisions. Before referring to those decisions, I wish to make a few observations. The Court's jurisdiction to order a reference to arbitration is derived from the agreement of the parties, and an order of reference has to be made by the Court, in accordance with the provisions of the agreement, and, at any rate, it should not be inconsistent with the intention of the parties disclosed by the agreement on a proper construction of its terms. That being so, it seems to me that one way of showing sufficient cause

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why the agreement should not be filed (within the meaning of paragraph 17) would be that, on account of the happening of a contingency, or on account of altered circumstances subsequent to the agreement, it would not be possible to the Court to make an order of reference in accordance with such intention. Where the agreement is to refer the matter to the decision of three named arbitrators, and one of them subsequently dies, if, on an application by one party under paragraph 17, when opposed by the other party, the Court chooses to order the agreement to be filed and make an order of reference to the remaining two arbitrators, such a reference would not be in accordance with the provisions of the agreement. Until after the order of reference is made, the Court cannot apply paragraph 5, and exercise the power of appointing a new arbitrator in the place of the arbitrator who has died or refused to act. This is clear from paragraph 19 of the second Schedule which runs thus:—

“The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.”

The Court not having the power to appoint a new arbitrator in the place of the one who died or refused to act, before making the order of reference under paragraph 17, it must be taken that sufficient cause is shown for holding that an order of reference could not be made to the arbitrators appointed in accordance with the provisions of the agreement (vide clause 4 of paragraph 17). It must also be noted that there is no provision in Exhibit I for the appointment of new arbitrators, in case of death or refusal to act of one or other of the arbitrators specified therein. If what I have stated above is the correct view, on a strict

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interpretation of the provisions of paragraphs 17, 18 and 19 of the second Schedule, the order of the learned District Judge refusing to stay the suit, and the order of the learned Sub-Judge dismissing the application put in under paragraph 17, must be taken to be correct.

A number of decisions relied on by the learned Advocate for the respondent go to support the view I have taken. In the case in *Deutsche Springstoff Actien Gesellschaft v. Briscoe*(1), the agreement was to refer the matter to two named arbitrators or their umpire. It was held that, if there was no subsisting agreement to refer capable of being carried into effect, the proceedings in the suit could not be stayed under section 11 of the Common Law Procedure Act, 1854. This principle was followed by a Division Bench of this Court in *Jaitum Bi v. Nabi Saheb*(2). The agreement in that case was to refer the matter to three named arbitrators, without any provision in the muchilika for the appointment of new arbitrators in their place. Two of them having declined to arbitrate, it was held that the agreement ceased to be operative and therefore did not bar the suit. In a recent decision, *Ramayya v. Bapayya*(3), the learned Judges have construed an agreement to refer the matter to three named arbitrators (similar to Exhibit I) as implying an intention to be bound by the decision of all the three and not merely of a majority, and, in this view, it was held that the Court had no power to order under paragraph 4 that the parties should abide by the decision of the majority, because, according to paragraph 19, the provisions of paragraphs 4 and 5 could be applied only so far as they are consistent with the agreement filed. If, according to the construction of the agreement adopted in the aforesaid decision, the

(1) (1887) 20 Q.B.D. 177.

(2) (1912) 24 M.L.J. 15.

(3) (1926) 51 M.L.J. 440.

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parties wanted to abide by the decision of all the three specified arbitrators, any reference made by the Court to two of them only, or after substituting a new arbitrator in the place of one who subsequently died, would not be valid, as it would not be consistent with the provisions of the agreement.

The contention of the respondent is lent support by the decisions of some other Courts also. The case in *Brooke v. Surdayal*(1) was decided under the old Code (Act VIII of 1859). Two points were decided. One is that the power of appointing a new arbitrator in the place of one who refused to act could not be exercised under section 319, before making the order of reference. The other is, that, by reason of one of the arbitrators named in the agreement having refused to act, the agreement to refer to arbitration as intended by the parties no longer subsists so as to enable the Court to direct that it should be filed [*vide also Ma Ba U v. Maung Pe Lan*(2)]. In another case decided by the Punjab Chief Court, an agreement to refer to five named arbitrators (without any provisions for substituting fresh arbitrators) was held to be inoperative by the death of two of them before the application was made for filing the agreement in Court. This was regarded as a sufficient reason for refusing to file the agreement under paragraph 17 [*Mohan Lal v. Damodar Das*(3)]. The same view has been expressed by the Lahore High Court in *Sri Ram v. Sorabji*(4). But, in that case, there was a distinct provision in the agreement itself that, in case of resignation or death of any arbitrator named therein, another might be appointed in his place. In *Ahmad Nur Khan v. Abdur Rahman Khan*(5), the application under

(1) (1874) 12 Ben. L.R. App. 13.

(3) (1918) 44 I.C. 868.

(5) (1919) I.L.R. 42 All. 191.

(2) (1917) 42 I.C. 911.

(4) (1919) 51 I.C. 636.

paragraph 17 for an order that the agreement be filed was dismissed, as the arbitrator refused to act for some reason.

On behalf of the appellant, some decisions were relied on as supporting his contention. Two of them are the decisions of the Allahabad High Court. In *Bhagwan Dass v. Gurdayal*(1), one of the three named arbitrators was alleged to have declined to act. Then one of the parties filed an application under paragraph 17 to have the agreement filed and a reference made. The learned Judges seem to concede that the Court has no power to utilize the provisions of paragraph 5 where no order of reference has been made under paragraph 17. But the fact of one of the three arbitrators refusing to act is taken to be no bar to the Court passing an order under paragraph 17. It is observed that an order of reference should be made under paragraph 17 to pave the way for the next step, which is the appointment of another arbitrator. But, it seems to me that such an order of reference (more clearly in the case of death of one of the arbitrators) cannot be deemed to be warranted by clause (4) of paragraph 17, if its terms are strictly construed. The view taken in the above case has been fully endorsed in the decision in *Fazal Ilahi v. Prag Narain*(2). Reliance has been placed on the decision of the Privy Council in *Sadiq Husain v. Nazir Begam*(3). If the facts in that case are carefully considered, it would appear that the agreement of the parties to refer the matter of settling and allocating the shares, etc., to two arbitrators was the razinamah petition filed in Court, on which a decree was passed. This itself amounts to the Court having filed the agreement. Then, one of the arbitrators

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(1) (1921) 19 A.L.J. 823; 64 I.C. 459.

(2) (1922) I.L.R. 44 All. 523.

(3) (1911) I.L.R. 32 All. 743 (P.C.).

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declined to act. It was held that the Court should have appointed another arbitrator under section 510 of the old Code of Civil Procedure (Act XIV of 1882). That was not strictly a case of an application for the filing of the agreement in Court after one of the arbitrators had refused to act. This decision of the Privy Council does not really help the appellant's contention in the present case. There remains the decision in *Bala Pattabhirama Chetti v. Seetharama Chetti*(1). It turned mainly on the construction of the words "so far as they are consistent with any agreement so filed" occurring in section 524 of the old Code of Civil Procedure (Act XIV of 1882) corresponding to paragraph 19 of the second Schedule of the present Code. According to the view taken in that case, section 524 should be read as if it contained the words "in the absence of anything in the agreement to the contrary", but a different view has been taken in the matter of construing a similar agreement with reference to paragraph 19 of the second Schedule in the later decision of this High Court, *Ramayya v. Bapayya*(2).

As regards the construction of the agreement (Exhibit I), reliance has been placed on the decision of the Privy Council in *Pestonjee Nussurwanjee v. Manockjee & Co.*(3). In that case, their Lordships had to deal with the jurisdiction of the Court under section 326 of the old Code (Act VIII of 1859) to direct an agreement of parties to arbitration to be made a rule of Court. It was held that no party to the agreement can revoke the submission to such arbitration unless for good cause. In construing that agreement, their Lordships remarked that the submission to arbitration must be deemed to be under and subject to the sections contained in the Code

relative to this subject, unless the provisions of the Code were expressly excepted by the parties to the agreement (vide page 130). The view taken in *Bala Pattabhirama Chetti v. Seetharama Chetti*(1) is in accordance with this principle. Section 326 of the Code of 1859, referred to in the judgment of the Privy Council, corresponds to paragraphs 17 and 19 of the second Schedule to the present Code. Adopting the rule of construction of the agreement as laid down by the Privy Council, the parties to Exhibit I should be deemed to have agreed to abide by the provisions of paragraphs 17 and 19, inasmuch as there is no express provision in the agreement indicating that these provisions were excepted by the parties. Taking this agreement to be subject to the provisions of paragraph 19, the Court can exercise the power of appointing a fresh arbitrator in the place of the deceased arbitrator under paragraph 5 only after the order of reference has been made under paragraph 17. There is no provision in paragraph 17 empowering the Court to make such an appointment before the agreement is made a rule of Court and an order of reference is actually made. Thus, it is clear that, even on the construction of the agreement in this case in the aforesaid manner, the Court cannot fill up the vacancy by appointing a substitute before ordering the agreement to be filed.

The next question is, whether under paragraph 17 the Court can order the agreement to be filed, in spite of the death of one of the three arbitrators named therein, and make an order of reference to the two surviving arbitrators alone. Would this be in accordance with what is laid down in clause (4) of paragraph 17? The words in this clause "and shall make an order of

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(1) (1894) I.L.R. 17 Mad. 498.

(2) (1926) 51 M.L.J. 440.

(3) (1868) 12 M.L.A. 112.

(1) (1894) I.L.R. 17 Mad. 498.

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reference to the arbitrator appointed in accordance with the provisions of the agreement, or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator" indicate, to my mind, that, when the agreement is to refer the matter to a named arbitrator or named arbitrators, the Court shall make an order of reference to such arbitrator or arbitrators, but, where the agreement has not named the arbitrators, it should be taken that there is no such provision in the agreement as to limit the appointment to a specified person or persons, in which case the Court itself may appoint an arbitrator or arbitrators, if the parties cannot agree as to the personnel, and then make an order of reference. That this is so would be clearer from the corresponding clause in section 523 of the previous Code, viz., "and shall make an order of reference therein, and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination."

The position in the present case, in view of the terms of Exhibit I, comes to this. The Court cannot make an order of reference to two out of the three arbitrators named in Exhibit I, for such an order would not be in accordance with the provisions of the agreement within the meaning of clause (4) of paragraph 17. Nor has the Court power to appoint a fresh arbitrator in the place of the deceased man, unless an order of reference has been made under paragraph 17. When the Court is thus unable to order the agreement to be filed and make an order of reference under clause (4) of paragraph 17, the application made under this paragraph has to be dismissed.

The preponderance of authority is in favour of the contention put forward by the respondent. I have to state with due respect that the view expressed in the

two decisions of the Allahabad High Court relied on by the appellant is one I am unable to accept, as the provisions of paragraphs 17, 18 and 19 of the second Schedule have to be strictly complied with.

For these reasons, I agree with my learned brother in dismissing the civil miscellaneous appeal and the civil revision petition. As to costs, I agree with the order made by him.

A.S.V.

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APPELLATE CIVIL.

*Before Mr. Justice Cargenven and Mr. Justice
Bhashyam Ayyangar.*

1930,
August 6.

RAMASWAMI CHETTIAR, MINOR BY NEXT FRIEND,
S. R. M. S. A. ANNAMALAI CHETTIAR
(PLAINTIFF), APPELLANT,

v.

ROYA KANNIAPPA MUDALIAR AND TWO OTHERS
(APPLICANTS), RESPONDENTS.*

Letters Patent (Madras), cl. 15—Code of Civil Procedure (Act V of 1908), O. I, r. 10 (2)—Order under, adding party to a suit—Whether "judgment" within meaning of clause—Appealability of.

An order under Order I, rule 10 (2) of the Code of Civil Procedure (Act V of 1908) adding a party to a suit is not a "judgment" within the meaning of clause 15 of the Letters Patent (Madras), and therefore no appeal lies against such an order.

Tuljaram Row v. Alagappa Chettiar, (1910) I.L.R. 35 Mad. (F.B.), followed.

APPEAL from the judgment of EDDY J., dated 17th January 1930, and made in Application No. 104 of 1930

* Original Side Appeal No. 85 of 1930.

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v.
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MUDALIAR.

in Civil Suit No. 762 of 1926 in the exercise of the Ordinary Original Civil Jurisdiction.

S. Duraiswami Ayyar (*K. S. Rajagopala Ayyangar* with him) for appellant.

K. V. Ramachandra Ayyar for respondents.

JUDGMENT.

CURGENVEN J. CURGENVEN J.—This is an appeal from an order passed by EDDY J., in Application No. 104 of 1930 in Civil Suit No. 762 of 1926, adding the three applicants as party defendants to the suit. The plaintiff, a member of a Nattukottai trading family, had sued the other members of his family for partition and an account of the assets and liabilities; and this application was made after a preliminary decree had been passed, the applicants, in their capacity as managers and worshippers respectively of a certain temple, applying to be added as parties to the suit upon the allegation that a sum of Rs. 1,38,000 of the alleged family assets was money to be held in trust for the benefit of the temple. Against the order of EDDY J. granting the application the plaintiff appeals.

The question is raised whether an appeal from an order of this kind lies, i.e., whether the order amounts to a “judgment” within the meaning of clause 15 of the Letters Patent. An attempt has been made by the appellant to derive from the specific consequences of this order grounds in support of its appealability, but I think it is clear that we must look only to the general nature and effect of the order, and not to the results to which it may eventually lead. An order adding a party is either appealable as a judgment or it is not; and it cannot surely affect the question whether or not it results in the raising of new issues in the suit or indeed whether or not the Court had jurisdiction to pass it.

There is no dispute that the order under reference is both in substance and in form an order under Order I, rule 10 (2) of the Code of Civil Procedure, and the point for decision is whether an order passed under this rule is appealable as a “judgment”.

It is common ground before us that the construction placed upon the word “judgment” by Sir ARNOLD WHITE C.J. in the Full Bench case, *Tuljaram Row v. Alagappa Chettiar*(1), should be adopted here, as indeed it has been adopted in all cases decided in this Court subsequent to that pronouncement. The passage embodying that construction has been often quoted, and it is unnecessary to set it forth again. We have to look to the effect, rather than to the form, of the adjudication. If its effect is to put an end to the suit or proceeding, it is a judgment. If it is in effect nothing more than a step towards a final adjudication, it is not a “judgment” within the meaning of the Letters Patent.

Judged by this test, I feel no difficulty in deciding that an order adding a party to a suit is not a judgment. It does not put an end to the suit, but is clearly a step towards a final adjudication. It settles no rights, other than the right to be heard in the cause. Such an order answers, I think, to the tests proposed by COURTS TROTTER C.J. in *The Official Assignee of Madras v. Ramalingappa*(2), a case which related to an order virtually identical in type, viz., transposing certain defendants as plaintiffs. The effect of the order was no doubt to confer upon the newly transposed parties facilities for the prosecution of the suit, and to put them on the road to an adjudication which they could not have secured as defendants, but it did

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(1) (1910) I.L.R. 35 Mad. 1 (F.B.).

(2) (1925) I.L.R. 49 Mad. 539.

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not settle any substantive rights. The order in the present case is equally initiatory in character. I do not think that any useful purpose will be served by referring to other cases relating to orders less closely similar. They all endeavour to apply the criterion proposed by ARNOLD WHITE C.J. Our attention has been specially drawn to a case decided by COUTTS TROTTER C.J. and WALLACE J., *Maharajah of Pithapuram v. Rama Rao* (1), where it was held that an order granting leave to sue is a judgment, if the effect of the order was that it finally shut out the defendant from pleading that the suit should have been dismissed on the point of jurisdiction. I do not deem it necessary to express either agreement with or dissent from this view, because, while admittedly the conclusion is a specific deduction from the accepted principles of construction, it relates to an order of a class not now before us. I do not think that it was intended to lay down the broad proposition that all decisions involving an assumption of jurisdiction by the Court, after contest, must necessarily be "judgments", though it may be that, conversely, the denial of jurisdiction, resulting as it must in the termination of the proceedings, does amount to a judgment.

I am of opinion that no appeal lies against the learned Judge's order. The appeal is accordingly dismissed with costs. Advocate's fee allowed is Rs. 250.

BHASHYAM AYYANGAR J.—I agree.

B.C.S.

(1). (1927) I.L.R. 50 Mad. 770.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair.

THE MUNICIPAL COUNCIL, TRICHINOPOLY
(FIRST DEFENDANT), APPELLANT,

1930,
August 4.

v

S. VENKATARAMA AYYAR (PLAINTIFF), RESPONDENT.*

Madras District Municipalities Act (IV of 1884), sec. 63 (1)
(a)—*Construction of—Madras District Municipalities Act*
(V of 1920), sec. 83 (a)—*Construction of—Public purpose—*
Meaning of.

A building used as a school for all the public is one used for a public purpose within the meaning of section 63 (1) (a) of the Madras District Municipalities Act (IV of 1884), which exempted from property tax "light houses . . . and other buildings or lands to the extent to which they are used for public, charitable or religious. . . purposes" though its proprietor is entitled to appropriate for himself all the surplus income from the school.

A building used for a school is within the exemption stated in section 83, clause (a) of the Madras District Municipalities Act (V of 1920), which exempted "places set apart for public worship and either actually used or used for no other purpose, choultries, buildings used for educational purposes, and libraries and playgrounds which are open to the public and from which no income is derived", even if the proprietor of the school made a profit out of it for his own use.

The words "from which no income is derived" refer only to libraries and playgrounds and not to buildings used for educational purposes.

APPEAL against the judgment of the Court of Small Causes, Trichinopoly, in Appeal Suit No. 35 of 1925 (Appeal Suit No. 232 of 1924, District Court, Trichinopoly) preferred against the judgment of the Court of the District Munsif of Trichinopoly in Original Suit No. 565 of 1922.

* Second Appeal No. 328 of 1927.

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P. Venkataramana Rao for appellant.
K. G. Srinivasa Ayyar for respondent.

JUDGMENT.

This second appeal raises the question whether the respondent is exempt from the liability to pay "property tax" with respect to a building known as "Arrack Godowns"—a place within the municipal limits of Trichinopoly—under section 63 (1) (a) of the old Municipal Act (IV of 1884) and section 83 (a) of the present Municipal Act (V of 1920).

The facts are not disputed. The respondent is the proprietor, headmaster and manager of the Aryan Secondary School located in a building known as "Arrack Godowns" at a place called Teppakulam. The appellant is the Municipal Council of Trichinopoly represented by its Chairman. The respondent purchased the building from the Government (see Exhibit C) for "school purposes only" for the price of Rs. 4,081-4-0. The Municipality assessed "Arrack Godowns" to property tax and realized from the respondent Rs. 297-4-2 for the years 1917 to 1921 by the issue of coercive process. The respondent claimed a refund of the amount from the Municipality on the ground that "Arrack Godowns" is exempt from taxation. The refund being refused, the respondent filed the suit, out of which this second appeal arises, to recover the amount with interest and also Rs. 1,000, being damages for trespass in execution of the illegal warrant issued to collect the tax in question. The District Munsif awarded the respondent a refund of all the taxes excepting the tax relating to the year 1917 which was disallowed as barred by limitation and also Rs. 500 as damages. This decree was confirmed by the Subordinate Judge. This second appeal has been filed by the Municipality against that decree.

The claim for the refund for the year 1917 does not now arise because the respondent did not file a cross-appeal in the lower Court against the Munsif's decree disallowing the claim. This second appeal relates only to (1) Rs. 208-10-9, property tax due for eight half-years collected under the provisions of the old Municipal Act (IV of 1884), and (2) Rs. 58-14-2, property tax for two half-years collected under the provisions of the present Act (V of 1920) and also to the damages awarded against the Municipality.

I shall first deal with that part of the case which falls under section 63 (1) (a) of Act IV of 1884. Section 63 (1) (a), (b) and (c) runs as follows:—

"If the Municipal Council notify, under section 50, that a tax shall be levied on buildings or lands or both in the Municipality, the Chairman shall impose such tax on all buildings or lands, or both, excepting (a) light-houses, piers, wharves, jetties, choultries, hospitals, dispensaries and other buildings or lands, to the extent to which they are used for public, charitable or religious, but not residential purposes, (b) burial and burning grounds, and (c) buildings or lands belonging to the Municipal Council."

Under this section, if the Municipality issues a notification under section 50 of the Act, it has the power to levy a tax on buildings or lands or both within the Municipality (referred to as property tax in the subsequent Act, that is, Act V of 1920), unless the buildings or lands fall within the exceptions mentioned in clauses (a), (b) and (c). The respondent claimed exemption from tax on "Arrack Godowns" under clause (a) on the ground that the building is used for "public, charitable purposes" as it was used for education which is a public and also a charitable purpose. The argument of the respondent that the purpose is also charitable and on that ground also the building was exempt from liability to pay the tax was overruled by both the lower Courts. In this Court he has tried to support the decree also on

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the ground that the building should be considered as being used for charitable purposes also. In the view that I take of the case, it will not be necessary to deal with this part of the argument.

The main question for consideration is whether the building, having regard to the facts of the case, can be said to be used for public purposes in the sense in which that expression is used in the Act. It is not denied by the appellant's learned Advocate that the school, inasmuch as it is open to all the public and it imparts education, is used for a public purpose; but his argument is that, unless the building is used *exclusively* for public purposes, it does not come within the term "public purposes" as used in the section. In this case it is admitted that the appellant is entitled to appropriate for himself all the profits arising from the school after meeting the expenses of the management, salaries of teachers, etc., though he says in his evidence that there has been no profit all these years. It is argued that, if the respondent makes profits for himself out of the institution, then, though the purpose served by it is a public one, it cannot be said to be used for "public purposes". Various cases, English and Indian, were brought to my notice by both sides, but I do not propose to discuss them in detail as, in my opinion, the decision of the question should largely depend on the special facts of each case. The term "public purposes" has not been defined in the Act. As pointed out in *Hamabai v. Secretary of State*(1), in English decisions the interpretation of the term "public purposes" is not uniform, and it is difficult to extract any general principle from them applicable to all cases alike. Mr. Venkataramana Rao relied on *The Queen v. The Blackfriars*

(1) (1911) 13 Bom. L.R. 1097, 1111 (P.C.).

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Bridge Company(1) and *The Queen v. The Harrogate Commissioners*(2) to show that, in England, in order to justify exemption from rateability under the Poor Relief Act, 43 and 44 Elizabeth, Ch. 11, sections 1 and 2, the claimant had to show that the building or land in question was used *exclusively* for a public purpose. I may observe—and this has been pointed out in the English decisions—that the exemption is not mentioned in the Act but it came to be recognized as a result of the decisions of Courts. These decisions, however useful they are in understanding the meaning of the term in a general sense, do not interpret the expression as used in any enactment. The strongest case relied on by the appellant is one reported in *Mayor etc. of Essen-den v. Blackwood*(3). In that case, which related to exemption from rateability of a racecourse held by the respondent therein in trust for a racing club, it was held that the land could not be said to be "used for public purposes" within the meaning of section 253 of the Victoria Local Government Act (1874), unless it was used exclusively for public purposes. The facts of that case showed that

"there was on the part of the club, according to the true construction of their Act, a beneficial enjoyment of the land beyond that of the general public, and a pecuniary interest in the surplus, rents, and profits of the racecourse, after providing for its maintenance and use." (See the head-note.)

On the strength of this decision, it is argued that, inasmuch as the respondent in this case derives profits from the school, though the public is benefited by it as a place of education, the building cannot be said to be used for a public purpose. This decision no doubt supports the appellant; but I am not quite sure whether

(1) (1839) 9 Ad. & E., 828; 112 E.R. 1428.

(2) (1850) 15 Q.B. 1012; 117 E.R. 741.

(3) (1877) 2 App. Cas. 574.

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the decision can be said to lay down a general test for the interpretation of the term "public purposes" applicable to all cases. The building in the case before us is used as a school for educational purposes, whereas the land in the case mentioned was used as a race-course. It is difficult to say whether the learned Judges in *The Queen v. The Blackfriars Bridge Company*(1) would have applied the same considerations to the case if the land in it was devoted for quite a different purpose. In this connection attention may be drawn to the often quoted observations of Lord HALSBURY L.C. in *Quinn v. Leathem*(2)—

"There are two observations of a general character which I wish to make, and one is . . . that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

Obviously there is no logical connection between the public purpose in the present case and the public purpose decided in *The Queen v. The Blackfriars Bridge Company*(1) under the Local Government Act in Victoria. In my opinion the decision in *The Queen v. The Blackfriars Bridge Company*(1) should not be applied in deciding this case.

The respondent relies on the decision in *Hamabai v. Secretary of State*(3) in which it was held that resumption by the Government "to provide accommodation for Government officers" of land leased to a lessee fell within the meaning of the expression "public purpose"

(1) (1889) 9 Ad. and E. 828; 112 E.R. 1428. (2) [1901] A.C. 495, 506.

(3) (1911) 13 Bom. L.R. 1097.

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as used in the contract between the parties to that suit. This decision was upheld on appeal by the Privy Council in *Hamabai Framjee v. Secretary of State for India*(1). As I have already said, the Municipal Act does not define the expression and there are no decisions of this Court on the point. It does not seem to me that the Legislature, when it intended to exempt from rateability buildings used for imparting education which is admitted to be a public purpose, intended to exclude only those institutions from which the headmaster derived no profits for himself. If that was the intention of the Legislature that would have been explicitly so stated. Under the present Act, Act V of 1920, as I shall presently show when I deal with section 83 of that Act, it is clear to my mind that the Legislature exempts from rateability all educational institutions irrespective of the question whether the proprietor makes out of those institutions any private profit for himself or not. In the same way, I think all buildings used for educational purposes were intended to be exempted from payment of the municipal tax under section 63 (1) (a) also. I find from the evidence of Moulvi Syed Murtuza Saib Bahadur, M.L.A., P.W. 5 in this case, that institutions similar to this in the same Municipality, namely, the St. Joseph's College, the National College, Bishop Heber College and School, the Hindu Secondary School, and the Islamia Secondary School during the days it was in his management, were enjoying exemption and were not made to pay any property tax. I am referring to this evidence only to show how, in applying this section, the intention of the Legislature was generally interpreted by the Municipality. I am unable to uphold the argument of the

(1) (1914) I.L.R. 39 Bom. 279 (P.C.).

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appellant on this point. In this view, it is not necessary to discuss the question whether the school carried on in "Arrack Godowns" comes within the description of charitable institutions and can claim on that ground exemption from rateability. In my opinion, the tax collected under Act IV of 1884 from the respondent was rightly ordered to be refunded by the lower Courts.

Coming now to the propriety of the collection of the tax Rs. 58-14-2 under Act V of 1920, we have to construe clause (a) of section 83 of that Act which says that the following buildings and lands shall be exempt from property tax:—

"Places set apart for public worship and either actually so used or used for no other purpose, choultries, buildings used for educational purposes and libraries and playgrounds which are open to the public and from which no income is derived."

It will be observed that under this Act all the exemptions are grouped together in a separate section. It is argued by the learned Advocate for the appellant that in clause (a) the descriptive clause, "which are open to the public and from which no income is derived" applies to buildings used for educational purposes and libraries and playgrounds alike, and that, since income is derived from "Arrack Godowns", the building does not fall within the exception and is clearly subject to property tax. I cannot agree with this construction of the clause. If this is the correct sense in which that part of the clause should be understood, then I can find no justification for the use of the word "and" between "purposes and libraries". If the Legislature wanted to interpret that part of the clause (a) in the sense contended for by the appellant's learned Advocate, then the first "and" between "purposes and libraries" would have been dropped retaining only the "and" between "libraries and playgrounds", but that has not

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been done. In my opinion, the words in sub-section (a) "which are open to the public and from which no income is derived" are referable according to the natural construction of the words only to "libraries and playgrounds" and not to buildings used for educational purposes. It is therefore clear under section 33 of the present Act that "Arrack Godowns" is exempt from property tax on the ground that it is a building used for educational purposes even though the proprietor of it makes profit out of the school which he carries on in that building. I would therefore hold that this sum of Rs. 58-14-2 also was rightly ordered to be refunded by the lower Courts.

The next question relates to damages. In awarding damages the lower Courts have considered the conduct of the Municipality and the circumstances relating to the collection of the tax. The concurrent findings of the lower Courts as regards the liability to pay damages and the amount are based on the evidence in the case. I do not see sufficient reason to interfere with the findings of the lower Courts on these points.

In the result, the second appeal is dismissed with costs.

B.C.S.

APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Pakenham Walsh.*

1930,
September
25.

In re KANAGA KOSAVAN ALIAS KANAKACHALA
KOSAVAN (ACCUSED), APPELLANT.*

Indian Penal Code (Act XLV of 1860), sec. 300, excep. 5 and sec. 304—Person kills another more than eighteen years of age—Pleads consent of deceased—Not impossible deceased asked to be killed—No motive proved for deliberately killing—Benefit of excep. 5 to sec. 300—Conviction under earlier part of sec. 304.

Where a person kills another who is more than eighteen years of age, and pleads it was done with the consent of the deceased, in circumstances in which the Court can hold that it is not impossible that the deceased feeling desperate and depressed asked to be killed, and no motive is proved against the accused for deliberately killing the deceased of his own free will, he is entitled to the benefit of exception 5 to section 300 of the Indian Penal Code, and must be convicted only of culpable homicide not amounting to murder under the earlier part of section 304 of the same Code.

TRIAL REFERRED by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the accused in Case No. 53 of the Calendar for 1930 and Appeal by the accused against the said sentence.

K. K. Sridharan for appellant.

Acting Public Prosecutor (K. N. Ganpati) for the Crown.

JUDGMENT.

BEASLEY C.J.

BEASLEY C.J.—The appellant was convicted in the Sessions Court of Coimbatore of the offence of murder and sentenced to death. The charge against him was that on the 13th November 1929 he murdered a woman named Unnamalai on a road between two villages not far from the village of Arasapalayam. The

* Referred Trial No. 80 of 1930 and Criminal Appeal No. 323 of 1930.

murder is alleged to have taken place between cock-crowing time and just after dawn, because at the latter time P.W. 7 was informed that a woman was lying dead on the road to the north of the village, and he went and saw the body which lay about two furlongs from his house. He identified the body as being that of a woman who had taken her meals and slept in his house the previous night and had left the house a little before cock-crow together with the appellant. The woman and the appellant had come to the house the evening before and they asked for food, and it was given to them, and then the woman and the appellant slept on the pial that night. If the evidence of this witness is to be believed—and there is no apparent reason for disbelieving it—then the deceased was last seen in the company of the appellant very shortly before the hour at which she was murdered. The evidence does not stop there, because there are other prosecution witnesses who speak to having seen the couple together before this. Two days before the occurrence they went to the house of P.W. 6 at Okkilipalayam and asked to be allowed to sleep on his pial and were allowed to do so and left the following morning. P.W. 14 says that he saw them both together on the 7th November, and P.W. 16 saw them together in October—November. The evidence of these witnesses can be believed, and indeed it is not disputed by the appellant that they did visit the house of P.W. 6 and the house of P.W. 7 on the days when those witnesses say they did, for he had made a long statement, Exhibit E, in which he admits having done so. This confession was subsequently retracted. His case in this confession is as follows:—The deceased was trying in various places to find a house to live in. He accompanied her to those places but no house was available. They were travelling about

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from one place to another. On the day of the occurrence, at about 5 o'clock in the morning after, leaving P.W. 7's house the deceased sat down at the junction of the Arasapalayam and Seerapalayam roads refusing to go to her village to which she had been advised by the appellant to return. He endeavoured to persuade her to go to her village saying that they had gone about for five or six days in search of a house but had found none, but she lay down and refused to get up. He sat by her, held her by her hand, and tried to make her get up. He said to her, "On account of you they are scandalizing me too. I cannot be here any longer." She refused to go and lay down. She took the knife out of his waist, put it into his hand and asked him to cut and throw her away and be off. He said he would not do so, but she seized the dhoti he was wearing and urged him to cut her. Thereupon, he cut her neck with the knife. While she was holding his dhoti the knife hit her first on the left shoulder and caused an injury. He then went away to his village taking the knife with him and when the police questioned him he gave the knife to them on Wednesday.

The learned Sessions Judge came to the conclusion that this confession, Exhibit E, was a voluntary one, and with that conclusion I entirely agree. P.W. 1, the Stationary Sub-Magistrate who recorded the confession, says that he warned the accused that he was not bound to make any statement and that any statement he made might be used against him. The appellant had been sent on the 28th November 1929 to the witness by the Podanur Police for remand, and he also received a requisition from the Sub-Inspector to record his confession; but the witness did not record it on that day, as the appellant had up to that time been in police custody, but examined him two days later, in the meantime

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remanding him to the Central Jail, Coimbatore. There is no reason to suppose that the confession was other than a voluntary one. The body of the deceased woman was not officially discovered until the 15th, although witnesses for the prosecution had seen it on the 14th without telling the authorities about it. P.W. 7's evidence is corroborated by that of P.W. 8 and the dead body was seen by P.Ws. 9, 10, 11 and 12. It was P.W. 12 who gave P.W. 13, the Village Munsif, the information about the corpse on the 15th November. The corpse had two injuries, a cut wound on the neck and one on the shoulder.

The earlier history of the relationship between the appellant and the deceased woman is that the appellant appears to have kept her up to some four years before the murder, but there is no apparent motive for the murder, though it is suggested by the prosecution that the appellant feeling that the deceased was an embarrassment murdered her in order to get rid of her. As against this theory, there is the statement of the appellant that he was willingly accompanying the deceased during the last days of her life. An attempt was made to support the case against the appellant by evidence with regard to a gold bangle which, it is alleged, was in the possession of the deceased at the time of her murder. This bangle was recovered from the appellant's mother by the police, when the appellant accompanied by the police asked his mother to give up the bangle to them; but the evidence does not, in my view, prove that the deceased woman had the bangle at the time of the murder. The bangle is an ordinary thin gold one of which there are many thousands and is one which is ordinarily worn by a male, and I am not satisfied that it was on the dead body of the deceased at this time. There can be no dispute about the ownership of M.O. 1,

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in view of the fact that it was, at the request of the appellant, delivered to the police. But there is no satisfactory evidence to show that the deceased had the bangle on when she died. An endeavour was made by the defence in the Sessions Court to show that the body was not the body of the woman seen in the company of the appellant; but, in my view, the evidence of the witnesses who saw her in the company of the appellant the night before, namely, P.Ws. 7 and 8, sufficiently identifies the corpse as that of the woman who stayed in P.W. 7's house the night before. The appellant attempted after retracting his confession to set up an *alibi*, but the evidence in support of it is obviously false. The learned Sessions Judge says that he cannot bring himself to believe that the deceased was a consenting party to the murder and he therefore disbelieves that part of the appellant's confession although he believes most of the other facts stated in it. There are no eye-witnesses of the killing of this unfortunate woman, and the possibility that she may have asked the appellant to kill her cannot be dismissed altogether, in view of the fact that this unfortunate woman had been wandering about from place to place and, according to the confession, trying to find a house in which to live, but unsuccessfully. It is not impossible that, under these circumstances, feeling desperate and depressed, she asked the appellant to kill her, and there is no real motive proved by the prosecution for the appellant deliberately killing her of his own free will. I think that in this state of affairs he must be given the benefit of the doubt and that the whole of his confession must be accepted and that I must find that he killed the deceased at her request.

What, then, is the legal position? It is argued on his behalf that on these facts the appellant is entitled to

the benefit of exception 5 to section 300, Indian Penal Code. It reads as follows:—

“Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.”

From the evidence it is obvious that the deceased was more than 18 years of age and she was therefore able to consent to her killing. Several authorities on this point were referred to and all of them seem to me clearly to support the appellant's contention. The first of these is *Queen v. Baboolun Hijrah*(1), where it was held that, if a man above the age of eighteen years submits himself to emasculation, performed neither by a skilful hand, nor in the least dangerous way, and dies from the injury, the persons concerned in the act are guilty of culpable homicide not amounting to murder. In *Queen v. Anunto Rurnagat*(2), the accused and his wife being overwhelmed with grief for the loss of their child determined to kill themselves. His wife made repeated requests to him that he should kill her and after a time he did so by striking her three blows with an adze. The Sessions Judge who tried the case was of the opinion that exception 5 to section 300, Indian Penal Code, did not apply to the case because he was of the opinion that the woman was killed whilst she was asleep; but on appeal it was held that the case did come within exception 5 to section 300, Indian Penal Code, and that the accused was guilty of culpable homicide not amounting to murder punishable under section 304, Indian Penal Code. Then there is *Queen-Empress v. Nayamuddin*(3), where, in a case in which it was found that accused persons were guilty of rioting armed with deadly weapons in a premeditated and prearranged fight

(1) (1866) 5 W.R. (Cr.L.) 7.

(2) (1866) 6 W.R. (Cr.L.) 57.

(3) (1891) I.L.R. 18 Cal. 484.

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which appeared to be a regular pitched battle or trial of strength between the two parties concerned in the riot and that, in the course of the riot and in prosecution of the common object of the assembly, one of the accused attempted to kill a man, under such circumstances that his act amounted to an attempt to murder, the question arose whether the act could be said to bear a less grave character by reason of exception 5 to section 300, Indian Penal Code, and it was held that the case did not fall within the exception. O'KINEALY J. was of the opinion that, before exception 5 can be applied, it must be found that the person killed was, with a full knowledge of the facts, determined to suffer death or take the risk of death and that this determination continued up to, and existed at, the moment of his death. In *Ujagar Singh v. Emperor*(1), the accused killed his step-father, who was an infirm old man, with his consent in order to involve some of their enemies in trouble by charging them with the murder and it was held that the case was covered by exception 5 to section 300, Indian Penal Code, and that the accused was guilty of an offence under section 304 of the Penal Code. In *Emperor v. Bharat Bipari*(2), the accused, the parents of a child, offered the child to the crocodiles in a tank in the belief that, though the child would be taken away, it would be returned unharmed and thereafter would lead a charmed life and attain to a good old age, and it was held that they were guilty of an offence under the latter part of section 304, Indian Penal Code. This case, of course, is not strictly in point, as this was not a case of exception 5 to section 300, Indian Penal Code. In *Emperor v. Ram Dayal*(3), it was held that persons actively assisting a Hindu widow in becoming a *sati* are

(1) (1917) 43 I.C. 418.

(2) (1920) 62 I.C. 414.

(3) (1918) I.L.R. 38 All. 26.

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guilty of the offence of abetment of suicide as defined in section 306, Indian Penal Code. In *Emperor v. Vidyasagar Pande*(1), *Emperor v. Ram Dayal*(2) was followed. In *Masum Ali v. Emperor*(3), a case very much in point, the accused strangled his beloved, aged sixteen years, to death upon their decision to die together in despair of the future separation and feeling that they could not live apart, and it was held that this was essentially the case where the spirit, if not the letter, of exception 5 may be applied and, though convicted of murder, the sentence should be transportation for life. Had the murdered girl been above the age of eighteen, the offence would have been culpable homicide not amounting to murder. There is an unreported Madras case, namely Criminal Revision Case No. 646 of 1925, where the wife was beaten to death in the belief that it would drive the devil out of her and it was held that the accused was guilty of an offence under section 304, Indian Penal Code.

It is obvious from all these authorities, the facts of this case being as I have found them, the appellant is entitled to the benefit of exception 5 to section 300, Indian Penal Code, and must be convicted only of culpable homicide not amounting to murder under the earlier part of section 304, Indian Penal Code. His conviction under section 302 of the Indian Penal Code must be set aside and also the sentence of death passed upon him, and in respect of his conviction under section 304, Indian Penal Code, earlier part, he must receive the maximum sentence, viz., transportation for life.

PAKENHAM WALSH J.—I agree.

B.C.S.

(1) A.I.R. 1928 Patna 497.

(2) (1918) I.L.R. 38 All. 26.

(3) A.I.R. 1929 Lah. 50.

APPELLATE CRIMINAL.

*Before Mr. Justice Jackson.*1930,
September
30.NANUREDDIGARI LAKSHMI REDDY (COMPLAINANT),
PETITIONER,

v.

URUGANAPALLE MUNI REDDY (ACCUSED),
RESPONDENT.**Code of Criminal Procedure (Act V of 1898), sec. 350—Magistrate who recorded evidence in inquiry ceases to exercise jurisdiction—Succeeded by another with jurisdiction—Latter acting on evidence recorded by predecessor—Validity of.*

Where a Magistrate who has recorded the evidence in an inquiry ceases to exercise jurisdiction and is succeeded by another Magistrate who has jurisdiction, the latter may under section 350 of the Code of Criminal Procedure act on the evidence recorded by his predecessor, and may, after perusing the record, frame a charge without re-examining the witnesses already examined, irrespective of whether there has been a change of Magistrates in the course of the inquiry or whether an order of discharge by one Magistrate is set aside by the Sessions Court and the inquiry is re-opened when another Magistrate has succeeded.

PETITION praying that the High Court may be pleased to issue an order directing retransfer of Criminal Case No. 178 of 1930, on the file of the Court of the Stationary Sub-Magistrate of Tirupati and transferred to the file of the Court of the Stationary Sub-Magistrate of Puttur and numbered as Criminal Case No. 277 of 1930 by the order, dated 6th August 1930, of the Court of the District Magistrate of Chittoor in Criminal Miscellaneous Petition No. 15 of 1930, from the file of the Court of the Stationary Sub-Magistrate of Puttur to the file of the Court of the Stationary Sub-Magistrate of Tirupati.

* Criminal Miscellaneous Petition No. 660 of 1930.

B. Somayya and Vedantam Satyanarayana for petitioner.

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S. Subrahmanya Ayyar for respondent.

Acting Public Prosecutor (K. N. Ganpati) for the Crown.

JUDGMENT.

On examining the record of Criminal Case No. 504 of 1929, the Sessions Judge of Chittoor acting under section 436, Code of Criminal Procedure, directed further inquiry and returned the case to the original Court, that of the Stationary Sub-Magistrate of Tirupati. Meanwhile, there had been a change of Magistrates, and the new Magistrate, after posting the case for inquiry, framed a charge without re-examining the witnesses already examined. Thereupon, the accused petitioned the District Magistrate of Chittoor, who transferred the case, holding that the procedure adopted by the Sub-Magistrate was illegal and diametrically opposed to the authoritative rulings. The learned Magistrate has not cited these rulings, but reserved them for a separate instruction to the Sub-Magistrate, a course that cannot be commended, because it leaves the parties and the revisional Court entirely in the dark. However, the learned Public Prosecutor says that the rulings relied upon are *Queen-Empress v. Hasnu*(1) and *Ram Dial v. Emperor*(2).

In *Queen-Empress v. Hasnu*(1), a District Magistrate himself conducted a further inquiry into a case discharged by a Deputy Magistrate and framed a charge upon the evidence recorded by the Deputy Magistrate. This was held to be irregular.

In *Ram Dial v. Emperor*(2), which is also an Allahabad case, it is ruled that further inquiry means

(1) (1884) 1 L.R. 6 All. 367.

(2) (1912) 13 Cr.L.J. 255.

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that the evidences should be taken *de novo*, and does not contemplate a mere re-perusal of evidence already recorded. This latter case carries no authority in Madras, for it is opposed to the Full Bench decision in *Queen-Empress v. Balasinnatambi*(1), where the matter is very clearly discussed by SHEPHARD J. The question is how far the matter is covered by section 350, Code of Criminal Procedure. A Magistrate has recorded the evidence in an inquiry, ceases to exercise jurisdiction, and is succeeded by another Magistrate who has jurisdiction; may the Magistrate so succeeding act on the evidence recorded by his predecessor? The learned Public Prosecutor would draw a distinction between cases where there has been a change of Magistrates in the course of the inquiry in the original Court, and where the inquiry has been closed by one Magistrate in the original Court by an order of discharge, and then re-opened by the Sessions Judge when another Magistrate has succeeded. This circumstance does not seem to carry the case out of the purview of section 350. It is the same inquiry until, on framing the charge, the proceedings become a trial, and the fact that there was an erroneous order of discharge, set aside by the Sessions Judge, is a mere incident in the course of that inquiry. When an inquiry was transferred from one Magistrate to another it was held to be the same inquiry, and section 350 was applied—*Palniandy Goundan v. Emperor* (2), following *Mohesh Chandra Saha v. Emperor* (3); and it is very doubtful whether, in the light of these rulings, *Queen-Empress v. Hasnu*(4) (where the District Magistrate in effect transferred the case to his own file) is still good law.

(1) (1991) I.L.R. 14 Mad. 334 (F.B.).

(3) (1908) I.L.R. 35 Calc. 457.

(2) (1908) I.L.R. 32 Mad. 218.

(4) (1884) I.L.R. 6 All. 367.

Mr. Somayya, who appears for the petitioner, has cited *Ramanathan Chettiar v. King-Emperor*(1) under the impression that the District Magistrate takes exception to the Sub-Magistrate's refusal to hold a *de novo* inquiry at the accused's request; but I do not gather that that point was ever in question. Of course the accused's right under section 350 is confined to trials and does not extend to inquiries. Nor do I gather that literal stress is laid upon the word "immediate". It is not suggested that the Sub-Magistrate framed the charge so immediately that he did not even peruse the record.

It is urged that the transfer ordered by the District Magistrate is no real hardship to any party and should be allowed to stand. The better rule when there has been any error is to restore the *status quo ante* and to allow the ordinary jurisdiction to prevail. Accordingly the order of the learned District Magistrate is set aside and the procedure of the Sub-Magistrate of Tirupati is affirmed.

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APPELLATE CRIMINAL.

Before Mr. Justice Krishnan Pandalai.

CHINNA VENKATESU (ACCUSED), PETITIONER,

v.

PEDDA KESAMMA (COMPLAINANT), RESPONDENT.*

1930,
September
15.

Indian Penal Code (Act XLV of 1860), sec. 447—Criminal trespass—Person in possession of property absent—Whether offence committed—Ploughing leased lands in absence of lessee, lessor coming to spot to prevent—Conviction under sec. 447—Validity of.

The offence of criminal trespass under section 447 of the Indian Penal Code may be committed even when the person in

(1) (1922) I.L.R. 46 Mad. 719.

* Criminal Revision Case No. 979 of 1929.

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possession of the property is absent, provided the entering into or upon the property is done with intent to do any of the acts mentioned in the section.

Where a person entered upon a field, that had been leased, during the absence of the lessee and ploughed it, and only the lessor came to the spot on hearing of it to prevent the commission of such acts, *held* that that was not enough to exonerate that person from intention to annoy the lessee and that such a person could properly be convicted under section 447.

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 Subdivisional Magistrate at Gooty in Criminal Appeal No. 39 of 1929 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tadpatri in Criminal Case No. 112 of 1929.

S. Ranganadha Ayyar for petitioner.

T. R. Arunachala Ayyar for respondent.

A. Narasimha Ayyar for *Public Prosecutor* (*L. H. Bewes*) for the Crown.

JUDGMENT.

This is a petition to revise the conviction of the petitioner under section 447, Indian Penal Code, for criminal trespass for entering upon and ploughing up a field called Tunga Chenu, 2 acres 75 cents in extent, belonging to P.W. 1 and leased by her in Fasli 1339 to P.W. 5. The petitioner seems to have set up that he was the person in possession. This was found against, the findings being that the petitioner and the husband of P.W. 1 were two out of five brothers who had once been joint but had subsequently divided off, that these two brothers had divided from each other about four years prior to this occurrence, and that the widow, P.W. 1, had been in possession of this property since her husband's death and had paid the kist for it and had also in Fasli 1339 leased it by a registered instrument

to P.W. 5 for five years. The petitioner was convicted upon these facts upon the inference of the lower Courts that his intention in entering upon and ploughing up the field was to cause annoyance to P.W. 5. The petitioner now attacks this conviction upon two grounds. In the first place, he says that there is no distinct finding that there was any intention to annoy P.W. 5. In the second place, he says that, even if there were, such a finding would be incorrect, because, P.W. 5 being admittedly the person in possession at the time when the petitioner entered upon the property, he being then absent and only P.W. 1 being present on the property, there could be no possible intention to annoy an absent person.

As to the first point, I think the language of the Magistrates is clear, and they expressly found that the petitioner's intention was to annoy P.W. 5. As to the next point, reliance is placed upon three decisions to show that, where a person in possession is absent, there cannot really or fairly be said to be any intention to annoy him, and the intention, whatever it may be, is not to annoy but may be to assert a right or something else. The first decision relied upon is *In re Chinna Thoyi*(1). In that case a woman had entered the compound of the Assistant Superintendent of Police in his absence for the purpose of meeting her paramour and not for the purpose of stealing as was alleged. On those facts, the Court held that there was no reason for supposing that the woman's entry into the compound was made with the object of intimidating, insulting or annoying the absent Superintendent of Police or any other person. I consider that to be a decision upon those facts and not a general decision that in no circumstances can an absent possessor be

(1) (1895) 1 Weir 518.

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annoyed, even if facts exist from which such an inference may be drawn. On the contrary, another of the decisions cited to support this proposition, *Emperor v. Moti Lal*(1), contains observations which are to the opposite effect. In that case, there were two rival claimants, A and B, to some immovable property, including a certain shop. A had let the shop to a tenant who had left it. On the same day, before the lessor A could himself take possession, B entered the shop; and the question was whether that was criminal trespass. In the course of their judgment the learned Judges say;

"First of all it is to be remarked that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as, for instance, the actual owner, his wife, servant, agent, licensee or other person. They are at all events results which more naturally follow when premises are occupied than when vacant."

The actual result of the case was that the Court held that the entry was a *bona fide* one for the purpose of asserting his title. But the observations above set forth show that it is unnecessary for a possessor to be always present upon his property in order that he may be annoyed by a trespasser; on the contrary, it was recognized that the actual owner need not be there, his wife, servant, agent, licensee or other person may be there. If so, why should any human being be actually present? Indeed, if that were the case, no person in possession of property could leave the property without the risk of some trespasser or intruder entering upon his premises and going scot-free upon the allegation that there was nobody to annoy. The learned Judges in the case cited merely observed "They (intimidation, insult and annoyance) are at all events results which more naturally follow when premises are occupied than when vacant". In my opinion, that stands to reason.

(1) (1925) I.L.R. 47 All. 855.

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Can it be pretended, if a man in Madras locks his house and goes for a walk to the beach and comes back a few hours or minutes later, that any one who enters his house in his absence in circumstances from which an intention to annoy may be otherwise drawn cannot be guilty of criminal trespass because he was absent? The proposition has only to be so stated to show how absurd the result will be if that were the law. The only other case relied upon was the Full Bench decision in *Vullappa v. Bheema Row*(1). That was not a decision on this point at all. All that was decided there was that the essence of an offence under section 441 is the intention to commit an offence—to intimidate, insult or annoy. It was held that it was not sufficient to prove that the offender knew that his act was calculated or likely to cause annoyance, insult or intimidation. That is not the question here, that question as stated having been actually found. I, therefore, think that the fact that P.W. 5 was absent when the petitioner entered upon the land and that only the lessor came to the spot on hearing of the petitioner's acts in order to prevent his doing so is not enough to exonerate the petitioner from the intention to annoy the lessee. The conviction therefore was right.

In deciding as to the sentence, in my opinion, a fine of Rs. 100 is far too excessive in a case of this kind. The dispute was between a person and his brother's widow; and there was no necessity to visit this petty offence with such a heavy fine. The sentence will be reduced to a fine of Rs. 20, in default, one week's simple imprisonment. The rest of the fine, if paid, will be refunded.

B.C.S.

(1) (1917) I.L.R. 41 Mad. 156 (F.B.).

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Reilly
and Mr. Justice Sundaram Chetty.

1931,
January 19.

IN RE A FIRST GRADE PLEADER.*

*Legal Practitioners' Act (XVIII of 1879), sec. 13 (b) and (f)—
Legal practitioner—Duty of, to Court and his client—False
representation to Court for the purpose of impeding the
course of justice—Misconduct.*

A legal practitioner has not only got a duty to his client but he has got a duty towards the Court and it is his duty to see that the case is fairly and honestly conducted.

If a legal practitioner, deliberately for the purpose of impeding the course of justice, makes a statement to a Court which he knows or believes to be untrue and thereby gains an advantage for his client, he is guilty of grossly improper conduct and, as such, renders himself liable to be dealt with by the High Court.

PROCEEDINGS under section 13 (b) and (f) of the Legal Practitioners' Act calling upon a First Grade Pleader to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court for his grossly improper conduct in the discharge of his professional duty in that he, in his capacity as Pleader engaged for the accused in Calendar Case No. 606 of 1929 on the file of the Court of the Sub-Magistrate of Polur, applied for adjournments of the said case on 8th February 1930, 27th May 1930 and 24th June 1930 on the ground that he would move the High Court for a transfer of the said case and, having secured the grant of these adjournments, he took no steps to move the High Court, and that he withdrew from the said case on 7th July 1930 without offering any explanation therefor, and that his applications for adjournments were not *bona fide* but were made only with the object of prolonging the

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case unnecessarily and defeating the ends of justice, and that he thereby rendered himself liable to be dealt with under the disciplinary jurisdiction of the High Court.

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Advocate-General (A. Krishnaswami Ayyar) for the Crown.—I concede that indiscretion or error of judgment in a legal practitioner should not be visited with serious penalty. Personal equation plays an important part in such matters. Intention is the test. Did he act in good faith when he applied for adjournments? Even one instance of grossly improper conduct must be punished.

L. A. Govindaraghava Ayyar for the practitioner.—The practitioner is a junior member of the bar. This case is one of mere error of judgment and as such cannot be brought under the disciplinary jurisdiction of the High Court. Good faith should be presumed. The Act requires that the practitioner should be guilty of fraudulent or improper conduct before he can be visited with any penalty. Misconduct has got to be proved and not inferred, *Dogar Mal v. P. a pleader*(1). In cases of this sort, the pleader's conduct should be viewed leniently, *In the matter of three Vakils of Jhansi*(2). The prolongation of the trial by ten months was not due to the pleader's conduct but to causes beyond his control.

JUDGMENT.

BEASLEY C.J.—This matter comes before us under section 13 (b) and (f) of the Legal Practitioners' Act. The charge against the legal practitioner here is that, on three different occasions, he applied for adjournment in the Court of the Sub-Magistrate at Polur on the ground that the High Court would be moved for a transfer of the case and that he took no steps at all on those occasions either himself or by means of his client to move the High Court. It is charged against him that he applied for those adjournments with the deliberate intention of delaying the course of justice. I am quite satisfied that, if it is proved against a legal practitioner that he, deliberately

(1) A.I.R. 1930 Lah. 947.

(2) A.I.R. 1928 All. 396 (S.B.).

**FIRST GRADE
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BRASLEY, C.J. for the purpose of impeding the course of justice, makes a statement to a Court which he knows or believes to be untrue and thereby gains an advantage for his client, he is guilty of grossly improper conduct and, as such, renders himself liable to be dealt with by the High Court. In this case, of course, it is not suggested that he has been guilty of fraudulent conduct in the sense that the word "fraudulent" is usually used, but it is alleged that his conduct has been grossly improper. The three dates upon which the legal practitioner applied for adjournments are the 8th February 1930, the 27th May 1930 and the 24th June 1930. His client was charged with the offence of criminal breach of trust. On the 4th October 1929 appearance was entered on behalf of the accused person by the legal practitioner in this case. Previous to this the accused, in the Magistrate's Court, had obtained an adjournment and actually presented a petition to the District Magistrate which was rejected. After the legal practitioner had entered his appearance on behalf of his client, the client applied for adjournments twice on his own behalf for the purpose of moving the High Court and one adjournment was granted and the other refused but on neither occasion were any steps taken to move the High Court and it is highly improbable that the practitioner was unaware of this. Then we come to the three occasions upon which the practitioner himself, on behalf of his client, presented petitions for adjournment. The first, as I have already stated, was on the 8th February of this year. The reason assigned then for an adjournment for the purpose of moving the High Court was, because it was contended on behalf of the accused that the offence with which the accused was charged was not one of criminal breach of trust but one of cheating under section 420, Indian Penal Code, and that the Sub-Magistrate of Polur had therefore no jurisdiction to

entertain that charge. An adjournment was granted for the purpose of taking that question up to the High Court but no steps were taken either by the legal practitioner or by his client. Then on the 27th May one of the defence witnesses was available in Court and ready to be examined. But the accused did not wish that witness to be examined as the other defence witnesses were not ready and an adjournment was asked for, for the purpose of having all the defence witnesses summoned and examined on the same day. That application was refused by the Magistrate. Then an adjournment was asked for by the legal practitioner for the purpose of making an application to the High Court against that order and it was granted. It does not seem to me to have been reasonable to ask for an adjournment of the case to some future date in order to examine all the defence witnesses. One of the defence witnesses was there and he could have been examined, but it has been stated, on behalf of the legal practitioner, by Mr. L. A. Govindaraghava Ayyar, that it was probably because it was thought more convenient to call the defence witnesses in a certain order. However that may be, no steps were taken to move the High Court in the matter, so that, we have here the second occasion on which the legal practitioner asked for an adjournment for a purpose which was never carried out. The third occasion was on the 24th June of this year. The case had been adjourned for hearing to the 21st June by the Sub-Magistrate and on that date the accused sent a telegram stating that he was ill and unable to attend Court. The Magistrate who had, by this time, formed a reasonable opinion with regard to the tactics being pursued by the accused would not accept that statement or the telegram or the excuse, and ordered the accused to be brought to Court on a non-bailable warrant, and he was produced in Court on the 24th June.

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BRASLEY C.J. With him came a medical certificate, granted by a local dispensary, showing that the accused had attended as an out-patient of that dispensary on the 21st June, the very day when the case should have been taken up by the Magistrate; but the nature of the illness from which the accused in that case was suffering was not stated in the certificate. With that certificate before him and the previous history of the case in his mind, the Magistrate refused to grant bail to the accused. Thereupon he was again asked by the practitioner for an adjournment, again for the purpose of moving the High Court. That, he refused to grant, but later on, in the same day, he granted an adjournment for fourteen days for the purpose of the High Court being moved. After thirteen days had elapsed, and no steps whatever had been taken to move the High Court, the practitioner withdrew from the case. That was on the 7th July 1930. The charge against the practitioner is that he was not acting *bona fide* in the matter and that he knew perfectly well, when he asked for adjournments for the purpose of moving the High Court and obtained them, that that purpose was not going to be carried out, and that he therefore impeded the course of justice. This, of course, is not a matter of direct evidence at all. One cannot look into the mind of the practitioner and say how much he knew, how much he did not know or, what his intention was. His intention has to be gathered from the circumstances of the case, and, if the inference is so strong that it leads us to the conclusion that he knew perfectly well, when he asked for adjournments and obtained them, that the purpose for which the adjournments were asked was not going to be carried out, then, he has been guilty of grossly improper conduct. The facts of the case here are that, to the practitioner's knowledge, obviously, before he himself commenced asking for adjournments, his client

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BRASLEY C.J. had twice asked for adjournment for the purpose of moving the High Court but had taken no steps whatever in the matter. Then he himself asked for an adjournment for a similar purpose and that purpose was not carried out. That was repeated a second time and it was repeated a third time. With the knowledge the legal practitioner had before him of what his client had done before he ever started making applications on his behalf, and with the knowledge that on the first occasion on which he himself gained an adjournment, no attempt was made to move the High Court, nor on the second occasion, nor on the third occasion, the inference is well nigh irresistible that he knew perfectly well, when he asked for the adjournment, that he was putting forward a misrepresentation for the purpose of gaining a benefit for his client, and that the High Court would never be moved by him. In his written explanation he says that he did this on the instructions of his client. He seems to think that it is the duty of a legal practitioner blindly to follow every instruction his client gives him. That is an entire misapprehension of the duty of a legal practitioner. He has not only got a duty towards his client but he has got a duty towards the Court and it is his duty to see that the case is fairly and honestly conducted. He must not trick or deceive the Court or attempt to gain for his client an advantage by dishonest means. To attempt to obtain adjournments by misrepresentations and to put forward a purpose which the legal practitioner knows will never be carried out is to attempt to gain and to gain an advantage by a trick and a very dishonest one too. It is to be noted also that in his written explanation he says that he withdrew from the case because his client was in want of funds and that his client's creditors were pressing him on towards insolvency. That must mean that, if his client had not been in need of funds and his creditors had not been

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pressing him towards insolvency, he would have remained in the case as his legal practitioner. Before the District Magistrate, upon whose report this case has come before us, a totally different explanation was given, namely, that the practitioner then realized that his client's conduct was not *bona fide*. It need hardly be pointed out that these two explanations appear to be quite contradictory. In my view, the charge against the legal practitioner has been proved and amounts to grossly improper conduct and for that conduct he must be punished. This is, so far as I know, the first case of this kind that has ever been before this Court and I do not think that we should make a very serious example of the Pleader. I think that one very useful purpose will have been achieved by it being brought home to some of the members of the legal profession that they are under a duty to the Court. They must not mislead the Court. They must not ask for adjournments for their clients when they know that the reasons they are putting forward are untrue or have reason to believe are untrue. They must only make applications which they believe to be well-founded. I think that this case will certainly serve a very useful purpose in bringing to the notice of legal practitioners, the majority of whom, of course, I feel sure, do not require such a thing to be brought to their notice, that this is not conduct which can be tolerated by the High Court. The punishment which in my opinion should be inflicted upon the Pleader is that he be suspended from practice for a period of three months.

REILLY J.—I agree.

SUNDARAM CHETTY J.—I agree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam.

VENKATAKRISHNA REDDI AND FOUR OTHERS
(DEFENDANTS 1 TO 5), APPELLANTS,

v.

SRINIVASACHARIAR AND FIVE OTHERS

(PLAINTIFFS AND LEGAL REPRESENTATIVE OF DECEASED THIRD
PLAINTIFF AND SIXTH DEFENDANT), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. 1, r. 8—Persons to whom leave to prosecute or defend a suit is given—Death of one—Proper procedure on—Legal representatives of deceased—Right to prosecute or defend suit, if survives to.

Where sanction is given by the Court to a certain number of persons *eo nomine* to prosecute or defend a suit and one of them dies, the right does not survive and his heirs are not competent to prosecute or defend the suit unless the order granting sanction can be so construed as to confer the right on the legal representatives also. In such a case, the proper procedure is for the remaining persons to apply to the Court for directions; and it is for the Court to decide whether it will permit the remaining persons to whom the original sanction was given to continue to prosecute or defend the suit, or whether it will insist upon the original number, in which case it should give directions authorizing an additional person, who need not necessarily be the legal representative of the deceased person, to join the survivors. When the Court gives the necessary orders the suit will proceed.

APPEAL against the decree of the Court of the Subordinate Judge of Cuddalore in Appeal Suit No. 4 of 1925 (Appeal Suit No. 254 of 1924, District Court of South Arcot) preferred against the decree of the Court of the District Munsif of Tindivanam in Original Suit No. 264 of 1923.

* Second Appeal No. 545 of 1927.

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Advocate-General (A. Krishnaswami Ayyar) with R. Ramamurti Ayyar for appellants.

T. M. Krishnaswami Ayyar and T. E. Ramabhadra-chariyar for first, second and fourth respondents.

Government Pleader (P. Venkataramana Rao) for party-respondent.

JUDGMENT.

The suit out of which this appeal arises was filed by four plaintiffs in a representative capacity for a declaration that Survey No. 65/6 in the village of Singanur of extent about 77 or 78 cents is kalam poramboke and for an injunction restraining the defendants from having a Droupadi Amman temple in any portion of that land. The original extent of the land was about 83 cents, but in the north-east corner of it there is an old Perumal temple. Both the Courts below found that the suit land is kalam poramboke. I will first deal with the preliminary objection that has been taken by the learned Advocate for the respondents. He contends that the appeal cannot proceed because it was originally filed by defendants 1 to 5, who were permitted by the District Munsif to defend the suit on behalf of those villagers who were of the same opinion as themselves, but the second appellant died and his legal representatives were not brought on the record and the remaining four appellants are not persons who were authorized to carry on the appeal. The first case relied on for this contention is *Wali Muhammad v. Mahlu*(1). In that case certain persons filed a suit on behalf of themselves and several others under Order I, rule 8 of the Code of Civil Procedure. Some of the persons so represented were also plaintiffs. They obtained a decree. In second appeal one of the persons who obtained sanction

(1) (1924) 86 I.C. 592.

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to represent others died, and an application to bring his legal representatives on record was made in time, but some of the other plaintiffs also died, but their legal representatives had not been brought on record. It was held that it was a joint decree obtained by all the plaintiffs, and that, though, after sanction under Order I, rule 8, the second set of plaintiffs were not necessary plaintiffs, they having been parties to the suit and the appeal, their legal representatives ought to be brought on the record and the order under Order I, rule 8, would not relieve the appellants from the necessity of impleading all the decree-holders or their legal representatives and therefore the appeal would abate *in toto*. An earlier decision of the same Court, *Ram Diyal v. Mohammad Raju Shah*(1), was distinguished on the ground that the persons who died never applied to be made parties to the suit and were not on the record. They were only represented by one person who obtained sanction under Order I, rule 8 of the Code of Civil Procedure. The decision in *Wali Muhammad v. Mahlu*(2) relies on and follows another decision of the same Court in Appeal No. 3169 of 1918, decided in 1922, and the two cases were said to be on all fours. These decisions were followed in *Samail v. Haji*(3). In this case five of the respondents were permitted to defend the appeal on behalf of others by an order under Order I, rule 8, and there was no death among these respondents. But there were other respondents in the appeal as originally filed and some of these died. It was contended by the appellants' Advocate that the appeal did not abate, but the Court held that, the other respondents having obtained a decree and having been made parties to the appeal, their representatives also ought to be made parties, and that, if they

(1) (1918) 51 I.C. 437.

(2) (1924) 86 I.C. 592.

(3) (1924) 89 I.C. 378.

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were not made parties, the appeal would abate. In my opinion, these two cases are distinguishable on the facts from the case before me. In the second appeal before me, I have not got the complication of parties other than those who obtained sanction under Order I, rule 8, being parties in appeal. In the first place, those are cases where the deaths occurred among the respondents, and, because the original respondents obtained a joint decree, it was held that the appeal could not proceed without the legal representatives of all the respondents. But, in the present case, the death of parties is among the appellants and all the appellants were only those who obtained sanction under Order I, rule 8. Another case mentioned is *Srinivasulu Chetti v. Guraviah*(1). In that case several plaintiffs obtained a decree for joint possession. There was an appeal, one of the plaintiffs-respondents died and his legal representatives were not brought on record. This case cannot help the respondents in the present second appeal. It being a joint decree for possession in favour of several parties, all of them or their legal representatives ought to be respondents on the record. There was no order under Order I, rule 8 of the Code of Civil Procedure in that case. Another case relied on before me is the decision of the Calcutta High Court in *Naimuddin Biswas v. Maniruddin Lashkar*(2). Here, there was a decree against four landlords. They appealed, one of them died and his heirs were not brought on record. It was held that the whole appeal abated. There, the rule was laid down that, if the appeal can be heard in the absence of the deceased appellants, the appeal can proceed, but whether the appeal can be so heard or not depends upon the nature of the suit. In this case also there was no order under Order I, rule 8. In my opinion, none of the

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cases cited governs the present case. It seems to me that, where sanction was originally given by the Court to a certain number of persons either to prosecute or defend a suit and one of them dies, his heirs are not competent to prosecute or defend the suit, because the sanction was accorded to certain individual persons *eo nomine* and not to their heirs, and, unless the order can be construed so as to confer the right on the legal representatives also, the right does not survive. In such a case, the proper procedure seems to me for the remaining persons to apply to the Court for directions. They should bring to the notice of the Court that one of the persons to whom the original sanction was given is dead and request the Court for directions whether the Court will be pleased to permit the remaining persons to continue to prosecute or defend the suit, or, if it thinks that the original number is necessary, directions should be given authorizing an additional person, who need not necessarily be the legal representative of the deceased person, to join the survivors; and when the Court gives the necessary orders the suit will proceed. To say in all such cases, first, that the legal representatives should be brought on record and secondly, that if they are not brought on record the suit abates, seems to defeat the ends of justice. In the present case I give sanction to the remaining four appellants to proceed with the appeal on behalf of their party and disallow the preliminary objection.

[His Lordship then dealt with the facts of the case and concluded :—]

In these circumstances, I think the Subordinate Judge's decree is right and the second appeal is dismissed with costs of the plaintiffs-respondents.

A.S.V.

(1) (1926) 52 M.L.J. 480.

(2) A.I.R. 1928 Cal. 184.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Krishnan Pandalai.

1930.
November 21. MANAVIKRAMA RAJA, THE ZAMORIN OF CALICUT
(SECOND DEFENDANT), APPELLANT,

v.

THATTAMANGALATH ALIAS MALLISSERI ILLATH
KRISHNAN NAMBU DRIPAD AND ANOTHER (PLAINTIFF
AND FIRST DEFENDANT), RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927), Chs. IV,
V and VI—Excepted temples—Policy in respect of—Decree
—Two possible constructions of—Rule to be applied.*

The policy of the Madras Hindu Religious Endowments Act, as seen from a comparison of Chapters IV, V and VI thereof, is to place maths and excepted temples, in normal conditions, under much less direct and detailed interference from the Religious Endowments Board in matters of internal management than ordinary temples. This does not mean that, in cases of proved mismanagement or incapacity or in the imperative interests of future good government, such interference may not have to be provided for in a scheme. Consequently, in a case where there is no proof of mismanagement, it is appropriate, in a scheme in respect of an "excepted temple," that the appointment of a manager should be with the trustees who are the persons really responsible.

Of two possible constructions of a decree, the Court will not accept the one which leads to plain injustice and makes its own decree an instrument of depriving parties, whose case had not been heard and decided, of valuable and cherished rights which no one had any intention to destroy.

APPEALS against the decree of the District Court of South Malabar in Original Suits Nos. 1 and 2 of 1929.

The appellant in both the appeals was the Zamorin of Calicut, who was a trustee (Uralan) of the Guruvayur

* Appeals Nos. 211 and 212 of 1930.

Devaswom. In certain proceedings between him and the Mallisseri Illom, which culminated in Appeal Suit No. 35 of 1887, the High Court declared that the latter was also entitled along with the former to the joint trusteeship (Uraima right) of the Devaswom, with equal powers to manage its affairs except with reference to certain minor details which are not material in connection with these proceedings. In 1912 four persons, as relators, with the sanction of the Advocate-General, filed a suit (which was afterwards numbered as Original Suit No. 27 of 1916) against both the trustees alleging mismanagement and praying for their removal and for a scheme. When this suit was pending, the Court of Wards took charge of the estate of the Zamorin and with it the management of the Devaswom. The Mallisseri Illom also gave a power of attorney to the Court of Wards to manage the Devaswom. The Subordinate Judge who tried the suit directed that the power of attorney should not be revoked by the Mallisseri Illom during the management of the Devaswom by the Court of Wards and held that no scheme was necessary. On appeal from this judgment the High Court, in Appeal Suit No. 8 of 1917, instead of merely leaving it to the Mallisseri Illom and in order to provide for the undivided responsibility of the Court of Wards, removed the members of the Mallisseri Illom from the trusteeship, with a direction that, after the expiry of the management by the Court of Wards, the parties be at liberty to apply to vary the decree with reference to the then existing facts. The management by the Court of Wards terminated in 1927 and the Zamorin was put in possession of the Devaswom along with his estate by the Court of Wards. The Zamorin, having thus got an unlooked for advantage, was in no mood to recognize the right of the Mallisseri Illom to

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the joint trusteeship. By that time the Madras Hindu Religious Endowments Act had come into force. This Devaswom was one of the excepted temples under the said Act. Certain worshippers of the Devaswom applied to the Hindu Religious Endowment Board to hold an enquiry into the affairs of the Devaswom and settle a scheme. Before the Board, the Mallisseri Illom, through its representative Thattamangalath alias Mallisseri Nambudripad, urged their right to the hereditary trusteeship. But the Board settled a scheme ignoring the right of the Illom to the hereditary trusteeship, stating that their right should be established in Court. It is this scheme that is the subject-matter of the present appeals. Thereupon the Mallisseri Illom filed Original Suit No. 1 of 1929 on the file of the District Court of South Malabar, under section 63, clause (4) of the Act, to amend the scheme framed by the Board and also filed, in pursuance of the liberty to apply expressly reserved in Appeal No. 8 of 1917, a petition in Original Suit No. 27 of 1916 asking to be restored to the position which the Illom occupied before the Court of Wards took over the management. The lower Court upheld the claim of the Illom to be a hereditary trustee of the temple as declared in Appeal No. 35 of 1887 and made certain amendments to the scheme which, in its view, were required for the future good management of the institution.

T. M. Krishnaswami Ayyar and A. Parameswaran for appellant.

T. S. Anantarama Ayyar for first respondent.

P. Venkataramana Rao for second respondent.

JUDGMENT.

These appeals are by the Zamorin of Calicut from decrees in two suits, Original Suits Nos. 1 and 2 of 1929,

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in the District Court of South Malabar in both of which he was the second defendant. Both suits were brought under section 63(4) of the Madras Hindu Religious Endowments Act to amend a scheme of administration settled by the Hindu Religious Endowment Board (the first defendant in both suits) under section 63 (1) of the Act in respect of the Guruvayur Devaswom, of which the appellant is a trustee (Uralan). The plaintiff in Original Suit No. 1 was the Mallisseri Nambudri, the first respondent in Appeal Suit No. 211. His claim was that he also was an Uralan of the Devaswom. His complaint was that the Board had, in their scheme, ignored his rights and he prayed that the scheme be amended in that respect. The plaintiffs in Original Suit No. 2 were certain worshippers, on whose petition the Board had started the enquiry which led to the scheme. Their complaint was that the Board had accepted *in toto* the scheme put forward by the Zamorin and had not adopted sufficient safeguards for the proper management of the institution, and their chief prayer was that the scheme should be amended by adding to the number of trustees and placing the management in the hands of a Board of five trustees, three of whom were to be nominated and a manager who was to be appointed by the Board. The appellant was the chief contesting defendant in both suits. He resisted the Mallisseri Nambudri's claim to Uraima on certain technical grounds, which will be explained more fully later, depending on the construction of the decree of this Court in Appeal Suit No. 8 of 1917 and section 73 of the Religious Endowments Act. He resisted the suit of the worshippers on the ground that the amendments in the scheme as proposed by them were unnecessary. The Board, while adopting an attitude of unconcern about the rights claimed by Mallisseri Nambudri, was inclined to favour the proposals of

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the worshippers as to future management because, in its opinion, the appellant had not worked the scheme already settled by it in the proper spirit, and it was improper to leave any longer an important temple like Guruvayur in the sole management of a hereditary trustee, like the appellant, who could never pay personal attention to the temple affairs both by reason of the great age at which Zamorins usually attain the stanom and the distance of their residence from the temple.

Two groups of questions thus arose in the suits—the first, relating to the claim of the Mallisseri Nambudri and the second, to the amendments of the scheme which were either proposed by the worshippers and the Board or became necessary by the Nambudri's claim being allowed.

[Their Lordships after stating the facts proceeded as follows :—]

The Zamorin does not, as indeed he cannot after the decree in Appeal Suit No. 35 of 1887, deny the right of the Nambudri's Illom to joint Uraima with him. But he contended (1) that the decree in Appeal Suit No. 8 of 1917 deprived the Illom of the Uraima till the Nambudri became restored to it by appropriate proceedings and that no such proceedings have been taken; (2) that, so far as the application of the Nambudri in the suit of 1912 is concerned, it is ineffective because, according to the Full Bench decision in *Veeraraghavachariar v. Advocate-General, Madras*(1), it was incompetent to this Court to reserve power to modify a scheme and therefore the power could not be used; and (3) that, so far as the Suit No. 1 of 1929 is concerned, the Court has no power, on a proper construction of the relevant provisions of the Hindu Religious Endowments

(1) (1927) I.L.R. 51 Mad. 81 (F.B.).

Act, to appoint, in a suit brought under section 63 (4), new trustees to an excepted temple.

The learned Judge, on the strength of the decision in *Veeraraghavachariar v. Advocate-General, Madras*(1), held that the direction in the judgment in review in Appeal Suit No. 8 of 1917 reserving liberty to apply *inter alia* to the Nambudri to be recognized as or restored to the trusteeship, could not be given effect to. He therefore dismissed the Nambudri's application in the suit of 1912 (Miscellaneous Petition No. 344 of 1929). The Nambudri has acquiesced in that decision and has not appealed therefrom.

The learned Judge also held that, in a suit brought under section 63 of the Religious Endowments Act to amend a scheme settled by the Board, the Court has only the powers of the Board, which, according to him, do not include the right to appoint a new trustee in an excepted temple.

The learned Judge, having thus accepted the two technical objections raised by the appellant, was faced with the difficulty that the Nambudri's suit, if regarded as one to get himself appointed as trustee of the Devaswom, would be incompetent under section 73 of the Act, as the consent of the Board had not been obtained for its institution. The learned Judge overcame this by holding that the Nambudri's suit may be regarded as one for the vindication of his personal rights or the rights of his Illom to the trusteeship and not one for any of the reliefs for which a suit under section 73 is necessary. For the purpose of ascertaining the Nambudri's rights in such a suit, the learned Judge held that he was at liberty to consider the effect of the decree in Original Suit No. 27 of 1916. On this

(1) (1927) I.L.R. 51 Mad. 81 (F.B.).

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last point he came to the conclusion that on the decree ceasing to operate (by the termination of the management of the Court of Wards) the rights affected by the decree revived. The result was that the Nambudri became automatically restored to his position before the suit began, as a hereditary co-trustee with the Zamorin.

It is plain that, if the opinion of the learned Judge about the meaning and effect of the decree in Appeal Suit No. 8 of 1917 is right, the technical objections raised by the appellant in bar of the suit and upheld by the Judge, together with the answer to them on which he found the Nambudri's suit still maintainable, all become irrelevant as they would not arise at all. This was admitted by the learned Advocate for the appellant.

We agree with the learned Judge in his construction of the decree in Appeal Suit No. 8 of 1917. The appellant's Advocate has drawn our attention to the judgments and decree in the appeal and urged that the removal of the Nambudri, though only intended for a temporary purpose to prevent the power of attorney given by the Illom to the Court of Wards from being revoked during its management, was still in terms neither temporary nor conditional but absolute and effective until altered as contemplated by subsequent application. We are unable to agree with this contention. To ascertain the meaning and effect of a decree of any Court, it is permissible, where the words are capable of more than one meaning, to look at all relevant papers and circumstances which were before the Court and the object which the directions contained in the decree were aimed to achieve. Of two possible constructions, the Court will not accept the one which leads to plain injustice and makes its own decree an instrument of depriving parties, whose case had not been heard and decided, of valuable and cherished rights which no one had any

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intention to destroy. That would be the effect of adopting the appellant's construction of this decree. It is not necessary to repeat the considerations set out in paragraphs 28 to 30 of the judgment of the lower Court which deal with this question. It is sufficient to refer to the fact that removing the representatives of the Mallisseri Illom was only an expedient devised to ensure that the management by the Court of Wards should not be disturbed by the power of attorney given by the Illom being revoked. It was not for any misconduct. In fact the only male member who had any subsisting rights in the Illom was then a minor and therefore incapable of misconduct. As pointed out by the learned Judge, when this Court said in Exhibit J that it would be open to the Sub-Judge to consider whether any change should be made in the management, it meant, not the management of the Court of Wards but the management before the Court of Wards entered, the management by both the trustees. The effect of this is that, on the termination of the Court of Wards' management, the previous state of affairs revived and Mallisseri Illom became restored to its previously existing rights.

In this view of the case, objection to the Nambudri's suit as one under section 73 of the Act and as involving the appointment of a new trustee for which the Court has no power in a suit under section 63 does not arise. He is entitled, as a trustee, to sue under section 63 (4) to have the scheme settled by the Board which ignores his rights so amended as to provide for them. The Board itself does not object to this and the worshippers also do not object. The main ground of Appeal No. 211 of 1930 therefore fails. The only matter left in it is whether the consequential amendments made by the learned Judge to the scheme are suitable. It is convenient to deal with this matter separately.

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We shall deal now with the major objections and suggestions of the several parties before the Court to the scheme settled by the learned Judge. The minor objections can be dealt with in finally passing the draft scheme on the footing of our conclusions.

Objections and suggestions of the appellant.

Objection is taken to the manner of appointing the manager on the ground that it will, in practice, vest the real power of appointment in the Board and not in the trustees whose nomination the Board is empowered to veto. The procedure of the Zamorin submitting three successive names in three months to the Board is also criticized as cumbrous and likely only to result in much needless waste of time. Taking the scheme as a whole, the learned Judge, while not acceding to the request of the Board and the worshippers to add new trustees, as in his view, the Court had no power to do so in a suit brought under section 63, produced almost the same effect by taking the appointment of the manager, the Chief Executive Officer, out of the hands of the trustees. The elaborate procedure prescribed in clause 3 of the scheme, viz., of the Zamorin sending nominations to the Board, their consulting the Nambudri and, on the Board's disapproval of the nominated person, itself calling for two more nominations one after the other after the interval of a month each time and, after all this, the Board choosing its own man, really puts the appointment into the hands of the Board, and if we intended to uphold that principle, we should adopt the much more simple and direct method of empowering the Board to make the appointment in the first instance. But we think the principle wrong. The duties and powers of trustees are generally laid down under section 40 of the Act. The provisions of the other sections in Chapter IV of

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the Act which applies to all religious endowments impose specific duties on trustees and confer specific powers on the Board in respect of all religious endowments. Chapter V relates to ordinary temples and Chapter VI to maths and excepted temples like Guruvayur. The policy of the Act as seen from a comparison of these chapters is to place maths and excepted temples, in normal conditions, under much less direct and detailed interference from the Board in matters of internal management than ordinary temples. This does not mean that, in cases of proved mismanagement or incapacity or in the imperative interests of future good government, such interference may not have to be provided for in a scheme. But, in the absence of such special grounds, we conceive that the proper aim, in a scheme of administration for an excepted temple, is to leave the internal management as much as possible to the trustees, providing only such safeguards as are sufficient to prevent grave misgovernment and to make the power of superintendence of the Board effective.

There is absolutely no evidence in the case of any previous mismanagement by the present trustees in this case for the very good reason that for twelve years ending September 1927 the temple was in the hands of the Court of Wards. A scheme was settled by the Board on 3rd November 1928 leaving the power of appointing the manager to the existing trustee who was to consult the Board about it. These suits were filed within six months afterwards. The learned Advocate for the worshippers complained that the learned Judge had shut out evidence of mismanagement. But the evidence which the learned Judge considered irrelevant and so excluded was not evidence of mismanagement before the date of the scheme but of evidence that the scheme

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had not worked satisfactorily. We consider that the learned Judge's opinion that, in a suit under section 63 for the modification of a scheme, evidence to show how the scheme worked is inadmissible is wrong. Obviously the need to amend a scheme may arise as much from the fact that it does not work or has not been worked properly as from previously existing facts such as mismanagement. But we consider that this defect does not affect the case seriously, because, we agree with the learned Judge that the evidence, which was intended to be offered and which the Board has by separate petition requested this Court to admit in appeal, was not of great moment on the question of the power of appointing the manager but relates to suggested improvements in lighting, sanitation, custody of records and the like. There being thus no question of mismanagement, we think it appropriate that the appointment of manager should be with the trustees who are the persons really responsible. It is argued that Mr. Venkatarama Sastri, in the lower Court, said that he did not object to a provision for the appointment being made with the previous consent of the Board. But, having regard to the elaborate provisions found necessary by the learned Judge in the attempt to reconcile that consent with any real freedom of choice in the trustees which ends, as it must, in the Board really making the appointment, we think it proper to abandon the attempt and to give the power of appointment to the trustees themselves to be exercised as between themselves in the manner provided by the agreement, Exhibit I, after consultation with the Board.

[Their Lordships discussed the qualifications necessary for the post of the manager and dealt with the objections and suggestions of (1) Mallisseri Nambudri, (2) the Hindu Religious Endowments Board, (3) and the

worshippers, with regard to some of the clauses in the scheme framed by the lower Court and concluded as follows:—]

Final scheme has been drawn up and passed to-day. Costs of all parties in Appeal No. 212 of 1930 will come out of the estate, Rs. 500 each to the four parties, Zamorin Raja, second defendant, Mallisseri Illom, first defendant, Hindu Religious Endowment Board, and plaintiffs. There will be no costs in Appeal No. 211 of 1930. No orders are necessary on the memoranda of objections. Second defendant (Zamorin Raja) will get the cost of printing out of the estate on presentation of vouchers accepted by the Deputy Registrar.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Krishnan Pandalai.

SOUDAGAR MUHAMMAD ABDUL RAHIM BAIG SAHEB
(FIRST DEFENDANT), APPELLANT,

1930,
November 28.

v.

SOUDAGAR MUHAMMAD ABDUL HAKIM BAIG SAHEB
AND SIX OTHERS (PLAINTIFF, SECOND DEFENDANT AND LEGAL
REPRESENTATIVES OF SECOND DEFENDANT), RESPONDENTS.*

Muhammadan Law—Co-heirs—Trade founded by a deceased Muhammadan continued as a family trade by his adult heirs—Whether contrary to Muhammadan Law—Relationship of the adult heirs to the other members of the family in such a business—If one of creditor and debtor, or one of co-ownership, or of trustee and cestui que trust.

The adult heirs of a deceased Muhammadan who founded a trade may carry on the same as a family trade for the benefit

* Appeals Nos. 280 to 283 and 460 to 463 of 1924.

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of all the members of his family including minors and females. In such a case the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family, or all the legal consequences of a lawful partnership. It is a question of fact in each case whether the relationship between such adult heirs and the rest of the family is one of debtor and creditor, or one of co-ownership, or one of trustee and *cestui que trust*.

APPEALS against the decrees of the Court of Subordinate Judge of Bezwada, dated 30th June 1924, and passed in Original Suits Nos. 19, 68, 69 and 70 of 1921 respectively.

G. Lakshman and P. Satyanarayana for appellant.

B. Pocker with Imam-ud-in and Rafi-ud-din for first respondent.

R. Krishnaswami, Court-guardian for fourth to sixth respondents.

The JUDGMENT of the Court was delivered by

WALLACE J.—These eight appeals arise from four original suits which were disposed of by the lower Court in four judgments which are practically one judgment. The suit was filed in the following circumstances. A Muhammadan, Abdul Karim Baig, who was a cloth trader, died on 30th September 1912, leaving a widow, two major sons, two minor sons and three minor daughters. The widow, the minor sons and the youngest daughter are the plaintiffs in the four suits. The two major sons are the first and second defendants in the four suits. The plaintiffs' general assertion, apart from minor differences which will be dealt with later on, is, that, on the death of the father, defendants 1 and 2 continued his cloth trade as a family trade for the benefit of the family and made profits thereby, that although an attempt at partition was made in 1915 it did not alter the position of parties, that the

family trade was continued from 30th September 1912, the date of the father's death, till October 1918, when owing to disputes between first and second defendants it came to an end, that these defendants taking advantage of their position as eldest males in the family used, in that trade, the shares of the other members in their father's assets and thus became executors *de son tort* liable to account to the plaintiffs for the profits they have made by such use of the plaintiffs' moneys, and that the plaintiffs are therefore entitled to a decree for an account from 19th December 1918, and a division of the trade profits in proportion to their family shares. The various plaintiffs sue for various sums which they estimate to be due to them on such accounts.

The general defence was that the trade carried on by defendants 1 and 2 after their father's death was entirely for themselves, and, while they admit that in that trade they employed the shares of the other members of the family, these, they say, were treated as mere loans of capital for which interest has been allowed in the firm's books. The lower Court has awarded the plaintiffs the sums set out as due to each in the alleged partition of 1915, plus interest at 6 per cent from that date. All the four plaintiffs appeal. Their appeals are Nos. 460 to 463 of 1924. The first defendant has presented an appeal in each of the four suits. His appeals are Nos. 280 to 283 of 1924, objecting to some points in the lower Court's decree which will be dealt with later.

The main question for decision is what was the nature, both in fact and in law, of the business carried on by first and second defendants after the father's death, and what was the relation, in fact and in law, of the plaintiffs in that business. We have no doubt that, from the date of the father's death up to at least the

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date of the alleged family partition on 7th March 1915, the business was in fact carried on by defendants 1 and 2 as a family business. Prior to the father's death it was a "one man show", first and second defendants being mere helpers and not partners with their father, and the business was therefore one of the main assets left by the father to his family. After his death, his various heirs took in law their several shares under the Muhammadan Law. But, in fact, it appears that no attempt was then made to settle and distribute these shares. The trade was not wound up; the accounts, Exhibits V and XVII, were not closed; the trade accounts were continued on the same books as before; no change in the constitution of the firm is noted in the books; no list of partners after the father's death was drawn up; the same constituents were dealt with; all the old stock was taken over by, and the debts of the father's firm were collected as owing to, his successors. There is every indication in favour of, and none really contrary to, the view that between 1912 and 1915 the father's trade was continued by first and second defendants as a family business for the benefit of all the heirs of their father. It is only necessary to refer, in passing, to some of the more important documents throwing light on this matter. The original name of the firm was S. M. Abdul Karim Baig. To this, after the father's death, was added the words "and sons" and this is the sole feature in favour of the first defendant's contention on this point. But even here there is no indication that "and sons" was confined to the two adult sons. [His Lordship discussed the remaining oral and documentary evidence as to whether the business was carried on as a family trade for the benefit of the family and held as follows:—]

All this shows quite clearly that the business was regarded as a family business in which all the members

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of the family were interested. The power of attorney is signed by all. Those regarded formally as members are all the males of the family and the designation "and sons" was therefore added. There is no break in the business after the father's death. Its credit and goodwill were taken over and used by the "and sons" Firm. The business is in fact continued just as if the father had not died. His assets, separately held in theory though they may be in law by the various heirs, continued as the assets of the business. It is quite clear that the first part of the plaintiffs' case that the business was in fact continued after the father's death as a family trade for the benefit of the family is fully justified.

The first defendant answers to this that, as in law there cannot be a Muhammadan joint family [see *Abdul Khader v. Chidambaram Chettiyar*(1)], therefore, there cannot be a family trade, and this is the argument which has found favour with the lower Court. It seems to us irrelevant. The point is not, whether this trade was one to which the law will impute all the incidents and legal implications of a Hindu joint family trade, but, whether in fact the business was carried on for the benefit of the whole family. There is nothing in law to prevent such a business being carried on by any one, of whatever race he may be. From what we have already said, we are satisfied that the trade was being continued as a family trade. The first defendant also regarded himself after his father's death as the guardian of the minors and acted as if he really were. This is plain from Exhibits A and X already noted [Referred to in portion of the judgment omitted.] No doubt he could not be guardian *de jure*, but that is again beside the point. It is plain that he was acting as guardian

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de facto. Thus he regarded himself as the representative of the minors in the trade and justified as such in using their moneys for it and protecting their interests. He looked upon himself as, to all intents and purposes, the eldest member of a Hindu joint family does, namely, as manager of a joint family business, and guardian of the minors, except that, as the family was Muhammadan, the family trade, in this case, was carried on by him on behalf of all the heirs of the deceased founder of the trade and thus on behalf of the females of the family also. It is not an uncommon thing in this Presidency, where members of the Muhammadan community live surrounded by Hindus, that they absorb and adopt Hindu social ideas and tend to look on their own social customs from a Hindu point of view. This tendency has been recognized in various rulings in this Court, in *Hussain Saib v. Hussain Saib*(1), for example, where it has been pointed out that it is common in this Presidency for descendants of Muhammadans to live and trade together, and the property is then held by the several members of the family in the shares to which they are entitled under Muhammadan Law. Clearly that is what has happened here. That the Courts will not apply Hindu Law to Muhammadans is obvious, but that is not the proper way to decide a case of this kind although it may be the way of least resistance. Such cases are not problems of law, nor does their decision depend on the ideas of law which the parties have put into their pleadings, but are concerned with questions of fact and have to be decided on the facts. The correct view, in our opinion, therefore, is that there is nothing contrary to law in Muhammadan adult members of a family carrying on such a family trade for the benefit of all the members of the family including the minors and the

(1) (1917) 5 L.W. 835.

females, and the Courts will therefore uphold it and such legal consequences as in law follow from it, although the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family or all the legal consequences of a lawful partnership.

What, then, are these legal consequences in this case? In the light of the facts which we have set out, it seems to us that the conclusion cannot be resisted that the first defendant by his conduct after his father's death put himself in a fiduciary relationship to the widow and the minor members of the family. He assumed the management of their father's business as if he was in law, what he conceived himself to be in fact, the manager of a family business for the benefit of all. He assumed the position of guardian of all the minors, male and female, and acted as such, a position obviously of fiduciary relationship; see *Sitha Boi v. Radha Boi*(1). He regarded the minor males as full members of the firm. He and the second defendant, in their self-imposed management of the family business, retained it intact as it had been at the father's death, did not wind it up or distribute to each sharer his quota, or allow it to be abstracted from the firm. They, by virtue of their position as the adult males, got possession of the shares of the widow and the minors and retained these in the firm. By this assumption of family management—it does not matter whether we call their position that of trustees *de son tort* or executors *de son tort*—the relationship in which the first defendant stood to the widow and the minors was essentially a fiduciary one. The present case is similar to *Vrandavan v. Parshottham*(2), in which a similar view was taken.

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(1) (1918) 36 M.L.J. 189.

(2) A.I.R. 1927 Bom. 75.

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The first defendant argues, in addition to the argument with which we have already dealt, that what is not legally correct cannot be actually possible, one or two points: first, that the matter of guardianship was never raised in the plaints. That is true; the two leading points in the plaints were family trade and executor *de son tort*. But the guardianship matter is merely a plank in that platform, and the matter of fiduciary relationship does not rest on that alone or chiefly, but on the general assumption by defendants 1 and 2 of management of their father's trade for the benefit of all his heirs. The matter of guardianship was raised in the lower Court at the time of trial and is dealt with by the Subordinate Judge, but with the same erroneous notion that one who cannot be a guardian *de jure* cannot act as guardian *de facto* and carry on a business as such. The decision in *Abdul Khader v. Chidambaram Chettiyar* (1), relied on by the first defendant, is not really in point. The question there was, whether the act of a guardian *de facto* of a Muhammadan minor could in law bind the minor *adversely* to his interests. We think therefore there is no force in this contention by the first defendant.

The next point was that the first defendant cannot be, in law, styled an executor *de son tort* because he did not do any act which belongs to the office of executor. It seems to us to matter very little what sort of name we give him in law, or whether the plaintiffs were right in their plaints in describing him as an executor *de son tort*. The relationship in which he stood to the plaintiffs was, as we have held, clearly fiduciary.

Then first defendant argues that, as he was legally in the position of co-owners with his co-heirs, he must

(1) (1908) I.L.R. 32 Mad. 276.

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be conceived to have been in possession of their shares as co-owner, and therefore not in a fiduciary capacity, as the relationship of co-owner is not in law a fiduciary one: see *Abdul Khader v. Chidambaram Chettiyar* (1) and *Abdul Samad Khan Khiladar v. Bibijan* (2). Here again it is a question not of law but of fact, and to our minds it is quite clear from the facts we have set out that the first defendant was assuming a position much more of trust than of a mere co-owner, and that he came into possession of the assets of the other members, not because of his co-ownership but because of the fiduciary relationship he adopted towards them, into which he entered on their behalf.

Apart from the general question of whether the first defendant is liable to account to the plaintiffs for the profits made by him on the ground that he made these profits in a fiduciary capacity, the first defendant urges that at least the profits got by foreign trade from 1912 to 1915, shown as Rs. 11,864-10-0 in Exhibit II, should not be included.

[His Lordship discussed the evidence in respect of this foreign trade and continued:—]

This attempt, to isolate a particular branch of the family trade and earmark it for defendants 1 and 2 alone, cannot therefore be upheld.

A dividing line, however, both in fact and in law, has to be drawn between the period 1912—1915, and the period 1915—1918. In March 1915, owing to one minor sister having come of age and having demanded her share, the firm's accounts were looked into and an attempt was made to ascertain the assets of the firm not on that date but on the date of the father's death, and to partition these assets among the various

(1) (1908) I.L.R. 32 Mad. 276.

(2) (1925) 49 M.L.J. 675.

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heirs. It was really rather a hopeless task owing to the failure of defendants 1 and 2 to close the firm's accounts at the time of their father's death and the resultant figures are only approximate. This partition is evidenced by Exhibit II. As it stands, it allotted all the profits between 1912 and 1915 wholly to the first and second defendants on the footing that the trade after their father's death was not a family trade but their own exclusive trade. Another minor daughter came of age in 1918 and also was then given her share according to Exhibit II. These two daughters gave release deeds Exhibit VI dated 1st April 1916 and Exhibit VI (a) dated 1st July 1918. Exhibit II and the partition which it represents were forced on defendants 1 and 2 by the demand of one co-heir for her share and it was carried through by these defendants alone. The process by which they came to the result that the profits between 1912 and 1915 were their own private profits and were not divisible as assets among the family can be regarded as barely honest. They had on their case used for themselves exclusively the whole credit and goodwill of their father's firm which had been going on for about 30 years, a very definite asset which ought to have been valued and divided between the co-heirs. Further, having obtained control of the shares of the other members of the family by the simple process of constituting themselves trustees and guardians for them, they used these shares in the business to obtain the profits which they under Exhibit II proceeded to divide between themselves alone. We are satisfied that, after the death of the father, the first defendant along with the second defendant carried on the father's business as a person bound in a fiduciary capacity to protect the interests of the plaintiffs. Sections 23 (f) and 68 of

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the Trusts Act will consequently apply. He was therefore bound to hold for the benefit of the plaintiffs any advantage he gained by availing himself of his fiduciary character and by utilizing the plaintiffs' shares in their father's assets for his own pecuniary advantage; and the measure of that advantage up till 7th March 1915 is the figure of profits both on his own trade and on the foreign goods as set out in Exhibit II. The plaintiffs are therefore each entitled to the profits between 1912 and 1915 arising to each of them proportionate to their share of the capital employed. The plaintiffs do not now challenge the figures in Exhibit II, although the figures are merely approximate, but only the method of division. The figures of profits therein given from 1912 to 1915 are Rs. 13,402-13-0 on the local trade and Rs. 11,864-10-0 on the foreign trade.

[His Lordship dealt with the further evidence in the case and held that, after the partition of 1915, the first and second defendants did not carry on the business as a family trade, and that thereafter the relationship between them and the other members of the family was not a fiduciary one and that the use by them of the share due to their mother in the trade could only be as capital lent for which they were liable to pay interest. His Lordship also gave directions as to the calculation of the figures and costs in the various appeals.]

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice
Bhashyam Ayyangar.

1930,
October 22.

CHINNAN AND TWO OTHERS (DEFENDANTS), APPELLANTS,

v.

RANJITHAMMAL (PLAINTIFF), RESPONDENT.*

Indian Easements Act (V of 1882), ss. 59 and 62—License in respect of a property—Whether annexed to it or transferable or heritable—Determination of—Continuance of licensee or representative after transfer.

A license enjoyed in respect of a property is not annexed to it and is not a transferable or a heritable right. The license is determined on the transfer of the property affected by it.

Obiter.—If the licensee or his representative continues after the transfer to exercise the privilege, he would be a mere trespasser.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 79 of 1927.

T. R. Venkatesa Ayyar and T. V. Gopalaswami Ayyar for appellants.

G. Devasahayam for respondent.

The JUDGMENT of the Court was delivered by

CURGENVEN
J.

CURGENVEN J.—In the suit out of which this appeal arises the plaintiff, as owner of land—a claim not now disputed—sued to eject the defendants from a portion of it. Her case was that one Punjolai had served her predecessor-in-title as watchman, and had been permitted to put up a hut and live on a small portion of the land. The defendants are relatives of Punjolai, and have succeeded him in occupation of the suit site, and have moreover, according to the plaintiff, encroached

* City Civil Court Appeal No. 55 of 1927.

upon a further area. There are thus two questions arising for decision:—

(1) Can the plaintiff eject the defendants from the site which Punjolai was allowed to occupy?

(2) Can she eject them from the area encroached upon?

(1) It is agreed that Punjolai was allowed to occupy the site as a licensee. Since the license was granted the property has changed hands, the plaintiff's mother purchasing it from the Administrator-General in 1902 and settling it upon her daughter, the plaintiff, in 1922. It is not very easy to decide what is the effect upon a license in India of a transfer of ownership. Under section 59 of the Easements Act,

"When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license."

and under section 62 a license is deemed to be revoked,

"(a) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license:—"

These provisions do not in terms lay down that a license is revoked by a conveyance of the property. On the other hand, the English Law, which undoubtedly forms the basis of the Indian Statute, seems clear that the license terminates

"If a man gives a licence and then parts with the property over which the privilege is to be exercised,"

says POLLOCK C. B. in *Coleman v. Foster*(1),

"the license is gone. A license is a thing so evanescent that it cannot be transferred."

The same view is to be found expressed in *Wallis v. Harrison*(2). There can be no doubt that the transferee is not bound by the license. But does the licensee,

(1) (1856) 1 H. & N. 37; 156 E.R. 1108.

(2) (1898) 4 M. & W. 536; 150 E.R. 1543.

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J.

from the moment the transfer takes place, become a mere trespasser, or should he be considered, until the contrary appears, to hold under an implied license? We do not think that it will become necessary in this case to decide that point, because, if the information given to us is correct (no evidence was taken), Punjolai died in or about 1904, and there seems no doubt that the license expired with his death. The learned City Civil Judge seems to be in error in holding that the defendants came in as licensees, if by that he means that, after Punjolai died, the license was renewed in their favour. Nor do we think, that the license granted to Punjolai became vested in them as his successors. A license is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents (section 56). Accordingly, in their occupation of the plot, and especially so since the death of Punjolai, the defendants have been mere trespassers. We have been invited to hold, on the analogy afforded by a Bombay decision, *Krishnaji Ramchandra v. Antaji Pandurang*(1), that the occupation was permissive and not adverse. That case related to the successors to a life-tenant deceased, and it was held that the occupation was of that character unless and until an adverse title was expressly set up. But in two later Bombay cases, *Kantheppa v. Sheshappa*(2) and *Ohandri v. Daji Bhanu*(3), it has been held that the possession of a tenant holding over is wrongful, and time begins to run against the landlord under article 139 of the Limitation Act as soon as the term of the lease expires,—a view which is not

(1) (1893) I.L.R. 18 Bom. 256.

(2) (1897) I.L.R. 22 Bom. 893.

(3) (1900) I.L.R. 24 Bom. 504.

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—
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J.

easily reconcilable with the position that the occupation of a tenant's successors is to be deemed permissive. We need not however look further for authority than to *Vadapalli Narasimham v. Dronamraju Seetharamamurthy*(1) for the proposition that the representatives of a tenant on sufferance are mere trespassers, since they cannot be regarded as succeeding to any interest in the tenancy; and what is true of a tenant on sufferance would seem to be true also of a licensee. We think therefore that at least from the date of Punjolai's death the possession of the defendants became adverse to the owner of the property. It will now be for the lower Court to decide upon evidence whether the claim to that portion of the site is barred.

(2) With regard to the area said to have been encroached upon, a matter not dealt with at all by the Court below—it will be for decision whether the plaintiff's suit is within time.

For the trial of these questions, allowing the appeal and setting aside the decree, we remand the suit to the lower Court. Costs to abide the event.

B.C.S.

(1) (1907) I.L.R. 31 Mad. 163.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice
Bhashyam Ayyangar.

1930,
October 27.

V. GURUVAPPA CHETTI (PLAINTIFF), APPELLANT,

v.

THAYARAMMAL AND THREE OTHERS (DEFENDANTS),
RESPONDENTS.*

Restitution of conjugal rights—Suit for—Order under sec. 488 of the Code of Criminal Procedure (V of 1898) by consent for payment of maintenance to wife—Whether bar to suit.

An order under section 488 of the Code of Criminal Procedure (V of 1898) directing the payment of a sum of money to the wife by way of maintenance, even though made by consent of parties, is not a bar to a suit which the husband may subsequently file for restitution of conjugal rights.

APPEAL against the decree of the Court of the City Civil Judge, Madras, in Original Suit No. 477 of 1927.

R. V. Seshagiri Rao for appellant.

P. Viswanatha Ayyar for first respondent.

V. N. Srinivasa Rao for second to fourth respondents.

The JUDGMENT of the Court was delivered by
CURGENVEN J.—The plaintiff sued as against his wife, the first defendant, for restitution of conjugal rights, and as against defendants 2 to 4, who are respectively his wife's parents and brother, for an injunction restraining them from in any manner interfering with him and his wife and from keeping his wife away from him without his consent. The learned City Civil Judge has dismissed the suit upon a finding upon what may be termed a preliminary issue, the second.

The plaint was filed on the 5th of August 1927, and it appears that on the 31st of May of that year a consent

order was passed by the Presidency Magistrate, Georgetown, between the same parties under section 488 of the Code of Criminal Procedure in these terms; "By consent of both parties, sum of Rs. 6 per mensem is ordered for the maintenance of the petitioner by her husband, the counter-petitioner". The learned City Civil Judge is of opinion that, as the plaintiff has expressly consented to such an order, it operates as a bar to his suit for restitution of conjugal rights. Now, it is not contended that, where an order is passed under section 488 after contest, it operates as such a bar. In fact there is now statutory recognition of the independence of the Civil Court in this matter by the enactment of sub-section (2) of section 489 of the Code of Criminal Procedure, the Magistrate being required to modify his order in consequence of any decision of a competent Civil Court. Does the circumstance that the order in this instance was a consent order make any difference? We think that it clearly makes no difference, unless it appears that something more than a consent to the order of the Magistrate was involved. In considering what the consequences of consent to such an order must be, we must consider the scope of the order which was consented to, and there is no reason to suppose that such an order, even when passed after consent, would have an effect in excess of an order passed without such consent. For instance, we cannot suppose that the provisions of section 488 (4) and (5), which enable a Magistrate to cancel his order, or of section 489 (1), which enable him on proof of a change in the husband's circumstances to modify it, would be affected by the fact that the original order was not passed on an adjudication but by consent. Now, would the fact of consent exclude the operation of sub-section (2) of section 489, already alluded to? Unless, therefore, it were expressed

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in the consent given that the consenting party agreed that in all circumstances the wife should live apart from him and should be entitled to the maintenance agreed upon, we are clearly of the opinion that it cannot operate so as to extend the scope of the order or to restrict the jurisdiction of the Civil Court to supersede it. We have been asked to frame an issue inquiring whether, in the circumstances of the present case, the consent given was not merely to the order in the terms in which it is drafted but was more unqualified and, in effect, a consent that the wife should live apart and should receive maintenance without such limitations as the order necessarily imposes. But we cannot find any such position taken up in the first defendant's written statement as would warrant such a course. In fact, in paragraph 8, it is clearly said that the plaintiff agreed to a consent order on the maintenance application if the hurt case which was filed at the same time by the first defendant was compounded, that the hurt case was accordingly compounded and a consent order passed, and paragraph 12 carries the matter no further because it only expresses the contention that the suit is not sustainable until the consent order of maintenance is set aside. We think, therefore, that the order carrying; as it must, the ordinary consequences of an order passed under section 488 of the Code of Criminal Procedure is no bar to the plaintiff's claim, and we must accordingly answer issue No. 2 by saying that the suit is maintainable.

We accordingly set aside the decree of the lower Court and remand the suit for trial upon the remaining issues. Costs will abide the event. The appellant will be entitled to a refund of the court-fees paid on the memorandum of appeal.

R.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Curgenven and Mr. Justice
Bhashyam Ayyangar.*

SANKAPPA RAI AND TWO OTHERS (FIRST DEFENDANT,
TWENTY-FIRST DEFENDANT AND NIL), APPELLANTS,

v.

KORAGA PUJARY AND OTHERS (PLAINTIFFS 2 TO 19 AND
DEFENDANTS 2 TO 16, 18, 20, 21 TO 43), RESPONDENTS.*

*Indian Evidence Act (I of 1872), sec. 33—Court having no
jurisdiction—Proceeding before—If “judicial proceeding”
—Deposition given in such proceeding—Admissibility of.*

A proceeding before a Court which has no jurisdiction to entertain it is not a “judicial proceeding” within the meaning of section 33 of the Indian Evidence Act, and a deposition given in such a proceeding is inadmissible in evidence under the section.

APPEAL against the decree of the Court of the Subordinate Judge of South Kanara, dated 7th November 1924, in Original Suit No. 9 of 1924.

A suit was filed in the Court of the District Munsif at Kasaragod and numbered as Original Suit No. 350 of 1921. After the examination of certain witnesses, the Court returned the plaint on the ground that the value of the subject-matter was above its pecuniary jurisdiction. Thereafter the present suit was filed in the Court of the Subordinate Judge of Kasaragod. The case of the plaintiffs was that they and defendants 2 to 43 were members of a family of Bilavars of South Kanara District who follow the Aliyasanthana Law, and that the first defendant was a mortgagee under two mortgage bonds executed by various members of the family for purposes not binding on the other members of the

* Appeal No. 266 of 1925.

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family. The defendants contended that the mortgages were executed for purposes binding on the family, and that the plaintiffs were not members of that family and as such had no right to question the said mortgages. The Subordinate Judge, relying upon a deposition given before the District Munsif of Kasaragod in Original Suit No. 350 of 1921 by the twentieth defendant, who died before the trial of Original Suit No. 9 of 1924, held that the plaintiffs were also members of that family and that the mortgages were binding on the family to the extent of Rs. 700 only. The present appeal was filed by the first defendant, Sankappa Rai. He transferred his rights to the twenty-first defendant, Dooma alias Dunappa, a member of the family of defendants 2 to 43, and his (twenty-first defendant's) sister Sanke, who were added as appellants in the place of Sankappa Rai by an order, dated 13th November 1925, in Civil Miscellaneous Petition No. 4109 of 1925.

K. Y. Adiga for second and third appellants.

B. Sitarama Rao and *K. Srinivasa Rao* for first to third and fifth respondents.

JUDGMENT.

[Their Lordships after stating the facts proceeded as follows :—]

The twentieth defendant had died before she could be examined again and accordingly her deposition was made use of in the manner stated. Now section 33 requires that evidence of this character, to be relevant, should have been given by a witness in a judicial proceeding, and it is contended before us that no proceeding is a judicial proceeding within the meaning of that section if it is conducted by a Court which has no jurisdiction to undertake it. There can be no doubt in our view that a Court which engages in the trial of a

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suit the value of which is beyond its pecuniary jurisdiction is doing something which it has no jurisdiction to do, just as much as if it tried a suit of a nature which it was not empowered to try or originating in some place to which its jurisdiction did not extend. The provisions of section 11 of the Suits Valuation Act with regard to pecuniary jurisdiction, and the parallel provision in section 21 of the Code of Civil Procedure with regard to territorial jurisdiction, no doubt allow exceptions to the rule that proceedings without jurisdiction are void and of no effect. They do not, as has been suggested to us, except in the circumstances in which they are applicable, give jurisdiction where it would not otherwise be enjoyed. If that is the effect of the decision in *Raghavachariar v. Raghavachariar*(1), we are unable to agree with it and we do not find that it has since been followed or referred to. It is not possible in our view to draw any distinction, for the purpose of applying this section of the Evidence Act, between want of jurisdiction of one kind and of another, and it seems that a necessary test to discover whether what purports to be a judicial proceeding is in fact one lies in the competence of the judicial officer who conducted it. The circumstance that, before he can verify his incompetence, he must often try the issue of jurisdiction by taking evidence does not necessarily make even that evidence admissible, as taken in a judicial proceeding, and much less so where, as here, the evidence which it is desired to use relates not to the question of jurisdiction at all but to the merits of the case. On the general question of the effect of a lack of jurisdiction, there is the authority of a case in this Court, namely, *In the matter of Rami Reddi*(2). It has

(1) (1898) 20 M.L.J. 723.

(2) (1891) I.L.R. 3 Mad. 48.

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also been held in *Buta Singh v. The Crown*(1) that a proceeding before a Judge or Magistrate who has no jurisdiction is not a judicial proceeding and the evidence of a witness given in such a proceeding cannot be used under section 33 of the Evidence Act on a retrial before a competent Court, the particular kind of jurisdiction involved in that case being territorial. For an expression of the general proposition, that if a Court has no jurisdiction over the subject-matter of the litigation its proceedings are mere nullities, reference may be made to *Rajalakshmi Dasee v. Katayani Dasee*(2). We must accordingly hold that the contents of the statement, Exhibit A, cannot be used in evidence in this case.

[Their Lordships discussed the remaining evidence with regard to the relationship of the plaintiffs to the family and came to the conclusion that their claim to be members of the family had not been established. Their Lordships dealt with the question of the validity and the binding character of the suit mortgage bonds and concluded as follows:—]

Now that the original plaintiffs have been non-suited on the question of relationship, there is no one upon the record before us qualified to dispute the binding character of these mortgages. Apart from that circumstance however, we are clearly of opinion that they are binding upon the family property and we must accordingly allow the appeal and set aside the decree of the lower Court and direct that the suit be dismissed with costs. Plaintiffs 1 to 11 will pay the costs of the twenty-first defendant in this appeal. The memorandum of objections preferred by the plaintiffs is dismissed with costs.

G.R.

(1) (1926) I.L.R. 7 Lah. 396.

(2) (1910) I.L.R. 38 Calo. 639.

ORIGINAL CIVIL.

Before Mr. Justice Madhavan Nair.

SRI RAJAH RAO VENKATAKUMARA MAHIPATHI
SURYA RAO BAHADUR GARU, THE MAHARAJAH
OF PITTAPURAM,—PLAINTIFF,

1931,
March 3.

GOKULDOSS GOVERDHANDOSS AND SEVEN OTHERS,—
DEFENDANTS.*

Receiver—At instance of person with equitable mortgage by deposit of title-deeds—Security proving insufficient—Right of mortgagee to moneys realized by receiver—Preferential right as against ordinary creditors of mortgage.

Where a receiver is appointed by Court in respect of certain properties at the instance of a person in whose favour an equitable mortgage of those properties had been created by deposit of title-deeds, the equitable mortgagee, in the event of the security proving insufficient, will have, in regard to any moneys realized by the receiver from the properties, a preferential right as against the ordinary creditors of the mortgagor, and will be entitled to the payment of such moneys or so much thereof as is sufficient to discharge the mortgage.

APPLICATION No. 860 of 1930 praying that the receiver appointed by Court may be directed to deposit certain moneys in his hands into Court. Application No. 244 of 1931 praying that the said moneys be paid over to the plaintiff.

Advocate-General (A. Krishnaswami Ayyar) (M. Subbarayu Ayyar with him) for plaintiff.

S. Duraiswami Ayyar (V. Balaraman with him) for first defendant.

C. Krishnaswami Ayyar for seventh defendant.

* Applications Nos. 860 of 1930 and 244 of 1931 in Civil Suit No. 229 of 1924.

JUDGMENT.

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These two applications relate to the same subject-matter, that is, a sum of Rs. 6,218-14-3 standing to the credit of Civil Suit No. 229 of 1924 and representing the income from the mortgaged properties involved in that suit other than Misquith Buildings and Cathedral Gardens. In the one, the receiver is asked to deposit the amount in Court and in the other, that is, Application No. 244 of 1931, a request is made that the same sum may be paid over to the plaintiff in the suit, the Maharajah of Pittapuram, who is the petitioner in both the applications. The Official Assignee of Madras and the plaintiff in Civil Suit No. 622 of 1923 oppose these applications.

The facts necessary for the disposal of these applications may be stated very briefly as follows: One Gokuldoss, manager of a joint Hindu family, trading under the style of Murlidoss Ramdoss & Co., effected on behalf of the firm an equitable mortgage by depositing title-deeds of ten items of properties with the petitioner, the Maharajah of Pittapuram, and borrowed from him a sum of Rs. 3,85,000 in the year 1922. For the recovery of the principal and interest due under this mortgage the Maharajah filed a suit, Civil Suit No. 229 of 1924, on 27th March 1924. In the meanwhile, the third defendant in the suit, a minor, had already filed Civil Suit No. 622 of 1923 against the other members of the firm for partition of the joint family properties. For disposing of these applications it is not necessary to state anything about the contentions of the parties in these suits. The suits were eventually decreed and appeals against the decrees are now pending in the Appellate Court. In Civil Suit No. 622 of 1923, the partition suit, Mr. E. R. Krishnan, an Advocate of this Court, was appointed on 31st August 1923 receiver of all

the properties alleged to belong to the joint family of Messrs. Murlidoss Ramdoss and Co., including the properties mortgaged to the plaintiff in Civil Suit No. 229 of 1924. Subsequently the firm was adjudicated insolvents in 1924 and the Official Assignee was impleaded as its legal representative. The receiver appointed by the Court continued in possession of the properties. On 18th July 1927 the petitioner (plaintiff in Civil Suit No. 229 of 1924) made an application for the appointment of an independent receiver for the properties mortgaged to him; but, it would appear, the learned Judge took the view that an independent receiver was unnecessary and that the plaintiff's interest could be safeguarded by directing the receiver in Civil Suit No. 622 of 1923 to keep a separate account of the income of the properties mortgaged to him and this was accordingly ordered on 25th July 1928. The receiver was also directed that none of the income from these properties should be spent in giving the maintenance allowed to the plaintiff in Civil Suit No. 622 of 1923. The petitioner again filed on 23rd April 1929 another application (Application No. 1524 of 1929) for the appointment of a receiver for the properties mortgaged to him. Both the suits were tried together by VENKATASUBBA RAO J. On 2nd May 1929 a mortgage decree was passed in favour of the petitioner (plaintiff in Civil Suit No. 229 of 1924) for Rs. 7,00,000 and odd and for the sale of the items of mortgaged properties except Cathedral Gardens and Misquith Buildings; and on the same date the learned Judge appointed Mr. E. R. Krishnan (the receiver in Civil Suit No. 622 of 1923) and Mr. P. Kameswara Rao, an Advocate, as joint receivers of the mortgaged properties for the sale of which the petitioner had established his right in the suit. The sum now in the hands of the receiver is stated to be the income from those properties

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realized subsequent to the date of the decree. The mortgaged properties except Cathedral Gardens were sold and were purchased by the petitioner himself. The affidavits stated that only a sum of three lakhs and odd were realized by the sale.

The petitioner now claims that the income realized from the mortgaged properties should in law be treated as additional security for the amount found due to him under the mortgage, inasmuch as the receiver was appointed at his instance in his mortgage suit and, as such, the income from the said properties should be considered to be ear-marked for his own use, it now having been found that his title to those properties has been established by the decree. His argument is that the possession of a receiver in a mortgage suit is *prima facie* for the benefit of the party who obtained the appointment, and on this principle he argues that the receiver who was appointed at his instance holds the property for his benefit and is bound to make over to him the entire income for the satisfaction of his dues. The Official Assignee, on the other hand, contends that with regard to this income the petitioner has no preferential rights and that his rights to it are only the same as those of the ordinary creditors. The question for decision is which view is right. If the petitioner's contention is to be upheld, he will be entitled to an order for the payment of the sum in question to him.

Admittedly, the rights of the petitioner who is an equitable mortgagee, are the same as those of a simple mortgagee, that is, he is not entitled to the possession of the properties under his mortgage; he can realize his dues only by getting a decree for selling them. In England it is well understood that an equitable mortgagee, though he is not entitled to take possession of the mortgaged properties, has the right to ask for the

appointment of a receiver : *Crompton & Co., Ltd. In re. Player v. Crompton & Co., Ltd.* (1). WARRINGTON J. observes at page 967 :

"I think the right to the appointment of a receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession and to whom security has become realizable as one of the steps in such realization."

See also Kerr on Receivers (seventh edition), page 37. For some time there was some doubt in this Court as to whether a simple mortgagee is entitled to ask for the appointment of a receiver in his mortgage suit. It was held in *Ethirajulu Chetti v. Rajagopalachariyar* (2) that the right to the appointment of a receiver, which an equitable mortgagee has, may be extended to a simple mortgagee also. The fact that he is not entitled to have possession of the properties which was urged as an objection against his claim to the appointment of a receiver cannot be considered as of any importance having regard to the reasons for the appointment of a receiver. As pointed out in *Khubsurat Koer v. Saroda Charan Guha* (3),

"If the decree is for sale, and if it is established that the security is not sufficient to satisfy the judgment-debt, a receiver will be appointed as a matter of course, specially if there has been default in the payment of interest."

In *Rameshwar Singh v. Chuni Lal Shaha* (4), MUKERJEE and PANTON JJ. observed.

"There is no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a receiver. Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession."

If the object of appointing a receiver in a mortgage suit is to look after the interest of the mortgagee,

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(1) [1914] 1 Ch. 954.

(3) (1911) 14 O.L.J. 526.

(2) (1923) I.L.R. 52 Mad. 979.

(4) (1919) I.L.R. 47 Cal. 418.

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though he is only a simple mortgagee, is he not entitled to claim that the profits of the mortgaged properties should be applied for his benefit when his security has become realizable, as one of the steps for such realization? This point was considered in *Rameshwar Singh v. Chuni Lal Shaha*(1), which I have already referred to. In that case, a receiver was appointed in a mortgage suit instituted by a simple mortgagee. The second mortgagee of the same properties was a party to the suit. The first mortgagee obtained a decree for the amount claimed by him. Meanwhile, the second mortgagee, who had a mortgage of only half of the property, had instituted a suit to enforce his security without joining the first mortgagee as a party. He obtained a decree and in execution of it he purchased the equity of redemption in relation to his mortgage. On an application made by him, the income of the property purchased by him in the hands of the receiver was ordered, in spite of the opposition of the first mortgagee, to be handed over to him by the Subordinate Judge of Dacca. This order was set aside in appeal. In the course of the judgment, MUKERJEE and PANTON JJ. observed as follows:—

“Our attention has been invited to the case of *Penney v. Todd*(2) where it was ruled that the possession of a receiver in a mortgage suit was *prima facie* for the benefit of the party who had obtained the appointment. On this principle it has been argued that a receiver who was appointed at the instance of the first mortgagee holds the properties for his benefit alone and is bound to make over to him the entire income for the satisfaction of his dues. In our opinion, this contention is clearly well founded.”

This decision is a clear authority in support of the contention urged by the learned Advocate-General on

(1) (1919) I.L.R. 47 Cal. 418.

(2) (1878) 28 W.R. (Eng.) 502.

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behalf of the petitioner. If, according to this decision, the receivers in Civil Suit No. 229 of 1924 are to be considered as having been appointed for the benefit of the petitioner at whose instance they were appointed, then it must follow that the income in their hands from the mortgaged properties should be devoted to the satisfaction of his dues. I may here refer to paragraph 6 of the order of the learned Judge appointing the receivers which is somewhat significant. It states subject to certain expenses the receivers “shall pay the net receipts into Court to the credit of this suit” (i.e., Civil Suit No. 299 of 1924). In *Khubsurat Koer v. Saroda Charan Guha*(1), MUKERJEE J. observes thus:

“If a receiver is appointed in the mortgage-suit, he is bound to apply the proceeds for the benefit of the mortgagee.”

In *High on Receivers* (third edition), in paragraph 643, it is stated that a mortgagee who procures a receiver to be appointed in a mortgage suit is entitled to the income from the mortgaged properties in the hands of the receiver in preference to the assignee. This statement of law is very relevant to the present proceedings, as objection to the payment of the money is here raised by the Official Assignee. The passage in which the statement of law is made runs thus:

“When, therefore, a mortgagee, upon proceedings for a foreclosure, obtains a receiver of the rents and profits, if the amount obtained upon a sale of the premises proves insufficient to pay the mortgage indebtedness, he is entitled to so much of the rents in the receiver’s hands as will make up the deficiency. And this is so, even though the mortgagor’s right in the premises have passed to his assignee in bankruptcy, and have been sold by him; since the mortgagee, who procures a receiver to be appointed for the protection of his lien, is entitled to the rents in preference to the assignee or purchaser at his sale.”

(1) (1911) 14 C.L.J. 526.

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These authorities would show that the learned Advocate-General's contention that the petitioner is entitled to the payment of the amount claimed should be accepted. Since the receiver in this case was appointed at the instance of the petitioner and since he was not able to realize his decree amount by the sale of the mortgaged properties, it must be held that he is clearly entitled to proceed against the income in the hands of the receiver as one of the steps for realization of his security.

Mr. Duraiswami Ayyar frankly concedes that the decision in *Rameshwar Singh v. Chuni Lal Shaha*(1) is against him, but he argues that the decision is wrong and the principle of the English decision, which grants the right to an equitable mortgagee to proceed against the income of the mortgaged properties in the hands of the receiver for realizing his debt when the security is insufficient, should not be extended to the case of a simple mortgagee in India who does not possess the right of foreclosure, which an equitable mortgagee has in England. I do not think this is a sound contention. If this is the correct principle to be applied, then it must also follow that a simple mortgagee is not entitled to the right of appointment of a receiver in a mortgage suit; but this I have already shown is not the case. It is true that a simple mortgagee has no right of foreclosure; but, in my opinion, it has not been established that there is any connection between the right of foreclosure and the right of getting a receiver appointed and the right of appropriating the income in the hands of the receiver, in the case of an equitable mortgagee. As already pointed out, a receiver will be appointed, if the demands of justice require that the

(1) (1919) I.L.R. 47 Calo. 418.

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mortgagor should be deprived of possession. In this connection, it may be observed that the right of foreclosure possessed by an equitable mortgagee, so much emphasized by Mr. Duraiswami Ayyar in his argument, is a right enforceable only by means of an action for the recovery of land; he cannot take actual possession of the land mortgaged to him as he is not entitled to it [see Coote on Mortgage (eighth edition), Volume II, page 823] and, in this respect, he is exactly in the same position as a simple mortgagee. The right of an equitable mortgagee to get a receiver appointed in a mortgage suit having been extended to a simple mortgagee, neither of them having any right to possession of the properties, I think his admitted right to proceed against the income of the mortgaged property in the hands of the receiver for realizing his debt, when the security is insufficient for that purpose, may also be extended to the case of a simple mortgagee in India. In my opinion, the authorities cited by Mr. Duraiswami Ayyar, *In re Potts. Ex parte Taylor*(1), *Pearce, In re. The Official Receiver*(2) and *Gershon and Livy, In re*(3), do not support the principle on which he has based his contention.

For the above reasons, I order the receiver to deposit the sum of Rs. 6,218-14-3 in his hands to the credit of Civil Suit No. 229 of 1924; and I also order that the same amount may be paid over to the petitioner in these applications. The petitioner is entitled to his costs (taxed costs) from the estate of the insolvents.

Attorneys for seventh defendant: *King and Partridge.*

B.C.S.

(1) [1893] 1 Q.B. 648.

(2) [1919] 1 K.B. 354.

(3) [1915] 2 K.B. 527.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

IN RE U. GOPALA MENON (PETITIONER).*

1931,
February 10.

Legal Practitioners Act (XVIII of 1879), sec. 7 and r. 13 of rules framed under Act—Renewed certificate—Receipt from High Court of—Forbidding of practitioner to practise pending—District Judge's power as to.

A District Judge has no power to forbid a legal practitioner to practise pending the receipt from the High Court of his renewed certificate. Any orders in regard to non-renewal or suspension pending refusal to renew must proceed direct from the High Court.

PETITION praying that in the circumstances stated in the affidavit filed therewith the High Court may be pleased to permit the petitioner therein to practise as a pleader in the District Court of South Malabar and in other Courts to which his certificate of pleadership extended, pending final orders of the High Court on his application for the renewal of his certificate for the year 1931, and to cancel the order of the said District Court of South Malabar, dated 21st January 1931, and made in his Proceedings D. No. 134-A of 1931.

S. Duraiswami Ayyar for P. Govinda Menon for petitioner.

Advocate-General (A. Krishnaswami Ayyar) pursuant to notice issued by Court.

JUDGMENT.

This is a petition from a legal practitioner practising in the Court of the District Judge of South Malabar to set aside the order of the District Judge, dated 21st January 1931, forbidding him to practise pending the

* Civil Miscellaneous Petition No. 531 of 1931.

receipt from the High Court of his renewed certificate. The petitioner held a certificate for the year 1930 which was to hold good till December 31st 1930. Under section 7 of the Legal Practitioners Act,

“At the expiration of such period, the holder of the certificate, if he desires to continue to practise, shall, subject to any rules consistent with this Act which may, from time to time, be made by the High Court in this behalf, be entitled to have his certificate renewed by the Judge of the District Court, etc.”

The only rule framed in this connection is rule 13 which provides that pending the receipt of the renewed certificate practitioners may continue to practise subject to such precautions as to identification as the District Judge may think fit to prescribe. It is therefore clear that the High Court has not delegated to District Judges the power to suspend practitioners pending the receipt of their renewed certificates. Any orders in regard to non-renewal or suspension pending refusal to renew must proceed direct from the High Court. In the circumstances, the order of the learned District Judge cannot be supported and is cancelled.

With this view the learned Advocate-General agrees.

A.S.V.

GOPALA
MENON,
In re.

APPELLATE CIVIL.

Before Mr. Justice Sundaram Chetty.

NAGAMMAL (MINOR) AND ANOTHER (DEFENDANTS
1 AND 2), APPELLANTS,

v.

SANKARAPPA NAIDU *alias* MUTHALAGIRI NAIDU
AND SIX OTHERS (PLAINTIFF AND DEFENDANTS 3, 4,
6 TO 9), RESPONDENTS.*

1930,
November 7.

Hindu Law—Adoption—Son disqualified for inheritance and incompetent to perform ceremonies—Existence of, not a bar to an adoption by his father—Indian Evidence Act (I of 1872), sec. 32, cls. 3 and 7—Leprosy of son at time of adoption by his father—Evidence—Adoption deed executed by father and attested by son—Recital in, as to son's leprosy at the time—Admissibility.

The existence of a son, who is not only disqualified for inheritance but also incompetent to perform obsequial and other ceremonies is no bar to an adoption by his father.

Bharmappa v. Ujjangauda, (1921) I.L.R. 46 Bom. 455, not followed.

On an issue as to whether an adoption made by A, who had two sons at the time, was valid because those sons were at the time suffering from a virulent and incurable form of leprosy, held that a recital in the registered deed of adoption, executed by A at the time of the adoption and attested by the sons, that they were then suffering from such form of leprosy was admissible in evidence under clause 3 or clause 7 of section 32 of the Indian Evidence Act.

APPEAL against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 103 of 1925, preferred against the decree of the Court of the District Munsif of Dindigul in Original Suit No. 324 of 1921.

T. A. Ananta Ayyar for appellants.

A. C. Sampath Ayyangar for first respondent.

* Second Appeal No. 204 of 1928.

JUDGMENT.

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The dispute in the suit, out of which this second appeal has arisen, relates to the succession to the properties of one Muthukrishna Naidu, who died a minor possessed of the suit properties. Defendants 1 and 2 are the sisters. The plaintiff claims to be the nearest heir to the deceased, as he is the adopted son of Pappi Naidu, who was the brother of the deceased's paternal grandfather. Both the Courts below have held that the plaintiff was the adopted son of Pappi Naidu and that the adoption is also legal and valid. If these findings are correct, there is no doubt that the plaintiff is entitled to succeed to the properties in question in preference to defendants 1 and 2.

The only question argued in this second appeal relates to the validity of the plaintiff's adoption. The circumstances in which the plaintiff was taken in adoption have been set forth in the registered deed of adoption, Exhibit A, executed by Pappi Naidu. It is recited in that deed that the adoption was necessitated by reason of his two aurasa sons being lepers from birth. It is stated that, as both the natural-born sons were suffering from leprosy for over 10 or 12 years and as he despaired of having any lineal descendant even from his sons to perpetuate the lineage, he had recourse to adoption. That deed is attested by both the sons. It is argued that the recital in Exhibit A is not legally admissible in evidence in the present case. The fact that the two sons of Pappi Naidu were suffering from a virulent and incurable form of leprosy at the time of the aforesaid adoption is a relevant fact for deciding in this case whether that adoption is valid or not. It seems to me that section 32, clause 7 of the Indian Evidence Act may apply. That clause makes a statement contained in any deed, will or other document

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which relates to any such transaction as is mentioned in section 13, clause (a), of the Act admissible in evidence. Exhibit A relates to the transaction of plaintiff's adoption whereby his alleged right has been created. The statement contained in Exhibit A as the basic ground for the adoption is therefore admissible in evidence. Moreover, the two sons of Pappi Naidu having attested that deed, they may be deemed to have acquiesced in the truth of that statement which is against their pecuniary interest. That being so, it may even be admissible under clause 3 of section 32. There is, however, other evidence also in proof of the leprosy of the sons of Pappi Naidu. It is clear from Exhibits D and E, the extracts from the death register relating to those two sons, that they died of leprosy. P.W. 2 also says that they were suffering from ulcerous leprosy and had no chance of getting any issue. The finding of the lower appellate Court that the two sons of Pappi Naidu were suffering from an incurable form of leprosy seems to me to be unassailable, and it must be accepted as correct.

There is no doubt that these two sons were disqualified for inheritance on account of their having been afflicted with such a virulent form of leprosy. According to the text of Manu,

"Eunuchs and out-castes, persons born blind or deaf, the dumb and such as have lost the use of a limb, are excluded from heritage."

To this enumeration, Yajnavalkya adds "a person afflicted with an incurable disease" (*vide* paragraph 592 of Mayne's Hindu Law, IX Edition). It is also thus laid down in the Mitakshara:—

"An impotent person or outcaste and his sons, one lame, a mad man, an idiot, a blind man and person afflicted with an incurable disease and others similarly disqualified, must be maintained, excluding them, however, from participation."

(*vide* section X, verse 1 of Mitakshara, at page 53 of Hindu Law books on Inheritance by Setlur).

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By a man destitute of male issue, that is, by one to whom no son may have been born or whose son may have died, an adoption can be made. It is clear that only in the absence of a son, grandson or great-grandson an adoption can be made. The point that arises for decision in this case is, whether the existence of the aforesaid two sons of Pappi Naidu, who were excluded from inheritance on account of virulent leprosy, was a legal bar to his making an adoption. The question is not free from difficulty. In support of the contention on behalf of the plaintiff (first respondent), his learned Advocate, Mr. Sampath Ayyangar, referred me to several ancient texts of Hindu Law and also to the opinions of the modern text-writers on Hindu Law.

In order to understand the reason for the rule that a sonless man may adopt, we have to see what the real purpose or purposes of adoption are. On this subject, Devanda Bhatta in his treatise "Dattaka Chandrika," which is a recognized authority in the Dravida school of Hindu Law, quotes the texts of Manu and Atri as authorities for stating the reasons for an adoption. Manu says:

"A son of any description must be anxiously adopted by a man destitute of male issue, for the sake of funeral cake, water and solemn rites and for the celebrity of his name."

Atri says:

"By a man destitute of male issue only must a substitute for a son of some one description always be anxiously made for the sake of funeral cake, water and solemn rites."

(Dattaka Chandrika in Setlur's book, page 423). In Dattaka Mimamsa, the same prominence is given to the obsequial ceremonies which would fail if no adoption is made. In section 1, verse 42, relying on the text of Manu, it is stated that an adoption is necessary; for,

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otherwise, the obsequies would fail. The obsequies are stated to be funeral rites consisting in presenting oblations of food and water and so forth (*vide* Dattaka Mimamsa in Setlur's book, page 361 and also verses 54 to 56 at page 363). In the aforesaid treatise, Nanda Pandita says, in section 2, verse 62, that participation in the obsequies and estate has been declared to be the result of filial relation. As to the presentation of funeral oblations, disqualified heirs like the impotent person and the rest who merely bore the semblance of being a son would be of no use (page 374 of Setlur's book). The text of Manu, namely,

"A given son must never claim the gotra and estate of the natural father; the funeral cake follows the gotra and estate; but of him who has given away his son the obsequies fail." is referred to in section 3, verse 25 of Dattaka Chandrika (page 440 of Setlur's book). In Colebrooke's Digest, Volume II, page 417, the following text of Manu is quoted, namely,

"These eleven sons (the son of the wife and the rest is enumerated) are allowed by wise legislators to be substitutes in order for the sons of the body, for the sake of preventing a failure of obsequies."

From these authorities, there can be no room to doubt that the main purpose or object of adoption is to secure the due performance of obsequial ceremonies and oblations of food and water given in sraddhas and such other ceremonies for the benefit of the adopter's soul. The perpetuation of lineage is also another object for making an adoption.

If a son is afflicted with a virulent and loathsome form of ulcerous leprosy, and, on that account, he is unfit to perform the funeral rites and such other ceremonies for his father, can it be deemed that the existence of such a son is bar to an adoption? Several texts have been relied on by Mr. Sampath Ayyangar, for the first

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respondent, in support of the position that a leper of the aforesaid type is not qualified to perform the obsequies and sraddhas, etc. In Yajnavalkya Samhita, verses 222 to 224, of the persons who are censured, i.e., considered unqualified to perform the sraddh, is mentioned a diseased person suffering from leprosy (*vide* page 37 of the Dharma Sastras translated by Dutt). In Yama Samhita (verses 29 to 31), a person suffering from leprosy is stated to be one of the persons who should be carefully shunned at a sraddha (*vide* page 280 of the same book). In Vyavahara Mayukha, relying on Sanka and Likhita, it is stated that the heritable right of him who has been formally degraded, and his competence to offer oblations of food and libations of water, are extinct (page 116 of Setlur's book). It is observed by Mr. Ghose, in his Hindu Law (third edition) at page 59, that in ancient times the competence to perform sraddha corresponded with the right to take the inheritance and the rule was that he who takes the inheritance gives the pinda. Among the persons competent to perform the sraddha, a disqualified heir, such as one suffering from leprosy, is not mentioned. There is no doubt, that, so far as the funeral ceremonies and sraddhas are concerned, leprosy of the aforesaid type is a disqualification, and that therefore the existence of such a son cannot serve one of the main purposes for which an adoption is prescribed under the Hindu Law. If for the sake of those ceremonies adoption is necessary, a son incapable of performing those ceremonies can only bear the semblance of a son whose existence can be ignored and an adoption made. It is argued that such a disqualified son may be eligible for marriage (Dr. Jolly's Hindu Law, page 280), but, though participation in the marriage ceremonies may be permissible for such a disqualified heir, his eligibility to perform his father's obsequial ceremonies and

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sraddhas stands on a different footing and is negatived by several texts bearing on ancient Hindu Law.

That one who is suffering from a virulent form of leprosy is disqualified for performing even the ceremonies of adoption has been held in judicial decisions. That is the dictum of the Privy Council in the case of *Bhagaban Ramanuj Das v. Ram. Praparna Ramanuj Das*(1); [vide also the decision in *Sukumari Bewa v. Ananta Malia*(2)]. If the disease of leprosy is virulent and inextinguishable, it undoubtedly disqualifies him from participating in the adoption ceremonies. In the case of a Sudra, as no religious ceremonies are necessary for making an adoption, it has been held that even a leper may adopt.

The opinions of almost all the modern text-writers on Hindu Law appear to be that the father of a disqualified heir can make an adoption. In the Hindu Law of Adoption by Sarkar (second edition) at page 196, the learned author, after referring to a text of Yajnavalkya, relies on the opinion of Nanda Pandita in respect of that passage. It is as follows:—

“It declares that the capacity to present oblations and to participate in heritage constitutes sonship: for, if that be wanting, the mere existence of filial relationship as of an impotent or the like disqualified son does not constitute it.”

The author says that the disqualified sons can neither render spiritual service nor inherit the estate; in fact, they do not possess the legal character of a son. Therefore a man having such a son is deemed in contemplation of law to be sonless for the purpose of adoption. In the opinion of the said author, the existence of a disqualified son is no bar to an adoption by the father. In his treatise on Hindu Law (fifth

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edition), the same author reiterates that opinion at page 182. He says that the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit and a child who is destitute of these capacities has not the status of a son in the eye of the Hindu Law and the existence of such a son is no bar to an adoption. It is observed by Sir Thomas Strange in his Hindu Law, Volume 1, at page 77, thus:

“The right of inheriting and that of performing for the ancestor his funeral obsequies being correlative, if, by any of the legal disabilities, as by degradation from caste, by insanity, by incurable disease or otherwise, living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches.”

According to the opinion of Mr. Ghose in his book on Hindu Law (third edition), Volume 1, at page 669, a man having a disqualified son or a son who is a *patita* on account of heinous offence or change of religion can adopt, and, as long as a man has no son capable of inheriting his property, there is no reason why he should not be able to adopt. The learned author refers to the observations in *Dattaka Mimamsa*, section 2, verse 62, as supporting this view. The following passage is found at page 104 in Trevelyan's Hindu Law (second edition):—

“If the son be permanently incapable of performing religious rites by reason of congenital blindness, deafness, dumbness, impotency, lameness, virulent leprosy, insanity, idiocy or from any other reason which involves an incapacity to inherit, he may be treated for this purpose as non-existent.”

In his Hindu Code (third edition), Sir H. S. Gour has expressed his opinion, at page 357, as follows:

“Since the primary purpose of adoption, as now understood, is to provide for the adopter's spiritual advancement by

(1) (1894) I.L.R. 22 Calo. 843, 858 (P.C.). (2) (1900) I.L.R. 28 Calo. 168.

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having someone legally qualified to perform his obsequies, and since such qualification must be judged by Hindu Law which disqualifies the son who is impotent, an idiot or insane, blind, deaf, dumb, lame, congenitally suffering from leprosy or from any infirmity or disease which disqualifies him for inheritance, or one who has become a convert to an alien faith or has turned a hermit, sanyasi, or fakir, and thereby snapped the natural tie by which he was bound to his father, the latter may make an adoption as such disqualified son is as good as civilly dead to him."

In West and Buhler's Hindu Law, (third edition), Volume 1—11, reference is made to Sir Thomas Strange's opinion that in such cases adoption was competent to the father who could not derive spiritual benefit from the incapable son. But, so far as Bombay is concerned, it is stated that, by the customary law prevailing in that Presidency, the insanity of a son by birth is not generally a valid cause for an adoption. The learned authors further say that it is consistent with this that the blindness or dumbness of a son should not justify an adoption (see pages 907 and 908). That being so, it is only so far as Bombay is concerned, we must take it that the customary law overrides the general rule of Hindu Law, which, however, should apply to the other parts of India. In Bhattacharya's Hindu Law (third edition), Volume 1, at page 342, it is stated that the criterion of sonship as given by Nanda Pandita in one place may throw some light on this subject. The learned author quotes the opinions of Nanda Pandita and of Sir Thomas Strange and leaves the matter there, without expressing any opinion of his own, after stating that the question whether the father of a disqualified son can adopt or not is one about which there is no decision one way or the other. Some reliance is placed by the learned Advocate for the

appellants on one of the special rules relating to construction of texts mentioned in this book. Rule 10 is—

"A clause in a text which seems like a reason for the rule of law enjoined by it has, generally speaking, no significance whatever."

(*vide* page 135). I fail to see how this rule of construction has any application in the present case, nor has he shown with any definiteness the applicability of this rule to any particular text relied on by the other side.

Much reliance has been placed by the learned Advocate for the appellants on the decision in *Bharmappa v. Ujjangauda*(1), wherein a similar question arose for determination. It was a case of dumbness, congenital and incurable. A person affected by such dumbness was held to be disqualified for inheritance according to the Hindu Law prevailing in the Bombay Presidency. On the further question as to the validity of an adoption made during the existence of such a dumb grandson, it has been held that the adopter cannot be deemed to be sonless so as to make the adoption made by him during the lifetime of such a grandson valid. At page 458, SHAH J. observes as follows :

"But it is urged that the existence of a grandson, disqualified as in the present case, is no bar to an adoption by the grandfather. There is no decided case on this point: and, so far as I have been able to see, there is nothing in the *Mitakshara* or the *Vyavahara Mayukha* to lend support to this view. The basic principle of adoption, as I understand it to have been laid by the *Smriti* writers, does not support the contention. The opinions expressed by writers on Hindu Law are conflicting; and, treating it as a point of first impression, at least so far as this Presidency is concerned, I have come to the conclusion that the fact of the grandson suffering from dumbness by birth does not render the adoption valid which

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(1) (1921) I.L.R. 46 Bom. 455.

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would be otherwise invalid on account of its having been made during his lifetime."

The learned Judge refers to the hardship and obsolete nature of some of the grounds of exclusion from inheritance and says that each defect must be considered on its merits. Following the decision in *Vallabhram Shivnarayan v. Bai Hariganga*(1), he held that a person born dumb was incapable of inheriting according to the Hindu Law prevailing in Bombay. Referring to *Vyavahara Mayukha*, the learned Judge says that there is no indication in the chapter relating to adoption that a son subject to any defect which would exclude him from inheritance was no son at all. The learned Judge further says that the Dattaka Mimamsa does not in his opinion afford any indication to the contrary. As to the passage in section 2, verse 62 in the Dattaka Mimamsa, which I have already referred to, the learned Judge does not accept the interpretation placed upon it by some writers on Hindu Law. That is one of the passages found in the chapter relating to the subject "Who is to be adopted?" It seems to me that the qualification or eligibility of the boy for adoption is a pertinent matter for consideration in that chapter. If in the aforesaid verse it is stated that impotent persons and the rest merely bear the semblance of being a son and would be of no use, it amounts to saying that such a person does not fulfil the capacity of sonship. Such a person is not only ineligible for adoption, but his father can be deemed to be sonless for the purpose of making an adoption. With great respect, I would state that the opinion of Nanda Pandita so expressed does not lose its value by the statement of it in the chapter on the subject "Who is to be adopted?", instead of in the first section where he deals with the

(1) (1887) 4 Bom. H.C.B. (A.C.J.) 135.

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question as to who can adopt. Moreover, the main purpose of adoption according to authoritative texts on Hindu Law being the due performance of obsequial ceremonies and the oblations of food and water given in sraddhas and such other rites for the benefit of the adopter's soul and the perpetuation of his lineage, if the existence of a son incompetent to perform such religious ceremonies and sacrifices is treated as a bar to an adoption, one of the aforesaid main purposes which necessitate an adoption becomes frustrated. This aspect does not seem to have been given due weight in the reasoning adopted by the learned Judge in that decision. There is almost a consensus of opinion among the modern text-writers on this question, as I have already pointed out. Some of the persons who are excluded from inheritance as disqualified heirs may be competent to perform obsequial and other ceremonies. Perhaps the existence of such a son may be held to be a bar to an adoption; but, I am clear that the existence of a son, who is not only disqualified for inheritance but also incompetent to perform the aforesaid ceremonies, should be deemed to bear only the semblance of a son, and his father can be very well treated as sonless for the purpose of enabling him to make an adoption. With due deference, I am unable to follow the decision of the Bombay High Court and apply it to the present case.

For all the foregoing reasons, I hold that the plaintiff's adoption is legal and valid.

In the result, the second appeal fails and is dismissed with costs.

The court fee payable to Government on the memorandum of appeal should be paid by the appellants.

A.S.V.

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Cornish.

1930,
November
20.

IN RE RAMAN KORAVAN AND TWO OTHERS (ACCUSED),
APPELLANTS.*

Indian Penal Code (XLV of 1860), sec. 395—Robbery—Trial by jury—Proper direction—Violence used in course of committing theft or for the purpose of committing theft—Omission of—Whether would make charge bad and amount to misdirection—Charge of dacoity—Jury return verdict of “guilty” against less than five—Duty of Court.

In explaining to a jury the constituent elements of the offence of robbery, it is essential that the jury should be directed that theft only becomes robbery, when it is shown that, in the course of committing theft and for the purpose of committing theft, violence is used; and the omission to point out that very important essential would make the charge bad on that point and would amount to a misdirection.

Where, at a Sessions trial, the jury have before them a charge of dacoity against named persons, and they return a verdict of “guilty” against some of them and a verdict of “not guilty” against the others, and the number of those found “guilty” falls below five, the jury should be told that they must have due regard to the fact that they have acquitted a certain number of persons reducing the number to below five and that before convicting any number short of five they must be satisfied that the accused found “guilty” were acting conjointly with persons not charged in the case and in number sufficient to make at least five including the accused found “guilty.”

APPEAL against the order of the Court of the Additional Sessions Judge of Coimbatore in Case No. 79 of the Calendar for 1930 and Reference under section 307 of the Code of Criminal Procedure, 1898, by the Additional Sessions Judge of Coimbatore in the same case.

* Criminal Appeal No. 470 of 1930 and Reference No. 6 of 1930.

No one appeared for the appellants.

K. N. Ganpati for Public Prosecutor (L. H. Bewes) for the Crown.

The JUDGMENT of the Court was delivered by

BEASLEY C.J.—In the Court below, seven accused BEASLEY C.J. were charged with the offence of dacoity, and another, the sixth accused, was charged with dishonestly receiving stolen property under section 412, Indian Penal Code. The jury convicted the first, second, sixth and seventh accused; the first, second and seventh accused of dacoity and the sixth of receiving stolen property. The third, fourth, fifth and eighth accused were found “not guilty”. The learned Sessions Judge accepted the verdict of the jury in regard to the eighth accused and acquitted him. In respect of the conviction of the first, second and seventh accused of dacoity, he sentenced the first and second accused to five years’ rigorous imprisonment each and the seventh accused to four years’ rigorous imprisonment. The jury having acquitted the third, fourth and fifth accused of the offence of dacoity, the learned Sessions Judge was dissatisfied with that acquittal and has referred the case to the High Court on the ground that the verdict of acquittal of those accused is perverse and that they should have convicted them of the offence of dacoity with which they were charged.

The occurrence took place on the 27th March last. On that day, P.Ws. 1 to 6 were returning from a shandy at Erode in the cart of P.W. 7. There were four carts going along the road and the last cart of the four was the object of attack by some persons after the carts had reached a place about twelve miles away from Erode. According to the prosecution case, about ten persons attacked the carts, threw stones, beat the bandy-man, P.W. 7, and some of the prosecution witnesses. They

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then took some purses containing money, some cloth bundles, and a bag of paddy from the cart. They then made off because the occupants of the other three carts came to the spot. The case against the accused in the Court below rested on the evidence of identification of the accused as being the persons who were present, on that of the approver, P.W. 12, who gave evidence with regard to the offence and his association with some of the accused, and on the evidence that the first, the second and the seventh accused were shown to have been in possession of property proved to have been stolen under the following circumstances. The houses of the first and the second accused were searched, and in their houses were found articles of stolen property, and with regard to the seventh accused he gave information about where some of the stolen property lay hidden, and, as a result of the information given, articles identified as the articles which had been stolen were there found. There was plenty of evidence to connect the other accused in the case with the offence of dacoity, but, as before-mentioned, the jury acquitted them and the learned Sessions Judge is of the opinion that they did so, because the evidence against them was mainly that of an approver, and they had not been shown to have been in possession of recently stolen property as the first, the second and the seventh accused had, and that the jury were prepared to convict of the offence only those persons who were actually found to be in possession of stolen property or who were able to show the police the place where the stolen property lay hidden. He is of the opinion that there is plenty of evidence in the case which clearly connects the other accused with the offence of dacoity and that is how the case comes before us. One difficulty of course in the way of the learned Sessions Judge was that the jury only found

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three of the accused guilty of dacoity—and this was not a case where the charge against the accused was of having committed dacoity with named persons and other unknown persons—and the effect of the jury's verdict without any explanation was that only three persons had been present and had taken part in a theft during the course of which violence was used, and therefore there was this difficulty that if the acquittal of the other four was correct, then clearly these three convicted persons could not be convicted of dacoity, because there is no proof that they had committed the offence of theft with violence with two or more persons, which would bring up the number to five required by the section. However, we are not here at present concerned with that point but with the charge to the jury of the learned Sessions Judge and it has been very fairly pointed out to us by the learned Public Prosecutor that there is a defect in his charge to the jury where he sets out the law on dacoity, namely, its definition. He says as follows:—“Dacoity is robbery conjointly committed by five or more persons; robbery is an aggravated form of theft; theft becomes robbery if force is used in committing the theft or in carrying away the property obtained by theft”. Then he goes on to define what theft is. The learned Sessions Judge does not point out to the jury that it is necessary not only that force should be used during the commission of the theft but that it must be used for the purpose of committing the theft. As has been pointed out by this Court and by the Calcutta High Court, it is essential that the jury should be directed that theft only becomes robbery when it is shown that in the course of committing theft and for the purpose of committing theft, violence is used, and, in my opinion, the omission of the learned Sessions Judge to point out that very important essential makes his charge

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to the jury bad on that point and that it amounts to a misdirection. This question was considered by a Bench of this Court of which I was a member in Criminal Appeals Nos. 169 and 183 of 1930. In that case, the Assistant Sessions Judge in his charge to the jury defined the offence of robbery as follows:—"When in committing the theft or in carrying away property, a person voluntarily causes hurt or wrongful restraint, the offence amounts to robbery"; and we held that that amounted to a misdirection, because on the authority of this High Court and the Calcutta High Court the omission to state that the violence must be used for the purpose of committing the theft was one which amounted to a misdirection. That is what the learned Sessions Judge has done in this case. The other cases upon the point are *Karuppa Gounden v. Emperor*(1), a decision of SPENCER and NAPIER JJ., and also *Otaruddi Manjhi v. Kafiluddi Manjhi*(2) and *King-Emperor v. Mathura Thakur*(3). As there is a misdirection in this case with regard to what constitutes the offence of dacoity, clearly the accused cannot be convicted of that offence. There is clear evidence that they were guilty however of the offence of theft. The offence of theft was quite correctly stated to the jury and there is ample evidence to show that the three convicted accused persons were guilty of that offence. They have filed jail appeals, and therefore it is necessary to say whether there was any misdirection by the learned Sessions Judge with regard to the facts of the case. There was not. There is clear evidence that the first accused's house on being searched contained a *saree* identified to be one of the stolen articles, that the second accused's house on being searched was found

(1) (1916) 88 I.C. 780.

(2) (1900) 5 C.W.N. 372.

(3) (1901) 6 C.W.N. 72, 79.

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to have in it M.O. 80, another article proved to have been stolen, and that the seventh accused pointed out a place where were discovered several articles identified as stolen property. Under these circumstances there was no misdirection by the learned Sessions Judge with regard to the evidence against those persons and there was ample evidence upon which they could be convicted of theft. As it was, they were on a misdirection convicted of dacoity. But it is open to us to convict them here of the offence of theft, and there being ample evidence with regard to the commission of that offence and no misdirection by the learned Sessions Judge upon the point, there must be substituted for the conviction of dacoity a conviction of the offence of simple theft. The theft was accompanied by some amount of violence and therefore we see no reason for treating this as anything but a serious offence, and under these circumstances they must be sentenced in respect of the offence of theft to three years' rigorous imprisonment. The disposal of the question of the misdirection as regards the law relating to the offence of dacoity makes it unnecessary for us to consider any further the reference to us by the learned Sessions Judge. If there had been a proper direction with regard to dacoity and we had been able to find that the verdict of the jury with regard to the other accused persons was perverse, the verdict of acquittal with regard to those persons would have to be set aside; but as the direction was wrong in law on the question of dacoity, we cannot go into the further question as to whether or not the acquittal of the three accused was or was not correct. I think I ought to mention one matter, because it is a matter which frequently arises when a jury have before them a charge of dacoity, viz., in cases where the charge is as against named persons, the jury often return a verdict acquitting some of them and convicting the

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others and the number of those convicted falls below five. In such cases, it should be pointed out to the jury what the effect of that verdict is. For instance, suppose nine persons are charged with the offence of dacoity and five of them are acquitted by the jury and four convicted. The number of those convicted being four and not five, it is essential that the attention of the jury should be directed to the effect of that verdict. As five persons have not been convicted of dacoity, unless the jury are of the opinion that in addition to the five acquitted there were other persons concerned not before the Court, clearly the verdict of conviction of the four persons of the offence cannot possibly stand. In this case, the accused were not charged with having committed dacoity together with unknown persons; had they been so, the difficulty would not have arisen, because it was open to the jury to find that the three persons whom they did convict were acting conjointly with two or more persons other than the named persons. But that was not the charge here, and it is very important when such a situation as this arises that the jury should be told when they do return such a verdict that they must have due regard to the fact that they have acquitted a certain number of persons reducing the number to below five and that they must be satisfied before convicting any number short of five that they were acting conjointly with persons not charged in the case.

The result is that the conviction of the first, the second and the seventh accused of the offence of dacoity is altered to a conviction of theft and that the sentence passed upon them is reduced to one of three years' rigorous imprisonment each. The third, the fourth, and the fifth accused must be acquitted and are directed to be set at liberty.

B.O.S.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

S. SENDIAPPA NADAR AND OTHERS (ACCUSED), PETITIONERS, 1930,
December 2.

v.

THE PRESIDENT, DISTRICT BOARD, MADURA
(COMPLAINANT), RESPONDENT.*

*Madras Local Boards Act (XIV of 1920), ss. 42 (b) and 159—
Removal of encroachment by owner of premises—Discretion-
ary nature of duty of President of Union Board under
sec. 159—President electing to allow encroachment to
continue—Whether enables President, District Board, to
act under sec. 42 (b).*

Under section 159 of the Madras Local Boards Act (XIV of 1920) the only duty imposed on the President of a Union Board is to exercise his discretion as to whether the owner of any premises should or should not be required to remove an encroachment; and, if he elect to allow an encroachment to continue, it cannot be said he has made default in performing his duty, so as to enable the President of the District Board to act under section 42 (b) of the Act and assume the function of the Union Board.

PETITIONS under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second-class Magistrate of Periyakulam, dated 21st June 1930, and made respectively in Criminal Cases Nos. 509, 511, 512, 514, 517, 519, 525 and 526 of 1930.

K. V. Sesha Ayyangar and T. Ramachandra Rao for petitioners in all the cases.

A. Srirangachari for respondent in all the cases.

* Criminal Revision Cases Nos. 445, 465 to 468, 520 and 521 of 1930.

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PRESIDENT,
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Public Prosecutor (L. H. Bewes) for the Crown in Criminal Revision Cases Nos. 445 and 465 to 468 of 1930.

JUDGMENT.

Criminal Revision Case No. 445 of 1930.

The petitioner seeks to revise an order passed in the course of a summons case by the Sub-Magistrate, Periyakulam. There is no provision in the Code of Criminal Procedure for writing orders in the course of a case, and the Sub-Magistrate would have been well advised to have deferred all writing till after the conclusion of the trial. If the petitioner felt aggrieved, his proper course was to have moved in revision against the issue of summons. But speaking for myself, I should not have thought it advisable for this Court to intervene at that stage. Where a remedy ultimately lies by way of appeal, it is unnecessary for the High Court to move in revision. And if it is argued that the lower Court is clearly acting without jurisdiction, then the short answer is that the party need not concern himself at all about the trial, but can simply appeal if the matter comes to judgment. If, on the other hand, it is not so clear, and it is a moot point whether or not the lower Court has jurisdiction, then that matter should be threshed out fully in both Courts below before it is brought, if necessary, to the High Court. Therefore, if this petition had come before me for admission, I should have dismissed it out of hand. I have only considered it because its admission was allowed, and the petitioner after incurring the cost of printing has brought the matter up ready for hearing.

The President of the District Board, Madura, complains against the petitioner for constructing a

building on a road vested in the Board. No section is mentioned. Attached to the complaint was a notice sent by the President of the District Board to the petitioner and apparently he is prosecuted for not obeying that notice by removing the encroachment, in which case it would be a complaint under section 220 of the Madras Local Boards Act.

Apparently the road in question is vested in a Union under section 60. The statement in the complaint that the road vested in the District Board seems to have been a deliberate misstatement of fact, because when the petitioner pleaded that the prosecution was without jurisdiction, the President of the District Board disclosed a cause of action of which he must have been aware when he launched the prosecution, but which he chose entirely to conceal. It appears that the Union was requested to move in the matter, and declined. Thereupon the President of the District Board acted under section 42 (b) and assumed the function of the Union Board. This may be done under section 41 if the Board has made default in performing any duty imposed upon it by statute.

The President of a Local Board may require the owner of any premises to remove an obstruction under section 159, but the only duty imposed upon him under that section is to exercise his discretion in the matter. The Act does not lay down that he must remove any encroachment; and if, as in this case, he elect not to serve a notice, it cannot be said that he has made default in performing his duty. Matters of discretion are never considered to be mandatory, *cf.*, Volume 10, Halsbury's Laws of England, paragraph 170.

It must be found therefore that the President of the District Board had no authority to serve a notice under section 159 in respect of a road not vested in that

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Board, or to prosecute for the failure to comply with that notice.

The petition is allowed and the complaint dismissed.

A similar order is passed in Criminal Revision Cases Nos. 465, 466, 467, 468, 520 and 521 of 1930.

B.C.S.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1930,
December 19.

GOPAL NAICK AND SIX OTHERS (ACCUSED NOS. 1 TO 5,
7 AND 8), PETITIONERS,

v.

ALAGIRISAMI NAICK (COMPLAINANT), RESPONDENT.*

*Code of Criminal Procedure (V of 1898), ss. 156 and 202—
Police receiving information in complaint forwarded for
enquiry under sec. 202—Whether can investigate under sec.
156.*

The police on receiving information in a complaint forwarded for inquiry under section 202 of the Code of Criminal Procedure (V of 1898) can investigate under section 156 of the Code.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Subdivisional Magistrate, Koilpatti, dated 6th March 1930, and passed in Criminal Appeal No. 6 of 1930 preferred against the Judgment of the Court of the Second-class Magistrate of Sankaranainarkoil in Criminal Case No. 596 of 1929.

The complainant (respondent) presented a complaint to the Subdivisional Magistrate of Koilpatti stating

* Criminal Revision Case No. 367 of 1930.

that the petitioners (accused) along with certain others trespassed into his house at Vizayarangapuram, on the night of 27th February 1929, in order to force him to execute a document giving a share of his property to a person alleged to be the son of his first wife whom he had divorced within a few months of the marriage, and that they assaulted him and confined him in his house the whole night. The Subdivisional Magistrate forwarded it to the police for investigation. The police submitted their case to the Subdivisional Magistrate, and he transferred it to the Second-class Magistrate, Sankaranainarkoil, for disposal. The police thereafter filed a charge-sheet against the accused charging them with offences under sections 448, 342, 323 and 352, Indian Penal Code, in the Court of the Second-class Magistrate, Sankaranainarkoil. All the accused were convicted under sections 448 and 341 of the Code and on appeal to the Court of the Subdivisional Magistrate, the convictions in respect of the petitioners were confirmed, and they preferred the present Criminal Revision Petition to the High Court.

K. S. Jayarama Ayyar and G. Gopalaswami for petitioners.

T. Krishnamachari for respondent.

Parakat Govinda Menon for Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

The first point is that the Public Prosecutor having withdrawn from the case, the accused must be acquitted. It does not appear that there was formal withdrawal from the prosecution under section 494. The Prosecuting Inspector simply dropped out and let a Vakil carry on the prosecution in what was practically a private complaint.

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The second point is whether the police on receiving information in a complaint forwarded under section 202 can investigate under section 156. The police need do no more than report; but if they choose to investigate, it is not illegal.

If *Emperor v. Haji Nur Mahomed*(1) is to the contrary, I respectfully disagree. In *Arula Kotiah, In re*(2), it was held that a Magistrate having taken cognizance of a complaint is bound, if he decides to delay process under section 202 to call for a report and cannot act under section 156 (3); but this ruling does not affect the powers of the police. It would be a strange state of the law if a dangerous murderer was at large and the police could not arrest him because some misguided person had already lodged a complaint so suspiciously false that the Magistrate had called for a report. *King-Emperor v. Bhola Bhagat*(3) is to the same effect.

The petition is dismissed.

B.O.S.

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- (1) (1928) I.L.R. 53 Bom. 339. (2) (1911) 12 Cr.L.J. 463.
(3) (1923) I.L.R. 2 Pat. 379.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice
Sundaram Chetty and Mr. Justice Stone.

1931,
January 8.

IN RE AN ADVOCATE.*

Indian Evidence Act (I of 1872), sec. 41—Judgment in rem—Judgment of an Insolvency Court admitting proof of an alleged debt, if a—“Legal character”—Meaning of—Indian Bar Councils Act (XXXVIII of 1926), sec. 12—Proceedings under—Genuineness of such debt, matter in issue—Court and the Tribunal of the Bar Council—If precluded from investigating same.

The judgment of a Court exercising Insolvency Jurisdiction, admitting proof of an alleged debt of a creditor and declaring him to be a creditor in the insolvency, is not a judgment *in rem* since it neither confers upon nor takes away from him any “legal character”, nor declares him “to be entitled to any specific thing, not as against any specified person but absolutely”, within the meaning of section 41 of the Indian Evidence Act.

In proceedings under section 12 of the Indian Bar Councils Act, on a complaint against an Advocate for certain alleged acts of professional misconduct, when the genuineness or otherwise of such a debt was a matter in issue, *held* that neither the Tribunal of the Bar Council nor the Court was precluded from investigating the same.

CASE referred to the High Court by the Bar Council under section 12 (3) of the Indian Bar Councils Act.

The facts of the case relevant to the report are as follows:—

The conduct of V., an Advocate, was the subject of enquiry by the Bar Council. A near relation of his, one L. V. N. Sastri, had filed a suit, Original Suit No. 288 of 1922 on the file of the District Munsif's Court

* Referred Case No. 1 of 1929.

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of Cocanada, against two persons, Kumaraswami Rao and P. Subba Rao, as endorsee of a promissory note alleged to have been executed by Kumaraswami Rao in favour of P. Subba Rao and endorsed over by the latter, which promissory note was stated to have been lost subsequently. He obtained an *ex parte* decree against Kumaraswami Rao and had the same transferred to the Court of Small Causes, Madras, for execution, obtained a warrant for his arrest and arrested him. Kumaraswami Rao was, thereafter, adjudicated an insolvent. L. V. N. Sastri filed an affidavit of proof of his claim before the Official Assignee, who rejected his claim as false. On appeal from the said order, KUMARASWAMI SASTRI J. upheld the Official Assignee's order. Against this, L. V. N. Sastri preferred an appeal, Original Side Appeal No. 25 of 1929, which was decided by RAMESAM and CORNISH JJ. In this appeal, L. V. N. Sastri's claim, based on the *ex parte* decree and also on the merits, was allowed. In proceedings against V., an Advocate, on notice under section 12 of the Indian Bar Councils Act, one of the charges against the Advocate was that he fraudulently conspired with L. V. N. Sastri to obtain an *ex parte* decree and to further prosecute the same, knowing the claim to be false, in order to secure some ulterior purpose. The question that arose for decision was whether, in proceedings under section 12 of the Indian Bar Councils Act, the findings, in Original Side Appeal No. 25 of 1929 declaring that L. V. N. Sastri's debt was proved, could be reopened for the purpose of finding out whether the Advocate was guilty of professional misconduct.

S. Duraiswami Ayyar for Advocate-General (A. Krishnaswami Ayyar) in support of the notice.

T. M. Krishnaswami Ayyar, M. Venkatasubbiah and G. A. Pais for the Advocate.

JUDGMENT.

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BEASLEY C.J.—[His Lordship, after stating the facts, proceeded as follows:—]

This brings me now to the consideration of the important and difficult question of law raised by Mr. T. M. Krishnaswami Ayyar in the course of his very able argument. That question is whether the judgment of the appellate Court must be deemed to be a judgment *in rem* within the meaning of section 41 of the Indian Evidence Act. If it is, it is conclusive and any other Court is precluded from reopening the same question. It is argued by Mr. T. M. Krishnaswami Ayyar that the finding of the appellate Court, that the debt claimed by L. V. N. Sastri as due to him from Kumaraswami Rao is true, is a conclusive finding under section 41 of the Indian Evidence Act. What has to be decided is whether the judgment of the appellate Court confers upon or takes away from L. V. N. Sastri any "legal character". The decision of what is a "legal character" within the meaning of that section is not free from difficulty. Mr. T. M. Krishnaswami Ayyar contends that, in insolvency proceedings, a declaration that a person is a creditor in the insolvency confers upon him a "legal character". He draws a distinction between a person who is a creditor of an ordinary debtor, not an insolvent, and the creditor of an insolvent and, although he does not admit that the former does not possess a "legal character", he contends that the latter certainly does, because, directly the claims of a creditor in insolvency are recognized, the Insolvency Act confers upon him special rights and places upon him certain liabilities which he did not formerly possess or have placed upon him and that he thus becomes clothed with a "legal character". He has, of course, to establish that position for his client because his client was not a party to the

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insolvency proceedings. He has, therefore, to contend that the appellate judgment is a judgment *in rem*. The term "legal character" is not defined in the Evidence Act nor in any other Act and we are therefore driven to the consideration of cases where it has been held that a person possesses a "legal character" or status. One of these is *Ramakrishna v. Narayana*(1). That was a case under section 42 of the Specific Relief Act. Under that section only a person entitled to any "legal character" or to "any right to property" can institute a suit for a declaratory relief in respect of his title to such legal character or right to property and on page 82 the Division Bench states :

"We take it that a man's 'legal character' is the same thing as a man's status. 'A man's status or "legal character" is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general.' According to Holland, the chief varieties of status among natural persons may be referred to the following causes:— (1) sex, (2) minority, (3) 'patria potestas' and 'manus', (4) coverture, (5) celibacy, (6) mental defect, (7) bodily defect, (8) rank, caste and official position, (9) slavery, (10) profession, (11) civil death, (12) illegitimacy, (13) heresy, (14) foreign nationality and (15) hostile nationality."

There must, of course, be other varieties such as, for example, insolvency. To declare a man to be an insolvent is clearly to place beyond all doubt the status of that individual and it is conclusive as against the whole world. But it is a very different thing to say that to declare a person to be the creditor of an insolvent is to confer a status upon that creditor which is equally conclusive as against the whole world. Apart from an insolvency, the creditor's position arises out of a contractual relationship. Does the mere fact that his

(1) (1914) I.L.R. 39 Mad. 80.

relationship is recognized in the Insolvency Court confer upon him a status? I think that it would be most undesirable to extend the scope of section 41 of the Indian Evidence Act and that the description "legal character" should receive a strict and limited construction. Mr. T. M. Krishnaswami Ayyar has referred us to cases where a presumptive reversioner under the Hindu Law has been held to possess a "legal character"—*Sheoparsan Singh v. Ramnandan Prasad Singh*(1), a decision of the Privy Council under section 42 of the Specific Relief Act; and a legatee or a beneficiary under a will has also been so held, *Chinnasami v. Hariharabadra*(2). In the latter case, it was held that the judgment of a Probate Court granting or refusing probate is a judgment *in rem* and therefore the judgment of any other Court in a proceeding *inter partes* cannot be pleaded in bar of an investigation in the Probate Court as to the *factum* of the will propounded in that Court. These decisions, though no doubt useful, do not, in my view, carry Mr. Krishnaswami Ayyar sufficiently far. On the other hand, there is a decision of this Court which seems to me to place a very necessary limit on the scope of section 41 of the Indian Evidence Act. That is *The Official Assignee of Madras v. The Official Assignee of Rangoon*(3). There, it was held by Sir WALTER SCHWABE C.J. and RAMESAM J., that an order of an Insolvency Court refusing to adjudicate a person insolvent on the ground that he was not a member of a firm which had been declared insolvent is not a final order which conferred upon or took away from him any "legal character" within the meaning of section 41 of the Evidence Act, and hence is not a judgment *in rem*, and that being a partner in a firm is

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(1) (1916) I.L.R. 43 Calo. 694 (P.C.). (2) (1893) I.L.R. 16 Mad. 390.
(3) (1923) 46 M.L.J. 580.

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not a "legal character" as contemplated by that section. On page 587, Sir WALTER SCHWABE C.J. states as follows :—

"In this case the way the Court in Rangoon arrived at its decision was by saying that Annamalai Chetty was a member of the joint family and that he had disclaimed any interest in the joint-family property as against his creditors, that there was no evidence before it that he was a partner and, therefore, it declared that he was not a partner. It would be a very remarkable thing if that is a binding decision on all the world that a partnership did not exist. For instance, if a creditor, here or elsewhere, were taking proceedings against Annamalai on the basis of the partnership, he could set up the decision of the Rangoon Court as a judgment *in rem* binding on the party here who was not a party in Rangoon. I do not think that was the intention of section 41 at all . . . "

This case, in my view, is one that is very much against Mr. Krishnaswami Ayyar's argument. If a partner does not possess a "legal character" then it is difficult to see how a creditor in an insolvency can be entitled to claim for himself such a character. The section does not use the words "legal right" but uses the words "legal character", and Mr. Krishnaswami Ayyar's argument in the main has been that a creditor has acquired a "legal right" which is a very different thing from saying that he has acquired a status which he can hold as against the whole world. In the absence of any authority for the contention that a creditor in an insolvency has a "legal character", I am not disposed to extend the scope of section 41 of the Indian Evidence Act to include such a person. Mr. Krishnaswami Ayyar, in the alternative, contends that the judgment of the appellate Court declares L. V. N. Sastri to be entitled to a specific thing, namely, the debt from the insolvent and that section 41 of the Indian Evidence Act makes such a declaration conclusive. Quite apart from the fact that, in my view, a debt is not a "specific

thing" referred to in section 41 of the Indian Evidence Act, there is the difficulty that the declaration of the Court must be that a person is entitled to that specific thing absolutely and not as against any specified person, or, in other words, the declaration must be that L. V. N. Sastri is entitled to the sum he has claimed as against the whole world absolutely, whereas the declaration is merely that he is entitled to it as against the insolvent. Mr. Krishnaswami Ayyar is unable to point to anything in the Insolvency Act which enables the Insolvency Court to declare the title of any person to any specific thing absolutely and not merely as against another person and it is only in the former case that it will have the conclusive character as against the whole world. I have come to the conclusion, therefore, that neither the Tribunal nor this Court is precluded from going into the question of the genuineness or otherwise of L. V. N. Sastri's claim and I also make the observation that, although it is true that the appellate Court did consider L. V. N. Sastri's claim not only on the footing of the judgment-debt but also on the merits, it was not, in my view, essential to consider anything more than the former question. RAMESAM J., after holding that it is open to the Insolvency Court to go behind an *ex parte* decree and investigate the nature of the debt if there are grounds for so doing, states:

"Where there are no other creditors the reason for examining into the judgment-debt especially when the debtor himself allowed the opportunity he had to pass by becomes much less"

and later on observes :

"I do not think this jurisdiction of the Official Assignee to enquire into debts could be used as a device to escape the execution of a decree where the only debt of the insolvent is the decree and there are no other debts. It seems to me that the insolvency jurisdiction should not be used as a device to

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evade execution of a decree which has become final and unimpeachable as in the present case."

After those observations it was unnecessary to consider the matter any further and to examine also the question whether in fact there had been the debt upon which the *ex parte* decree was based. Therefore, in my view, every finding of fact after this point was not essential to the decision of the appellate Court allowing L. V. N. Sastri's claim. CORNISH J. says:

"In my opinion these materials are not sufficient evidence either of collusion or of fraud or of miscarriage of justice", and it is quite clear, I think, that CORNISH J. based his decision chiefly on the grounds that there was not sufficient evidence to justify the Insolvency Court setting aside the *ex parte* decree.

[His Lordship, after discussing the evidence, concluded by finding that the Advocate was guilty of unprofessional conduct.]

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SUNDARAM CHETTY J.—[His Lordship, after stating the facts, proceeded as follows:—]

The learned Judges allowed the appeal, holding that there were no adequate grounds for vacating the *ex parte* decree passed against the insolvent and also stating that the debt must be regarded as proved. It is strenuously contended by Mr. T. M. Krishnaswami Ayyar, on behalf of the respondent, that that judgment of the appellate Court in insolvency proceedings should be deemed to be a judgment *in rem* within section 41 of the Indian Evidence Act and as such conclusive, so as to preclude any other Court from reopening the same question. If this contention should prevail, the finding of the appellate Court in its insolvency jurisdiction that the debt set up by L. V. N. Sastri as due to him from the insolvent is true should be taken to be conclusive. It is argued with great insistence that, by

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reason of that judgment, the legal character of L. V. N. Sastri as a creditor of the insolvent must be deemed to have been declared so as to be operative as a judgment *in rem* against all the world.

In order to decide this question, which is not free from difficulty, the true scope of section 41 of the Evidence Act has to be understood. That section incorporates the law on the subject of "judgments *in rem*" as explained in the decision of Sir BARNES PEACOCK in *Kanhya Loll and others v. Radha Churn and others*(1). According to that section,

"A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant."

The section further lays down that such judgment, order or decree is conclusive proof that the legal character conferred or declared accrued to that person at the time when such judgment, order or decree was pronounced and that anything to which it declares any person to be so entitled was the property of that person at that time. Such an effect seems to be of a limited character, and, in order to make any such judgment, order or decree conclusive proof operating as a judgment *in rem*, what was conferred on or taken away from a person should be a "legal character" within the meaning of that section.

As observed by Messrs. Woodroffe and Ameer Ali in the Law of Evidence, one of the main difficulties has always been to ascertain some principle upon which to

(1) (1867) 7 W.R. 338.

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rest this class of judgments so as to determine what cases fall within it. The principle is lucidly stated in Phipson's Law of Evidence (5th edition) at page 387 as follows:—

"The principle of the conclusiveness of judgments *in rem* as regards persons is, that public policy for the peace of society requires that matters of social status should not be left in continual doubt; and as regards things, that generally speaking every one who can be affected by the decision may protect his interests by becoming a party to the proceedings. In addition to which it is to be remembered that a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared; thus, a decree of divorce not only annuls the marriage but renders the wife *feme sole*; an adjudication in Bankruptcy not only declares, but constitutes, the debtor a bankrupt; a sentence in a prize Court not merely declares the vessel prize, but vests it in the captor."

The expression "legal character" has not been defined in any statute. Its meaning has to be understood in the light of the principles relating to judgments *in rem* which the legislature must have had in view in framing this section. The same expression "legal character" is found in section 42 of the Specific Relief Act. That section says that only a person entitled to any legal character or to any right to property can institute a suit for a declaratory relief in respect of his title to such legal character or right to property. In construing the significance of that expression, a Division Bench of this Court has observed in *Ramakrishna v. Narayana*(1) as follows:—

"We take it that a man's 'legal character' is the same thing as a man's status. 'A man's status or "legal character" is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the

(1) (1914) I L.R. 39 Mad. 80, 82.

attributes which may be said to belong to normal humanity in general'."

The chief varieties of status as set forth in Holland's Jurisprudence are also mentioned in that decision as illustrations. Now, what is it that the judgment (Exhibit XIII) has declared? The claim of L. V. N. Sastri as a creditor of the insolvent was allowed; in other words, the debt alleged by him as due from the insolvent was found to be true.

Mr. Krishnaswami Ayyar, in the course of his able argument, contends that the declaration that L. V. N. Sastri is a creditor of the insolvent made by the Court in the exercise of insolvency jurisdiction confers upon him a legal character as contemplated in section 41 of the Evidence Act. Ordinarily, the right of a creditor is to recover his debt from the debtor. That right arises from a contractual obligation. It cannot strictly be deemed to confer on him any status or legal character. It is however urged that, as soon as he is recognized as a creditor to the insolvent's estate, the law gives him a position out of which certain special rights and duties flow. By virtue of the attributes which the law attaches to him, it is argued that a legal character may be deemed to have been conferred on him. The decision in *Ramakrishna v. Narayana*(1) shows that a right claimed as arising out of a contractual obligation would not be a right to a "legal character" within the meaning of section 42 of the Specific Relief Act. The grant of probate by a Court in the exercise of probate jurisdiction has been held to be conclusive proof of the truth of the will which has the effect of declaring a person to be an executor, and that is conferring on him a legal character. This is indicated by the decision of the

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(1) (1914) I L.R. 39 Mad. 80.

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Privy Council in *Sheoparsan Singh v. Ramnandan Prasad Singh*(1). From the observations of their Lordships, it may also be taken that a presumptive reversioner under Hindu Law has a legal character, entitling him to sue for a declaration under section 42 of the Specific Relief Act. In *Chinnasami v. Hariharabadra*(2), it is stated that by the grant of probate of a will, the legatee or the beneficiary under the will acquires a legal character. It has been held in *The Official Assignee of Madras v. The Official Assignee of Rangoon*(3), that a declaration by the Insolvency Court that one is a partner or not a partner of a firm does not amount to the conferring of a "legal character" on, or the taking away of a "legal character" from, a person within the meaning of section 41 of the Indian Evidence Act. At page 587, the learned CHIEF JUSTICE observes that an order of the Insolvency Court refusing to adjudicate one Annamalai Chetti a bankrupt, on the ground that he was not a member of the firm which had been declared insolvent, is not an order conferring upon Annamalai Chetti or taking away from him any "legal character" within the meaning of section 41 of the Indian Evidence Act which would operate as a judgment *in rem* binding on all the world. This decision is, in my opinion, the nearest approach to the present case. It is argued that, in consequence of the recognition of a person as a creditor to the insolvent's estate in the course of the insolvency proceedings, certain special rights and liabilities are created by the Insolvency Act which may not be applicable to the case of an ordinary creditor. As he is clothed with certain statutory rights and obligations, it is urged that he must be deemed to have been clothed with a legal character. The same

(1) (1916) I.L.R. 43 Cal. 694 (P.C.). (2) (1893) I.L.R. 16 Mad. 380.
(3) (1923) 46 M.L.J. 580.

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thing can be said even in respect of a partner. If a partnership is created by contract among two or more persons, certain special rights and obligations are created by virtue of the provisions of the Indian Contract Act which are not traceable to any contract between the parties. It is not easy to distinguish the position of a partner from that of a scheduled creditor in insolvency, because certain rights and duties imposed by the statute apply to both of them, though these do not flow from any particular contract. If a partner has no "legal character" within the meaning of section 41 of the Evidence Act as held in *The Official Assignee of Madras v. The Official Assignee of Rangoon*(1), it is difficult to hold that a creditor whose debt is held to be proved by the Insolvency Court has acquired a "legal character" within the meaning of that section. If the expression "legal character" used in section 41 denotes a status, the acceptance of Mr. Krishnaswami Ayyar's contention in the present case would amount to saying that "legal character" would mean a "legal right", acquired not solely by a contract but by virtue of a statutory provision. That would be too broad a definition of "legal character", and I do not think that such an unrestricted and wide scope could be given to that expression occurring in section 41 which deals with judgments *in rem*, in the absence of any direct authority. The decisions in *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratap Narain Singh*(2), and *Kishorbhai Revadas v. Kanchodia Dhulia*(3) do not seem to be quite in point for purposes of the present question. I am, therefore, of opinion that the final judgment of the Insolvency Court (Exhibit XIII) cannot be deemed to have conferred a "legal

(1) (1923) 46 M.L.J. 580.

(2) (1926) I.L.R. 5 Pat. 777.

(3) (1914) I.L.R. 38 Bom. 427.

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character" on L. V. N. Sastri within the meaning of section 41 of the Indian Evidence Act, in which case alone the declaration that he is a creditor of the insolvent would operate as a judgment *in rem*.

I may now refer to the alternative contention raised by Mr. Krishnaswami Ayyar that L. V. N. Sastri must be taken to have become entitled to a "specific thing" by reason of the finding given by the appellate Court in insolvency jurisdiction, Exhibit XIII. Here again a difficulty arises in ascertaining what is meant by a "specific thing" in this section. *Prima facie*, it connotes tangible, movable property. It would be somewhat strange if an actionable claim such as a right to recover a debt from another person can be deemed to come under "any specific thing" mentioned in this section. It is not enough to show that under the judgment of the Insolvency Court one has become entitled to a "specific thing", but his title to such a thing must have been declared not as against any specified person, but absolutely. So far as I could see, there is nothing in the Insolvency Act for declaring the title of any person to a "specific thing" in the manner provided for in section 41 of the Evidence Act. The title to the specific thing should be declared absolutely and not merely as against another person and, in such a case only, it would have the conclusive character as against the whole world. Such declarations may be made in the exercise of admiralty jurisdiction. However, reliance is placed upon a decision of the Allahabad High Court in *Pitaram v. Jhujhar Singh*(1). In that decision, an adjudication by an Insolvency Court as to the title of a claimant in respect of some houses, crops and some movable property, has been held to amount to

(1) (1916) 38 I.C. 798.

conclusive proof of title in respect of the specific things claimed by the applicant within the meaning of section 41 of the Evidence Act. That decision would no doubt be an authority which would help the respondent in this case, provided a chose in action or a right to recover a debt could be brought under "any specific thing" mentioned in section 41. But it seems to me that, even as a legal fiction, a right to recover a debt or a chose in action cannot be deemed to be a specific thing. It would be going too far if such an extended meaning is attached to it.

For the reasons mentioned above, I am of opinion that the final judgment (Exhibit XIII) does not amount to a judgment *in rem* within the meaning of section 41 of the Indian Evidence Act, so as to bind persons who were not parties or privies to that case. That being so, there is no legal bar to the Tribunal investigating into the matter at issue and coming to an independent conclusion on the merits.

[His Lordship concluded the judgment by finding that the conduct of the Advocate was by no means honourable or honest.]

STONE J.—This case raises questions of fact and of law. The question of law is of some importance and can be most conveniently considered after one question of fact has been examined. I accordingly consider first that question of fact which can be expressed as follows:—Was the respondent the prime mover in a course of conduct which had for its purpose the securing of a judgment in proceedings (which may be referred to as the Sastri proceedings) against the complainant without giving the complainant an opportunity to enter any defence?

It was conceded by the respondent's Counsel in the course of the argument, and, in my view, properly conceded, that if the Sastri proceedings could be brought

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home to the respondent, his conduct in that matter could not be justified. The vital question thus became, not "Were those proceedings well founded?", but "Was the respondent behind those proceedings?"

[His Lordship stated the facts, discussed the evidence, found that the Advocate was guilty of professional misconduct and proceeded as follows:—]

The question of law arises as follows:—Granted that the proceedings in the Sastri suit were objectionable, still the degree of culpability is much less if it appears that Sastri was an endorsee of a promissory note than if it appears that there was no note and no debt and consequently that the Sastri suit was a swindle from beginning to end. Thus, although on the question of professional misconduct I consider the vital question to be as above stated, when one comes to consider the punishment it is necessary to determine whether there was any debt at all. This issue, it was argued, the Court was precluded from considering because, on appeal from the judgment of KUMARASWAMI SASTRI J. (which judgment upheld the decision of the Official Assignee disallowing the Sastri claim in the insolvency of the complainant), RAMESAM and CORNISH JJ. allowed the claim and one of the Judges (RAMESAM J.) used the following words:—"We think the debt must be regarded as proved and we allow the appeal." The debt here referred to is not the judgment-debt but the debt alleged to be due from the complainant herein which was the foundation of the Sastri suit. CORNISH J. does not use any language which can be construed as amounting to a finding that the debt on which the Sastri case was founded is established. He limits himself to the question at issue, viz., whether in all the circumstances the Court should exercise its discretion to go behind the judgment and he holds that there is no sufficient evidence of collusion, fraud, or miscarriage

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of justice to justify the Court's taking such a course. That is he does not go behind the judgment. Following the judgments delivered by RAMESAM and CORNISH JJ., a decree was entered. That decree is, in my view, the decree made in that case and is the document to be looked at when considering section 41 of the Evidence Act. That decree decreed that the "appellant's debt is proved." The debt in question was the judgment-debt, not the debt on which judgment was obtained *ex parte*. Clearly, therefore, in no view of the law, unless not the decree but the judgment is to be looked at and unless RAMESAM J.'s above-quoted observation is to be treated as a judgment *in rem*, is this Court, in proceedings between the complainant and the respondent herein, precluded from considering whether the allegation of indebtedness in the Sastri suit was well founded?

The argument, as I understand it, is that the judgment in question is a judgment declaring that a debt is owed to S by an insolvent, that accordingly it clothes S with a character he would not otherwise possess, for it makes him a creditor, and that, although the term "legal character" does not embrace ordinary creditors, it does embrace creditors in an insolvency, for such creditors, by the very fact of insolvency, have their rights varied by act of law. The argument thus amounts to this: that even as insolvency alters the legal character of the insolvent so also it alters the legal character of the creditors of the insolvent. I do not agree. "Legal character" here means something equivalent to status; see *Kanhya Loll and others v. Radha Ohurn and others*(1), *Gungadhur Roy v. Uma-soondery Dossee*(2) and *Ramakrishna v. Narayana*(3). The legal character assigned to a person announces to all

(1) (1867) 7 W.R. 338.

(2) (1867) 7 W.R. 347.

(3) (1914) I.L.R. 39 Mad. 80.

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the world what the legal status of the person in question is. The meaning of "legal character" must be narrowly construed, for it must be remembered that an action *in rem* is not an action against a thing but an action availing against all the world. One must be cautious lest litigation between *A* and *B* be allowed unduly to affect the rights of *C*. The sort of danger is clearly shown in *The Official Assignee of Madras v. O.R.M.O.R.S. Firm*(1). The point there taken was similar to the point here taken and it failed. In *The Official Assignee of Madras v. The Official Assignee of Rangoon*(2), it was held that a declaration that *A* is a partner in a firm is not a declaration of legal character. The extraordinary consequence that would flow if a declaration of partnership or of non-partnership in litigation between *A* and *B* were held to conclusively bind *C* is there pointed out. Yet, it can hardly be doubted that the condition of being a partner much more nearly approaches status than the condition of being a creditor in an insolvency.

The decision of the Judicial Committee in *Sheoparson Singh v. Ramnadan Prasad Singh*(3) does not assist. That case decides that, where an action is founded upon the vital allegation of intestacy, once it appears that a Probate Court has affirmed the will of the alleged intestate, the action fails *in limine*, because that decision is binding and conclusive, there is therefore a will, and there is therefore no intestacy. The cases cited in *Kishorbhai Revadas v. Ranchodia Dhulia* (4) and *In re Ivory. Hankin v. Turner*(5) amount to no more than this: that, where a Court of Probate has declared a will to be valid or has made a declaration as to next of kin, the fact of the will or of

(1) (1926) I.L.R. 50 Mad. 541.

(2) (1923) 46 M.L.J. 580, 587.

(3) (1916) I.L.R. 43 Calo. 694 (P.C.).

(4) (1914) I.L.R. 38 Bom. 427.

(5) (1878) 10 Ch. D. 372.

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the declared next of kin cannot be disputed in another Court. Neither case purports to construe section 41. The case of *Kathama Natchiar v. Dorasinga Tevar*(1) does not, in my opinion, touch the point under decision. It does not even establish that a reversioner is a person clothed with a "legal character" within the meaning of section 42 of the Specific Relief Act, for it is obvious from Sir BARNES PEACOCK's remarks at page 174 that the suit for a declaration of title was one to which the reversioner was not in that case entitled. *Sripatrao v. Shankarrao*(2) is of assistance only as showing that a declaratory suit is not maintainable by a creditor as such; that is, that the condition of creditor is not a legal character. This, however, is conceded.

It is next argued that, assuming that the judgment that the debt was proved does not confer a legal character, yet, it declares a right to a specific thing and to a specific thing not against a specific person but absolutely. Upon this latter point *Pitaram v. Jhujhar Singh*(3) is relied upon. There, the Allahabad High Court observed:

"We think the decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely, within the meaning of section 41 of the Evidence Act."

There, *A* was claiming certain specific articles which he alleged were his but which being in the possession of the insolvent had been taken by the receiver. He had two remedies (i) to apply to the Insolvency Court, (ii) to institute a suit for recovery in the Munsif's Court. He pursued (i) and lost. He did not appeal but commenced suit, No. (ii). Obviously the earlier decision was binding on him on the ordinary principles of *res judicata*.

(1) (1875) L.R. 2 I.A. 169.

(2) (1929) 32 Bom. L.R. 207.

(3) (1916) 33 I.C. 798, 799.

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The above-quoted observation would therefore appear to be *obiter*. I doubt whether a finding of a Bankruptcy or any other Court in a contest between *A* and *B* as to whether certain property belongs to *A* amounts to anything more than a finding that as against *B* it belongs to *A*. I cannot believe that in such a contest the rights of *C* to such property can be conclusively determined. It is no use urging that, under the Insolvency rules, *C* could afterwards come and claim. *Ex hypothesi*, if the judgment in the suit between *A* and *B* is *in rem* and conclusive against strangers, *C* would be met with a conclusive finding. I can well understand that in an Admiralty action *in rem* against the ship there would be a declaration made effective against the whole world, but, as at present advised, I find it difficult to conceive how otherwise the judgment could declare title to a specific thing to be in *A* against the whole world as distinct from a specific person. However that may be, in this case the point does not arise, for I am clearly of the opinion that a decree declaring that *A* is entitled to a debt is not a declaration of title to a specific thing made not against a specific person but absolutely. By the very nature of the case, by the time you have made the chose in action a specific thing (assuming that it can be regarded as a specific thing as to which I have doubts) you have specified the debtor.

Finally, I observe that a judgment in insolvency declaring that the creditors' debt (i.e. a judgment-debt) is a provable debt does not declare that an alleged debt which merged in that judgment-debt is proved. In *Chandreshwar Prasad Narain Singh v. Bisheshwar Pratab Narain Singh*(1), it is observed that "all that is essential to the decision that the executor was entitled to probate

(1) (1928) I.L.R. 5 Pat. 777.

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must be taken to have been conclusively determined." It is argued, therefore, that it was essential to the decision arrived at by RAMESAM and CORNISH JJ. to hold that the alleged debt was proved and that, therefore, not only the judgment-debt but the alleged debt which was the foundation of the Sastri suit is conclusively established against the world. I am not to be taken as assenting to the above citation, but, assuming that it is a correct statement, it is not applicable, for it was not necessary for the Court in the insolvency proceedings to hold that the alleged debt in the Sastri proceedings was proved. Judgment could have been given without any such finding of fact and one of the learned Judges (CORNISH J.) gave such a judgment. But, even had it been a necessary step, I incline to the view that the observations to be found on page 34³ of *Gungadhur Roy v. Umasondery Dossee*(1) express the true position. Though it be necessary as a step to making a declaration which will operate *in rem* to find a fact that finding will not bind third parties in subsequent proceedings.

I am accordingly of the opinion that the Tribunal was at liberty to consider whether the alleged liability founded upon an alleged promissory note and sued for in the Sastri suit ever existed.

[His Lordship agreed with the conclusion of the Bar Council on the issue of fact.]

ORDER OF COURT.

The Order of the Court is that the Advocate be suspended from practice for the period of five years and pay the fee for the appearance here of Mr. S. Duraiswami Ayyar for the Advocate-General which we fix at Rs. 750.

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(1) (1867) 7 W.R. 347.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Krishnan Pandurai.

1930,
December 18.

R. M. C. T. RAMANATHAN CHETTIAR AND ANOTHER
(PLAINTIFF AND HIS LEGAL REPRESENTATIVE), APPELLANTS,

v.

P. L. C. LAKSHMANAN CHETTIAR AND SEVEN OTHERS
(DEFENDANTS NOS. 1 TO 4 AND 6 TO 9), RESPONDENTS*.

Ejectment suit—Effective possession of the property—Neither party proving, within twelve years of suit—Effective enjoyment of same—Not the customary mode of exercising the right of possession—Possession—Presumption of, in favour of the person holding title.

As a general rule, in a suit in ejectment, when the plaintiff seeks, on the strength of title and dispossession, to oust the defendants in possession, he must prove possession within twelve years of suit. But the possession to be proved is such possession as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any acts of effective possession, and the normal method of possession is not referable to any such act, and effective enjoyment of the property is not the customary method of exercising the right of possession, possession must be presumed to be with the person holding title to the extent to which that title is found valid.

APPEAL against the decree of the Court of the Temporary Subordinate Judge of Devakottai in Original Suit No. 22 of 1923 (originally filed as Original Suit No. 24 of 1920 on the file of the Sub-Court, Rāmnād) and dated 31st December 1923.

C. S. Venkatachari for second appellant.

K. R. Rama Ayyar for first to fourth respondents.

* Appeal No. 240 of 1925.

M. Patanjali Sastri for fifth to seventh respondents.

C. S. Rama Rao Sahib for seventh respondent.

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JUDGMENT.

The original suit from which this appeal arises was a suit in ejectment, the plaintiff alleging title under a sale deed, Exhibit B, dated 22nd November 1898, from the two sons of one Sethuraman Servai, Kaliappan and Audiappan, and alleging also possession up to 10th February 1919 and a dispossession by the defendants on that day. The suit was brought on 18th February 1920 for possession from the defendants and consequential reliefs. The lower Court dismissed the suit on its finding that the plaintiff had not proved possession within twelve years of suit. The plaintiff appeals.

[Their Lordships dealt with the evidence and found that the plot covered by Exhibit B measured 63,597 square feet and that, in regard to a portion, viz., 7,200 square feet, the plaintiff, even if he had possession at some earlier time, had lost the same during the material times, in connection with some other litigation, and that the plaintiff's title was *prima facie* good only in respect of one-third of the remaining extent, viz., 18,799 square feet and that it was not open to the plaintiff to plead for more than this extent and proceeded as follows:—]

To sum up, so far as effective possession goes, neither party has established it earlier than 1919. So far as title goes, that of the plaintiff is superior to, and more reliable than, that of the defendants to the extent of 18,799 square feet in the north. To that extent the plaintiff's title carries with it a presumption that he was in such possession as the land was capable of, which possession his vendors had, and his possession was not

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effectively invaded till 1919, only two years before suit. He is entitled to have that possession restored.

It is urged as a point of law by the defendants that the plaintiff cannot succeed on the mere plea of title when he comes into Court with an allegation of definite acts of possession and dispossession and has failed to prove this. This plea is based on the fact that the plaintiff alleges acts of possession, of storing timber and putting up a prickly-pear fence, neither of which acts we can regard as proved. The plea might have force if effective acts of possession by the defendants prior to the dispossession alleged in the plaint had been proved. But we find none such are established and they certainly cannot be presumed. The net result therefore is that the plaintiff's possession presumed by law upon his title has not been displaced by any act of dispossession prior to 1919, and his failure to prove specific acts of possession does not afford any proof of defendants' possession or any displacement of the possession which under the law is presumed from his title. In these circumstances it is unnecessary to go at length into the law on the subject. It is true, of course, as a general rule that, when the plaintiff seeks on the strength of title and dispossession to oust defendants in possession he must prove possession within twelve years of suit; see *Mohima Chunder Mozoomdar v. Mohesh Chunder Neoghi*(1). But the possession to be proved is such possession, as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any acts of effective possession and therefore the normal method of possession is not referable to any such act, possession must follow title, since the defendants are no more able

(1) (1888) I.L.R. 16 Calo. 473 (P.C.).

than the plaintiff to claim effective possession for twelve years before suit. Possession in such circumstances is with the party holding title. The case, *Rakhal Chandra Ghose v. Durgadas Samanta*(1), is strongly relied upon for the proposition that this presumption does not follow in a case where acts of possession have been pleaded and the evidence of both parties is equally unworthy of reliance. That ruling sought to carry further the proposition of the Privy Council in *Runjeet Ram Panday v. Goburdhun Ram Panday*(2) :—

“Now the ordinary presumption would be that possession went with the title. That presumption cannot, of course, be of any avail in the presence of clear evidence to the contrary; but, where there is strong evidence of possession, as there is here, on the part of the respondents—opposed by evidence, apparently strong also on the part of the appellant—their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded ; . . . ”

The Calcutta Weekly Notes case cited, as authority for its proposition, *Thakur Singh v. Bhogeraaj Singh*(3), *Lalu Singh v. Mir Latif Hossein*(4) and *Fakira Lal Sahu v. Munshi Ramacharan Lal*(5). In the first of these cases, we do not find the proposition contended for set out in the judgment, although it does appear in the headnote. In the second case, the Bench quotes *Thakur Singh v. Bhogeraaj Singh*(3), as if it had in fact set out the proposition which we do not find set out. The character of the property in that case, and the nature of the possession that would ordinarily be exercised over it are not noted. The third case makes a special exception in the case of land of a special character such as waste, jungle, or land under water.

(1) (1922) 26 C.W.N. 724.

(3) (1899) I.L.R. 27 Calo. 25.

(2) (1878) 20 W.R. (Civil) 25 (P.C.).

(4) (1915) 21 C.L.J. 480

(5) (1916) 1 P.L.J. 146.

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In the Calcutta Weekly Notes case, the land appears to have been cultivable and in fact cultivated until a tank was excavated. If parties are to be held strictly to their pleadings, no doubt, land, over which acts of user are asserted, is land over which acts of user may be and have been exercised and, therefore, can be ordinarily exercised. But, we think, the real test is whether in fact acts of user were being regularly exercised over it by one or the other party so as to constitute, in the words of the Calcutta Full Bench in *Mahomed Ali Khan v. Khaja Abdul Gunny*(1), "such acts of ownership as are natural under the existing condition of the land", during the critical period between twelve years before suit and the actual dispossession which forms the cause of action. And we find that none such were in this case in fact exercised. In such circumstances it does not seem to us proper that, where there has been no effective possession by anyone, the title holder should be deprived of what he has acquired merely because he equally with the other side has exaggerated his case in the pleadings. In a case like the present, when effective enjoyment was not the customary method of exercising the right of possession, it must be held that the plaintiff by his title obtained such possession as the property was capable of, and therefore his possession goes with the title to the extent to which that title is found valid; see *Mahamadsaheb v. Tilokchand*(2) and *Venkata Somayajulu v. Satyanarayana*(3). For these reasons, we think, that the lower Court's decree should be modified and the plaintiff given a decree for the possession of 18,799 square feet in the north of the suit plot. The strip will be a quadrilateral figure whose northern boundary is

(1) (1883) I.L.R. 9 Calo. 744 (F.B.). (2) (1922) I.L.R. 46 Bom. 920.
(3) (1928) 25 L.W. 808.

the northern boundary of the suit plot, whose east and west sides are of equal length along the east and west sides of the suit plot, and whose area is 18,799 square feet. In view of the fact that neither party has put forward a true case, we direct that each party bear his own costs in both Courts. Plaintiff's plan will be attached to and form part of the decree.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

PANNIRSELVAM (RESPONDENT), PETITIONER,

1930,
October 29.

v.

VEERIAH VANDAYAR AND ANOTHER (PETITIONER
AND Nil), RESPONDENTS.*

Madras Local Boards Act (XIV of 1920)—Election petition filed during currency of—Jurisdiction of Court to decide the petition after the passing of the amending Act (XI of 1930)—Section 54 (2) and proviso, and transitional provisions and rr. 5 (3) and 6 of Act XI of 1930, effect of—Statute—Retrospective operation of.

Generally, except in matters regulating procedure, no statute can be construed to be retrospective in its operation so as to take away substantive rights of parties, unless such a result arises by express declaration or by necessary implication.

While the Madras Local Boards Act (XIV of 1920) was in force, A, a Public Prosecutor and Government Pleader, successfully stood for election as President of a district board. Even while the above Act was in force, an election petition was filed to set aside his election on the ground of his ineligibility to stand for election on account of his holding the above offices.

* Civil Revision Petition No. 1326 of 1930.

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Held that the Court which then had jurisdiction to decide the petition was not deprived of its jurisdiction to do so after the coming into force of the amending Act (XI of 1930) by any provision contained either in its sections or in its transitional provisions.

Held further that neither the amending Act (XI of 1930) nor section 54 (2) nor the proviso (2) to section 54 (2) thereof was merely declaratory of the existing law and therefore retrospective in operation, as section 54 (2) and its proviso contained amendments and additions to the corresponding repealed provisions of Act XIV of 1920.

Held further that rule 5 (3) of the transitional provisions of the amending Act (XI of 1930) did not relate to the method of disposal of election petitions, either past or future, but related to other matters.

Held also that rule 6 of the transitional provisions of the amending Act (XI of 1930) applied only to persons validly holding office when that Act came into force.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Tanjore in Original Petition No. 40 of 1930.

Advocate-General (A. Krishnaswami Ayyar), with him *P. Venkataramana Rao* and *R. Sundaralingam* for petitioner.

T. R. Venkatarama Sastri and *K. P. Ramakrishna Ayyar* for first respondent.

K. Bhashyam for second respondent (District Board).

JUDGMENT.

REILLY J.

REILLY J.—The petitioner in this revision petition was elected President of the District Board of Tanjore in January last. His opponent at that election, the first respondent here, put in an election petition in the Court of the Subordinate Judge of Tanjore early in February of this year. Unfortunately for various

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reasons the disposal of that petition was delayed until the 4th of September last. The petitioner here has urged before us that by the 4th of September the Subordinate Judge had lost jurisdiction to deal with the petition in consequence of a new Act, which had come into force, Act XI of 1930. There is no dispute that at the time when the election petition was presented to the Subordinate Judge he had jurisdiction to dispose of it; nor is it suggested before us that he lost jurisdiction until the new Act came into force on the 26th August 1930. The Subordinate Judge found that the election of Mr. Pannirselvam, the petitioner here, was void and ordered a re-election. That decision of the Subordinate Judge is contested before us for various reasons. But the reason which has occupied our attention—and with which only I think it necessary to deal at any length—is the allegation that at the time he disposed of the petition the Subordinate Judge had no jurisdiction to do so. For the election petitioner, Mr. Veeriah Vandayar, it is contended that, as admittedly the Subordinate Judge had jurisdiction to deal with the petition when it was presented to him, the new Act did not deprive him of jurisdiction.

The new Act amends in many particulars the Madras Local Boards Act of 1920, which was in force when this election took place and under the provisions of which Mr. Veeriah Vandayar instituted his election petition. Among other things it repeals section 13 of the Act of 1920, under which no salaried officer of the Government was eligible to be elected President of a local board. And I understand that the only objection to the election of Mr. Pannirselvam which was pressed when the election petition came on for hearing before the Subordinate Judge was that he was ineligible for election as President because he was a salaried

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officer of the Government. Now it cannot be doubted that it is a fundamental rule of interpretation that a statute other than one dealing with procedure shall not be construed so as to have retrospective effect unless the intention of the Legislature that it should have such an effect appears in its terms or by clear and necessary implication. That principle is reinforced, so far as this Presidency is concerned, by the Madras General Clauses Act, under which, unless a contrary intention appears in an Act of the Madras Legislature, though it may repeal a previous Act, that repeal does not affect any right, privilege, obligation or liability acquired, accrued, or incurred under the enactment so repealed nor affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, etc.; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed. That is very much the effect of the Interpretation Act in England. But, if a contrary intention appears in a subsequent Act, there is no doubt that it can have a retrospective effect so as to apply even to pending litigation, as is shown by *Quilter v. Mapleson*(1). But, when we look at the new Act, XI of 1930, with which we are concerned, we find nothing explicit in it to the effect that it is retrospective in its action. The learned Advocate-General, who appears for the petitioner before us, has urged that that is of little importance because the Act itself is a declaratory Act. If it were really a declaratory Act, an Act which merely declared the law as it was at the date of its commencement and as it had been, then no doubt it might have, and ordinarily would have, a retrospective effect as pointed out by

(1) (1882) 9 Q.B.D. 672.

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Lord Chief Justice COLERIDGE in *Jones v. Bennett*(1), though the mere description of an Act as a declaratory Act is not decisive on that point. But, when we examine this Act, XI of 1930, is it a declaratory Act? That is not what it purports to be in its preamble, which runs :

“Whereas it is expedient further to amend and consolidate the Madras Local Boards Act, 1920, and the Madras Village Panchayat Act, 1920.”

So far as the new Act is a consolidating Act, it is so because it consolidates the Madras Local Boards Act, 1920, and the Madras Village Panchayat Act, 1920. Apart from that it purports to be an amending Act.

Nevertheless, failing his contention that the whole of the new Act is a declaratory Act, the learned Advocate-General has contended that certain provisions of it may be declaratory in nature and retrospective in effect. No doubt it is possible that a provision of an Act not in its general character declaratory may be declaratory in effect, though not in form, as was the case in the *Attorney-General v. Heriford*(2). What the learned Advocate-General has suggested before us is that section 54 (2) of the Madras Local Boards Act in the form in which it has been re-enacted in Act XI of 1930 is a declaratory provision, which sets out and limits retrospectively the disqualifications of Government officers. Section 54 (2) of the Madras Local Boards Act before its recent amendment ran :

“No salaried officer of Government shall be qualified for election as a member of a local board, provided that this prohibition shall not apply to village headmen.”

Mr. Pannirselvam held the office of Public Prosecutor and Government Pleader of Tanjore, and it was

(1) (1890) 63 L.T. 705.

(2) (1849) 3 Ex. 670.

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alleged against him by his opponent that he was therefore a salaried officer within the meaning of section 54 (2) and section 13 of the Act before its amendment. It has not been denied before us, and the exhibits in the case show, that doubts were felt by various parties and were at times referred to the Government whether a Public Prosecutor and Government Pleader was a salaried officer of Government within the meaning of section 54 (2) of the Act as unamended. The learned Advocate-General has urged that section 54 (2) as re-enacted by Act XI of 1930 was designed to clear up those doubts and to declare the law and in that sense must be regarded as a provision having retrospective effect. The new section 54 (2) as re-enacted runs:

"No officer of Government other than a village headman shall be qualified for election or for holding office as a member of a local board: provided that this prohibition shall not apply to the holder of any office which does not involve both of the following incidents, namely, that the incumbent (a) is a whole-time servant of the Government and (b) is remunerated either by salary or fees."

It cannot be denied that that provision as re-enacted does clear up any doubts which might be felt and which had been felt as to whether a Public Prosecutor and Government Pleader could be elected as a member of a district board. But it goes a good deal further than that, as has been pointed out by Mr. Venkatarama Sastri for the first respondent here. It amends section 54 (2) of the old Act in two marked ways. The old section said that no salaried officer of Government shall be qualified for election as a member of a local board. The new section says that not only will no officer as interpreted by the proviso immediately following be qualified for election but no such officer will be qualified for holding office as a member of a local board. That is something far more than merely

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declaring the law. That is a plain amendment of the law. And, when we go on to the proviso immediately following, under which certain persons who are officers of Government are not to be held officers of Government disqualified by this sub-section, we find instead of "salaried officers" of Government being mentioned whole-time servants of Government who are remunerated either by salary or fees are mentioned. That again makes a very distinct change in the law. Salaried officers of the Government were excluded from election by the old section even though not whole-time servants of the Government. Such officers are not now disqualified for election or for holding office as members of a board, though they were disqualified for being elected before. When we examine the sub-section in that way and find that it makes two marked changes in the law, even though it may have cleared up doubts, and have been intended to clear up doubts, in respect to the eligibility of persons holding such offices as Government Pleaders and Public Prosecutors, we cannot treat it properly in my opinion as a declaratory provision. But of course, had it been a declaratory provision, that would not necessarily have affected the jurisdiction of the Subordinate Judge. It would have declared the law by which he had to decide the question before him; but it would not have taken away his jurisdiction. What is urged in that connection is that the Subordinate Judge lost his jurisdiction in consequence of the second proviso to section 54 (2) of the Act as amended, which runs:

"Provided further that, if any question arises either before or after an election whether any person is or is not disqualified under this sub-section, the question shall be referred to the Local Government, whose decision shall be final."

It is suggested that, when that provision came into force, the Subordinate Judge lost jurisdiction to decide

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the question which was properly before him in the election petition already instituted. Now to my mind the natural reading of that second proviso is not to that effect. Its words are "If any question arises." That in itself is no indication of the past. The next words on which the learned Advocate-General laid stress were "either before or after an election." Those words, I do not think, help him, because they are still in the natural construction of the sentence referring to future matters. "If any question arises before an election"—that does not mean "has arisen in the past." "If any question arises after an election"—neither does that refer to any question in the past. And it is of interest to notice that the whole of that sub-section (2) of section 54 in its new form is grammatically in the future tense, a matter which we cannot ignore when dealing with the contention that a particular provision, not explicitly retrospective, not described explicitly as declaratory, is yet to be construed as retrospective in its effect. The importance of that use of the future tense was pointed out in *Smithies v. National Association of Operative Plasterers*(1) in connection with the question whether a new provision should be applied to a pending action. To my mind we cannot find that anything in section 54 (2) as re-enacted by Act XI of 1930 is retrospective in its effect.

But there is another provision on which the learned Advocate-General strongly relied. There is a schedule at the end of Act XI of 1930 containing some rules, which are described as "transitional provisions", providing for certain matters until the amendments made by the new Act come into full force. One of those rules, Rule 5 (3), runs:

(1) [1909] 1 K.B. 310.

"Any remedy by way of application, suit or appeal which is provided by the said Act (that is the Madras Local Boards Act, 1920) as amended by this Act shall be available in respect of proceedings under the said Act . . . pending on the date of the commencement of this Act, as if the proceedings in respect of which the remedy is sought had been instituted after the commencement of this Act."

The learned Advocate-General has contended that the effect of that rule is that the remedy open to an objector in an election petition under the Act before the amendment is replaced by a new remedy under the Act and itself has disappeared. That is not what Rule 5 (3) grammatically says. What it says is that any remedy by way of application, suit or appeal which is provided by the said Act as amended by this Act shall be available in pending proceedings. First it is to be noticed that that rule disposes of the contention that the proceedings before the Subordinate Judge in the election petition were somehow guillotined by the new Act and came to a final end when the new Act came into force. But it must be borne in mind that it provides literally that any new remedy provided by the new Act shall be available in the pending proceedings. It does not say that the old remedy available when the proceedings were instituted has gone. We are asked to interpret it in that way. But surely that would be a most backhanded way of expressing such a result. Indeed I can hardly imagine that, if the Legislature really wished to bring all election petitions properly instituted under the Act before this amendment to an end, had they not been disposed of when the new Act came into force, that would not have been stated in clear and simple language. It would be a strong course to cut short proceedings in such a petition, on which an aggrieved person had properly embarked, though no doubt it would have been within the competence of the

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Legislature to do that. But, if such a very unusual thing was to be done, surely we should expect it to be done in plain language, not by an implication in a rule such as this, an implication which cannot strictly be found in the language used. But I think that Mr. Venkatarama Sastri has really provided us with the right explanation of Rule 5 (3) of these transitional provisions. He has pointed out that Rule 5 has four sub-rules in it. The first provides that the property and rights used, enjoyed, possessed by, vested in, etc., a board in existence under the old Act shall, when Act XI of 1930 comes into force, pass to the board which takes its place. Sub-rule 2 provides that proceedings of the old boards may be continued, so far as they are not inconsistent with the new Act, by the new board concerned. Sub-rule 3 then provides for remedies by way of application, suit or appeal provided by the old Act as amended by the new Act being available in pending proceedings. Then comes sub-rule 4, which takes up each of the three previous sub-rules in turn and provides that, if any dispute arises as to the local board to which any property, right, interest or liability is to pass under sub-rule 1 or as to the local board by which any proceeding is to be continued under sub-rule 2 or as to the local board to or against which any remedy is to be available under sub-rule 3, then that question shall be referred to the Local Government, whose decision shall be final. When we take the whole of Rule 5 together, including the provision in sub-rule 4 for deciding disputes on that point, I think it is clear that all these sub-rules refer to the local boards concerned and that sub-rule 3 refers to applications, suits or appeals by or against a local board and not to applications or litigation between individuals, such as election petitions, in which one person attacks the election of

another person. If that is the correct view to take, then Rule 5 (3) of the transitional provisions had no effect upon the jurisdiction of the Subordinate Judge.

But a modified contention was put forward by the learned Advocate-General in the course of his argument that, even if the Subordinate Judge's jurisdiction to deal with the election petition before him was not affected by the new Act, the second proviso to section 54 indicated a new procedure which he was bound to follow in deciding the question before him, the question whether Mr. Pannirselvam was disqualified for election. As I have pointed out, the second proviso to section 54 as re-enacted is that, if any question arises whether any person is or is not disqualified, the question shall be referred to the Local Government, whose decision shall be final. It is not disputed that a new provision in regard to procedure might well have retrospective effect so as to apply to pending litigation, and what is suggested is that the Subordinate Judge in this case, once Act XI of 1930 came into force, instead of trying to decide the question whether Mr. Pannirselvam was disqualified or not, should have referred it to the Local Government and, when he got the Local Government's ruling, should have disposed of the petition before him accordingly. It is interesting to notice that in the transitional provisions, to which I referred just now, certain questions as to which board of the new boards to come into being is to have any property or to continue proceedings or to have a remedy in suits and so on are to be referred to the Local Government, questions which without that provision might have to be decided by a Court; and there is no doubt that after Act XI of 1930 came into force a question about the disqualification of a person by reason of any office he held under Government would have to be referred to

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the Government. But it is going a very considerable length to urge that that provision, the second proviso to section 54 (2) as re-enacted, was intended to apply to the procedure of Courts dealing with election petitions already properly before them. No doubt the Legislature could have applied a new procedure to such inquiries. But to my mind, if that had been their intention, something much more clearly stated would have been found in regard to the matter. It is not necessary to interpret the second proviso to section 54 (2) as re-enacted in that way; and without something far more clear I am not prepared to infer that the intention of the Legislature was to interfere with the procedure of a Court in a matter already pending before it, remembering that this Act, XI of 1930, has nothing in its general scope to do with the procedure of Courts at all.

However, that is not the end of the argument for the petitioner here. It is urged that there are other provisions, other rules in the transitional provisions, which oust the jurisdiction of the Subordinate Judge. Rule 6 of those transitional provisions provides that, notwithstanding anything contained in the Madras Local Boards Act of 1920 or the amending Act, the members of every district board or taluk board holding office at the date of the commencement of the amending Act shall be deemed to have been elected under that Act and their term of office shall extend to a date to be fixed by the Local Government not more than a year after the coming into force of the amending Act for the purpose of new elections to the new boards. And in Rule 6 (1) (c) it is provided that the President and Vice-president of the district board or taluk board holding office at the commencement of the amending Act shall hold office as President or Vice-president, as the

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case may be, up to the date so fixed by the Local Government. It has been urged by the learned Advocate-General that the effect of that is that a President holding office at the date when the new Act came into force, that is on the 26th August 1930, will be entitled to remain in office until the date fixed by the Government, which, I believe, is the 25th August 1931, however irregular may have been the method by which he has come to hold office, any election petition instituted against him under the old Act before the new Act came into force having no longer any effect. That is a surprising contention, and we should have to be very sure that the rules had that effect before we could accede to it. There are various reasons which under the old Act could be urged why an election was invalid, why a candidate for an election was disqualified. According to the learned Advocate-General's contention in this part of the case, however serious might be the disqualifications which might be urged against an elected President in an election petition pending at the date when the new Act came into force, that is on the 26th August 1930, all those disqualifications would evaporate for the period until the date fixed by the Government, as it happens a year later, for the new elections. If he were discovered to be a deaf-mute or a leper, if he were discovered to have been an adjudicated insolvent, if he had any other of the disqualifications which might have been made the basis of an election petition against him, none of them would have any effect for the period until the new elections were to be held, that is for the ensuing year. In connection with that argument it is interesting to observe that Rule 6 (1) (a) of the transitional provisions makes the holding of office by members of boards for the period until the date fixed by the Government for the new elections

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subject to the provisions of sections 54 (2), 56 and 59 of the Act. That is the members holding office when the new Act came into force are to continue to hold office subject to those sections which provide for certain supervening disqualifications, many of them of the same nature as the disqualifications which would have made a man ineligible for election and might be the subject of an election petition; and the members are to hold office subject also to section 57, which provides for those disqualifications being decided by the District Judge. Similarly Rule 6 (1) (c) provides that Presidents and Vice-presidents of boards are to continue to hold office until the date fixed by the Government for the elections subject to sections 15, 43 and 44, that is subject to the provisions for their vacating office in certain events or for their removal by the Government in certain events or as the result of a vote of "no confidence". So it will be seen that members are not to hold office from the date on which the new Act comes into force until the date fixed by the Government for the new elections irrespective of any disqualification which may occur to them, nor are Presidents and Vice-presidents to hold office irrespective of the ordinary provisions for their vacating office in certain circumstances or for their removal. Then why are we to jump to the conclusion that all questions of disqualification which might be raised in election petitions are to lapse, that a member or a President is to hold office however he might have been disqualified for getting into that office originally? The learned Subordinate Judge in dealing with this matter has come to the conclusion that in Rules 6 (1) (a) and 6 (1) (c) "holding office" means validly holding office. That certainly gives a reasonable interpretation to those two rules. It has been urged by the learned Advocate-General that under the provisions

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in regard to election petitions, when there is a petition pending against a member or a President, he is entitled to hold office until the petition is decided, and therefore Mr. Pannirselvam in this case was holding office at the date when Act XI of 1930 came into force because for various reasons this petition against his election had not been disposed of. But neither the new Act nor the old Act explicitly provides that members or Presidents against whom election petitions are pending shall hold office until the petitions are disposed of. On the contrary, if they are found to be disqualified in such petitions, the order which has to be made is that their elections are void. What the old Act provided by section 57 (3) was that "pending such decision the member shall be deemed to be qualified." What the Act as now amended provides is that "pending such decision the member shall be entitled to act as if he were not disqualified." That is a very different thing from providing that he holds office pending the decision; and in my opinion the learned Subordinate Judge was right in finding that at the date when Act XI of 1930 came into force Mr. Pannirselvam was not holding office as President of the district board within the meaning of Rule 6 (1) (c) of the transitional provisions of the new Act. That being so, we cannot find that he holds that office by virtue of those transitional provisions and is so immune, as has been contended, from the jurisdiction of the Subordinate Judge from the date when the new Act came into force. In my opinion all these contentions that the Subordinate Judge had no jurisdiction to dispose of the petition before him on the 4th September 1930 fail.

It is also urged in the petition before us that apart from any question of jurisdiction the learned Subordinate Judge's decision that Mr. Pannirselvam was

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disqualified as a salaried officer under the Act before it was amended was wrong. Whether his decision on that point was right or wrong, it does not appear to me to be a question with which we need deal on this occasion. It is not a question properly coming before us in revision proceedings under section 115 of the Code of Civil Procedure. Whether he decided rightly or wrongly, if he had jurisdiction to decide the matter, then we cannot find that there was anything illegal or materially irregular in his decision. And in my opinion this is not a case in which we need fall back upon any reserve power of revision or superintendence which we have under any other enactment, because the question whether Mr. Pannirselvam was qualified or not under the Madras Local Boards Act before it was recently amended is not a question of any general public importance. From the date upon which the new Act came into force, 26th August 1930, such a question in the particular form in which it was raised in this case cannot be raised any longer. Therefore it appears to me quite unnecessary that we should go into it now.

In my opinion this revision petition should be dismissed with the costs of respondent 1 (Advocate's fee Rs. 250).

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ANANTAKRISHNA AYYAR J.—I agree. The petitioner before us was elected President of the District Board of Tanjore, and, on an election petition duly presented, the learned Subordinate Judge has declared his election to be void on the ground that, as Government Pleader and Public Prosecutor, Tanjore, he held a salaried office under Government and was not eligible for election as President of the District Board under section 13 of the Madras Local Boards Act (XIV of 1920); and he has therefore presented this revision petition to us against that order. On his behalf the

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learned Advocate-General raised before us three contentions and Mr. P. Venkataramana Rao who followed him raised a fourth contention. The learned Advocate-General argued that, having regard to the provisions of the new Act, XI of 1930, which became law while the proceedings were pending before the learned Subordinate Judge, the Court had lost its jurisdiction in respect of this matter and that guillotine had been applied by the Legislature to the petition pending in the lower Court. It was argued that the petition and the proceedings before the lower Court "dropped automatically"—in the words of the learned Advocate-General. But, at a later stage of the argument, the learned Advocate-General modified that position to some extent. As I understood him, he argued that, though the petition might not have "dropped automatically," the proper procedure that the learned Subordinate Judge ought to have followed was to refer the particular point in dispute before him to the Local Government and to pass his final orders on the petition in accordance with the opinion of the Government thereon, and, the learned Subordinate Judge not having done so, his order should be revised as one passed without jurisdiction, or, at any rate, as one passed with material irregularity. Thirdly, the learned Advocate-General argued that, under Rule 6 of the transitional provisions, the petitioner before us was holding office on the date of the commencement of the new Act and therefore the other sub-rules of Rule 6 apply, with the result that he is secure in the holding of his office till the 25th August 1931. The fourth point that was argued by Mr. P. Venkataramana Rao, who followed the Advocate-General on behalf of the petitioner, was that the learned Subordinate Judge was not right in his finding that a Government Pleader and Public Prosecutor in the mofussil is a salaried officer under the

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Government and as such ineligible for election as President of the District Board.

To take the last point first; it is at the highest only a mixed question of fact and law whether a Government Pleader and Public Prosecutor in the mofussil is "a salaried officer under the Government." I proceed on the assumption that it is a mixed question of fact and law. From the records before us it appears that on this question the Government held different views on different occasions. We find from Exhibit A that as early as 1887 the Government held the view that he was a salaried officer under the Government within the meaning of a similar provision under the Madras District Municipalities Act. In Hammick's Municipal Manual published in 1905, I find a statement to the same effect (see page 29). A reference to Exhibit III would show that subsequently the Government were advised that the amount paid to a Government Pleader and Public Prosecutor could be said to constitute "only retaining fee," but could not be said to be "salary," and consequently that the Government Pleader is not "a salaried" officer under the Government. Whichever might be the correct view, the finding arrived at by the learned Subordinate Judge is on a mixed question of fact and law. I am not sitting here in appeal against the learned Subordinate Judge's finding upon that question. The High Court's power of revision does not ordinarily extend to examine the correctness or sustainability of a finding of fact arrived at by the lower Court, and I do not think that the case before me in any way constitutes an exception to the general practice of this Court. That being so, and having regard to the circumstance that such cases are not likely to arise in future—the policy of the new Act being, in this respect, quite different—I do not think that this is a case in which the High Court

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should enter into the examination of the correctness or otherwise of the finding on such a question. No special grounds are shown for us to interfere with such a finding. In this view, I overrule the fourth contention raised by the learned Advocate for the petitioner.

In order to understand and correctly decide the first three contentions raised by the learned Advocate-General, I think it is necessary to keep in view the general principles of legal interpretation of statutes, and also bear in mind the exact scope of, and limitations imposed on, the principle relating to the construction of statutes regarding their retrospective operation. Though the general position could not be disputed, yet, as I think that most of the contentions raised by the learned Advocate-General could be properly appreciated and answered if the rule of interpretation and its limitations be succinctly stated, I proceed to refer to the statement of the rule and its limitations as appears from decided cases and leading text-books. In Maxwell on Interpretation of Statutes, at page 348, the rule is stated in these terms—rules regarding procedure apart—

"Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain."

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Similarly, in Statute Law by Craies, at pages 324 and 326, there are similar statements of the rule. I do not propose to quote them *in extenso*, but one paragraph at page 326 I should like to refer to here—

“Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”

In Halsbury's Laws of England, Volume 27, page 159, it is stated :

“A statute is *prima facie* prospective, and does not interfere with existing rights, unless it contains clear words to that effect, or unless, having regard to its object, it necessarily does so.”

Further,

“A statute is not to be construed to have a greater retrospective operation than its language renders necessary.”

Now, it is, therefore, necessary, not only to see whether the wording of the new Act is clear on this point, but also to examine how far it is clear, and how far it necessitates retrospective application of the provisions of the new Act, because, in cases of doubt, or where a line is reached where it is not at all clear whether the Legislature intended that particular provisions should have retrospective operation or not, the rule is clear that such new provisions should have prospective operation only. I do not think the correctness of these statements is really disputed, but I thought it proper to refer to these authorities only because it is necessary to keep in mind the exact scope and the limitations of the doctrine as laid down by learned authors.

Now, the learned Advocate-General argued that section 54 as enacted by the new Act (XI of 1930) is a

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declaratory provision only, and, therefore, the presumption is that the new provisions were intended to have retrospective operation. In this connection it is necessary that I should refer to an observation made by the Privy Council in *Young v. Adams*(1), because that observation, it seems to me, furnishes an answer to this contention of the learned Advocate-General.

“It may be true”, Their Lordships remark, “that the enactments are declaratory in form ; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law.”

They proceed further to lay down that the context of the statute and the terms of the clauses in question should be examined before even statutes which are declaratory in form are held to be retrospective. No doubt, when it is clear from a declaratory statute that its object was to “explain” certain words or clauses used in a prior enactment, it would be easy to infer the intention of the Legislature to be that the new Act should be retrospective. This High Court had to deal with such a question recently, when, for example, a question arose whether the meaning to be attached to the word “attested” occurring in the Transfer of Property Act was as explained in a later Act. The later Act—Act XXVII of 1926—was passed “to explain” certain provisions of the prior (main) Act. The Court had also to consider in another case what the effect of an amendment to section 53 of the Provincial Insolvency Act was when there was doubt regarding the meaning of a certain expression used in the main Act. In those circumstances this Court held in two recent Full Bench decisions that, having regard to the scope and the

(1) [1898] A.C. 489, 474.

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avowed object of the declaratory Acts, they should be taken in those cases to be *prima facie* retrospective; see *Veerappa Chettiar v. Subrahmanya Ayyar*(1) and *Thaticherla Pichamma v. Official Receiver of Cud-dapah*(2). Unless the intention be clear, either by express words used or by necessary intendment, I should not be justified in holding a new Act to be retrospective. The Privy Council, in *Delhi Cloth and General Mills Co. v. Income-tax Commissioner, Delhi*(3), made the following observations as to when statutes should be construed as retrospective. At page 290, this is what their Lordships say :

“ While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment.”

Now, keeping in mind the exact scope of this principle, and also the limitations which have been laid down as attaching to the same, I proceed to examine the material sections to which our attention was drawn by the learned Advocate-General.

On the first question relating to section 54, I am not able to agree with the learned Advocate-General that what has been done under the new Act is only to “ explain ” the position of a person holding a “ salaried office under the Government ” as laid down by the prior Act. The Legislature evidently took occasion to modify its policy relating to the whole matter. Under section 54 they have provided for a case where “ a person is remunerated either by salaries or fees.” They have also specially provided for other classes of officers

(1) (1928) I.L.R. 52 Mad. 123 (F.B.). (2) (1930) I.L.R. 54 Mad. 12 (F.B.).
(3) (1927) I.L.R. 9 Lah. 284 (P.C.).

of the Government, whole-timed and not whole-timed. They have also taken care to indicate that, unless both these conditions are fulfilled in any particular case, viz., unless a person be both a whole-timed officer and also remunerated by salaries or fees, he could not be held disqualified under the new Act. Again, the effect of such a disqualification has been extended to persons who, after becoming a member, etc., become subsequently disqualified to hold the office. It is clear to my mind that the present is not a case where the statute could be said to be merely declaratory. The present case is therefore not governed by section 54 of the new Act and the first contention must accordingly be overruled.

Again, the learned Advocate-General argued that, under Rule 5, sub-rule 3, of the transitional provisions, the present is a case where the Legislature has expressly provided that applications made while the old Act was in force should not be proceeded with; but that, if any dispute arises, such as the one with which the learned Subordinate Judge was concerned, then the question has to be referred to the Local Government whose decision shall be final. It seems to me that Rule 5 does not apply to the present case. Under the new Act the Government have taken power to change the areas and jurisdiction of local boards. They could extend the jurisdiction and area of one taluk board by adding new area to the same, and they could cut up an old taluk board or take away some portion from it, as they think proper. The Government could also change the names of such boards, etc.; see sections 4 and 5 of the new Act. Questions will naturally arise in such cases as to which local board is to be the owner of property possessed by the old board, and as to which board is to sue or be sued with reference to particular causes of action; questions would arise whether notices already issued

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preliminary to imposing taxes regarding persons or properties would be valid or not, and whether the new boards would have to begin the whole process afresh. It seems to me that Rule 5 of the transitional provisions only deals with cases similar to those I have suggested above. No doubt, sub-rule 3, if it stood alone, and if it be wrested from its context, might lend some support to the contention. If the object was to enact a provision which would have the effect attributed to it by the petitioner, its present place between two sub-rules which refer to quite a different matter would be the most inappropriate place to locate such an important provision relating to the automatic dropping of an application filed in due course under the old law and pending before a Court when the new Act came into force. Sub-rule 4 refers to any dispute arising as to the local board by which any proceeding is to be continued under sub-rule 2, or to or against which any remedy is to be available under sub-rule 3. It is thus applicable to disputes to which the local board is a party. Election petitions, like the one in question, are not covered by the said rule, the board not being a party to such petitions. On the other hand, if we read all the four sub-rules together and in harmony with one another, the object of Rule 3 is clear; and, in my opinion, that is the correct view that we should take. Even if I am wrong in my view as regards the exact scope of Rule 5, sub-rule 3, the word "available" occurring in the rule would seem to indicate that a new remedy is provided for by it which may be taken advantage of by a person interested, in the circumstances, but it does not follow that that is the only remedy open to him. Remedies may be given by a statute, and, if a new remedy is given in a case where an old remedy existed, the ordinary presumption is that this new remedy is a

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cumulative one and not in lieu of the old remedy. It is a rule of construction that, when a statute creates a new remedy in respect of a cause of action which existed, under the common law, this new remedy is taken to be cumulative and not in substitution of the old remedy. If we take it that under sub-rule 3 a new remedy has been made available to a person in the position of the petitioner in the lower Court, that does not, in this view, disable him from pursuing the old remedy, which he has already adopted, by way of moving the Court by a petition and which petition is pending before a Court. I would, however, prefer to base my judgment on the first of the two grounds mentioned by me. It, therefore, seems to me that sub-rule 3 of Rule 5 of the transitional provisions is not capable of the construction put upon it by the learned Advocate-General on behalf of the petitioner.

The last point on which great stress was laid by the learned Advocate-General relates to the construction of Rule 6 of the transitional provisions. The words "holding office" occurring in sub-rule (a) of Rule 6 (1) were strongly relied on. It was argued that, as the petitioner was "holding office" on the date when the new Act came into force, his term of office became secure, and that he was entitled to continue till 25th August 1931, the date fixed by the Local Government. As I read the other sub-rules of Rule 6, it seems to me that what is provided for by Rule 6 is to extend the terms, and in some cases to shorten the terms, of the members, etc., referred to therein. One cannot speak of a person's term of office unless he validly holds that office. No doubt in one sense a person elected as a member, or elected as President, holds office (though his election is questioned) until the rights are finally adjudicated upon in an election petition duly presented under the Act. But

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both the old Act and the new Act make it clear that the result of the adjudication so far as his office is concerned is to declare his election void, and under the present Act it is expressly enacted that, "pending such decision," the member shall be entitled to act as if he were not disqualified—Section 50. In order to bring about as little dislocation as possible in the actual transacting of business by the boards, the Legislature has provided for the validation of those acts of such members and Presidents which were done before the adjudication by the Court on the validity of the elections concerned; but, at the same time, the Legislature has also made it clear that, when the legality of the election or appointment is decided against by the Court, the election is declared void. A trespasser who might be in possession of such an office on the date of the new Act could not be said to "hold office" within the meaning of the rule. Again, Rule 6 adds a proviso—"subject to the provisions of sections 54 (2), 56, 57 and 59 of the Act." The result of the construction of Rule 6 and its sub-rules contended for by the learned Advocate-General would be that, having regard to the other provisions of this Rule 6, allegations serious in the eye of the Legislature made against such candidates and pending adjudication in a Court are all condoned—so to speak—during this interim period, whereas if the same candidate be guilty of the same disqualification after the Act, proceedings could be taken against him in respect of the same. It is therefore difficult to accept the argument that what the Legislature has provided for in Rule 6 is to condone such disqualifications and make such persons duly elected members or Presidents, irrespective of all allegations made against them, though they are pending investigation before the Court. I do not think it necessary to dilate upon this part of the case, as I

agree with my learned brother's observations thereon. I overrule this contention also.

I must state that, if the Legislature intended that the amended section 54 is to have retrospective operation, or that an election petition duly filed and being inquired into by a Court should automatically drop, or that the jurisdiction which a Court admittedly had when proceedings were initiated before it should be taken away from it or otherwise curtailed or guillotine applied to such pending proceedings, one should have expected the Legislature to say so in express terms, or at least by necessary intendment. I am not able to find any such reasonable indication in the new Act; and, having regard to the well-settled principles applicable to such matters, I do not think that the above contentions urged on behalf of the petitioner before us should be accepted.

In my view, it could not be said that the learned Subordinate Judge has in this case either exercised a jurisdiction not vested in him by law or exceeded his jurisdiction in the matter. That being so, I agree that this revision petition should be dismissed with costs.

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APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1930,
October 8.

ANNU AVATHANIGAL (RESPONDENT), APPELLANT,

v.

SOMASUNDARA AVATHANIGAL (APPELLANT),
RESPONDENT.*

*Indian Limitation Act (IX of 1908), arts. 89 and 116—
Account—Suit for, or for compensation for breach of
registered contract—Art. 89 applicable in former case—
Nature of suit for an account.*

A suit for an account is governed by article 89 of the Limitation Act.

In a suit for an account, if the result of taking an account shows a balance in favour of the defendant, he can get a decree for the amount of that balance.

Two brothers, *A* and *B*, agreed to partition their property by means of a registered deed, by which some property was not actually divided but was to be managed by each in turn, and each agreed to account to the other for the other's share of the income at the end of his management. When *A* sued *B* for an account of *B*'s management, *B* prayed for an account of *A*'s management and claimed to set off what would be due to him from *A* on taking an account.

Held that, as both *A* and *B* claimed only an account and not compensation for breach of the registered contract, each claim was governed only by article 89 and not by article 116 of the Limitation Act.

APPEAL under clause 15 of the Letters Patent against the judgment of WALLACE J., dated 22nd October 1929, in Second Appeals Nos. 469 and 470 of 1926 preferred against the decrees of the District Court of Madura in Appeal Suits Nos. 11 and 39 of 1922, respectively (Original Suit No. 222 of 1921 on the file of the Court of the District Munsif of Madura Taluk—

* Letters Patent Appeal No. 129 of 1929.

Original Suit No. 189 of 1920 on the file of the Court of the District Munsif of Madura Town).

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K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellant.

R. Viswanatha Ayyar for *K. Bhashyam* for respondent.

JUDGMENT.

REILLY J.—In this suit the plaintiff and defendant, who are brothers, and another brother as members of a joint family owned a village. In 1896 they executed a registered deed of partition, Exhibit A, by which they agreed that each brother should be in management of the village for two years in turn and should settle the accounts for his management in July of each year and pay the amounts due to the other brothers. The defendant was in management under that arrangement for faslis 1326 and 1327. The plaintiff sued for what was due to him for those faslis. The defendant in his written statement claimed to set off what was due to him from the plaintiff for the plaintiff's period of management, faslis 1324 and 1325. The District Judge found that the defendant's claim for those two earlier faslis was barred, as it should be taken to be governed by article 89 of the Limitation Act. On second appeal WALLACE J. found that the defendant's claim in respect of those two faslis was in time as it could be brought under article 116 of the Limitation Act as well as article 89. The present appeal is against that decision of WALLACE J.

As the document, Exhibit A, was a registered document and there was this contract that each brother in turn should be in charge and render accounts in July of each year and pay over what was due to the other brothers, if those terms of Exhibit A were broken, as it

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is admitted they were broken, then either the plaintiff or the defendant could have sued for damages for breach of contract and the suit would have come under article 116. WALLACE J. is of opinion that the suit and the defendant's claim were of that nature. But, if we examine the plaint in this case, we find that the plaintiff was clearly not suing for compensation for breach of contract. He sued for an account and put in an approximate account, stating approximately what he thought was due as it was necessary under the Code of Civil Procedure that he should put in some such statement. The defendant in his written statement said, "the plaintiff is bound to render accounts to this defendant relating to his (plaintiff's) management for faslis 1324 and 1325 when he had the management and pay to this defendant the proportionate amount found due under the same," and he put in an account. I think it is perfectly clear that, whatever kind of suit the plaintiff and the defendant might have brought, the suit which the plaintiff brought and the reply which the defendant gave were both claims for an account and nothing else. With great respect it appears to me that WALLACE J. has not noticed exactly what the prayers of the parties were.

It has been decided that, when by an oral agreement one tenant in common is left in possession as the agent of the other tenants in common, if one of them sues him for an account, the article applicable is article 89 of the Limitation Act. A Full Bench of this Court expressed that opinion in *Yerukola v. Yerukola*(1); and the Privy Council decided that that was the right article in *Asghar Ali Khan v. Khurshed Ali Khan*(2). Again, when the High Court of Calcutta applied that article to such a case

(1) (1922) I.L.R. 45 Mad. 648 (F.B.).

(2) (1901) I.L.R. 24 All. 27 (P.O.).

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in *Chandra Madhab Barua v. Nobin Chandra Barua*(1), that was approved by their Lordships of the Privy Council in *Nobin Chandra Barua v. Chandra Madhab Barua*(2). There is also another statement of the Privy Council, *obiter dictum*, to the same effect in *Merla Venkanna v. Merla Agasthiah*(3). It has also been decided that, when an agent agrees to submit yearly accounts to his principal, article 89 is the article which applies to a suit for an account brought by the principal. *Madhusudan Sen v. Rakhal Chandra Das Basak*(4) and *Bhabatarini v. Sheikh Bahadur*(5) are to that effect. Even if the agent's agreement to submit yearly accounts is a registered agreement, there is the opinion of Chief Justice MACLEAN *obiter* in *Hafezuddin Mandal v. Jadu Nath Saha*(6) that the article applicable is article 89.

But for the defendant it has been contended before us that, when a principal sues his agent for an account, he sues for money which he hopes to obtain as the result of the accounting. As a matter of human nature no doubt that proposition is true. Very few people, one may imagine, bring suits for accounts before the Courts and hope to get nothing out of them. The Privy Council in *Rahimbhoy Habibbhoy v. C. A. Turner*(7) has stated that a decree for the taking of an account implies that, if a balance is due from the defendant, he must pay it. So far the contention of the defendant is no doubt sound. Then it is further contended by Mr. Viswanatha Ayyar for the defendant that in such cases, if money is found due on the agent's account being taken, it is really due because the agent has broken his contract to account, and, if anything is

(1) (1912) I.L.R. 40 Calo. 108.

(2) (1916) I.L.R. 44 Calo. 1 (P.O.).

(3) (1922) 27 C.W.N. 725 (P.O.).

(4) (1915) I.L.R. 43 Calo. 248.

(5) (1919) 30 C.L.J. 90.

(6) (1906) I.L.R. 35 Calo. 298.

(7) (1890) I.L.R. 15 Bom. 155 (P.O.).

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recovered in such a suit from the agent, it must be regarded as compensation for breach of contract, and, if the agent's agreement is registered, then article 116 of the Limitation Act applies. He has pointed out that money recovered by suit as due on a registered bond or due as rent under a registered counterpart of a lease must now be treated by us as money recovered as compensation for breach of contract under article 116 of the Limitation Act in accordance with the opinion of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(1). That is so. But is a suit for an account a suit for compensation in that sense? It has been decided in some cases that it is a suit for compensation in that sense. That is the effect of *Mati Lal Bose v. Amin Chand Chattopadhyay*(2), *Easin Sarkar v. Barada Kishore Acharya Chowdhry*(3), *Jogesh Chandra alias Dhalu Ghose v. Benode Lal Roy*(4) and *Bhagirath v. Prem Chand*(5). On the other side there is the decision in *Bhabatarini v. Sheikh Bahadur*(6) that a suit for an account and for money due on taking the account is not a suit for compensation for breach of contract. But, in my opinion, Mr. Rajah Ayyar for the plaintiff in this case is right in his contention that we are not at liberty to say that a suit for an account is a suit for compensation for breach of contract even in the sense in which "compensation for breach of contract" has been used in the cases recognized as correct by the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(1). In *Hurrinath Rai v. Krishna Kumar Bakshi*(7) their Lordships of the Privy Council themselves made a statement, which shows that a suit by a principal against his agent for an account is something different altogether

(1) (1916) I.L.R. 44 Calo. 759 (P.C.).
(2) (1902) 1 C.L.J. 211.
(3) (1909) 11 C.L.J. 43.
(4) (1909) 14 C.W.N. 122.
(5) (1912) 17 C.L.J. 201.
(6) (1919) 30 C.L.J. 90.
(7) (1883) I.L.R. 14 Calo. 147 (P.C.).

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from a suit for compensation for breach of contract, because in a suit for an account the defendant can claim a decree, if the accounting turns out to be in his favour, and that could never happen in a suit merely for compensation for breach of contract. The words actually used in that case by their Lordships of the Privy Council are:

"Nothing could prevent the defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the plaintiff claims it if a larger sum than he specifies should be found due to him."

There we have an essential difference between a suit for an account and a suit for compensation for breach of contract. As was pointed out by TREVELYAN J. in *Kunjo Behary Singh v. Madhub Chundra Ghose*(1), a suit for an account is not a suit for a definite sum of money but for ordering the defendant to account to the plaintiff for monies received by him and the first result is that the plaintiff gets a decree for discovery. That an agent when sued as defendant for an account can get a decree for the balance of the account, if anything is found due to him, even though he has not claimed it in his pleadings, was decided in *Parmanand v. Jagat Narain*(2), which was approved in a later decision of the same Court, *Ram Charan v. Bulaqi*(3). It is true, as Mr. Viswanatha Ayyar has pointed out, that in *Narasimha Rao v. Zamindar of Tiruvur*(4), PHILLIPS J. dissented from that view and was of the opinion that a defendant-agent in such a suit could not get the balance by decree if a balance was found due to him. But it appears that *Hurrinath Rai v. Krishna Kumar Bakshi*(5) was not quoted to the learned Judge in that case, and, as

(1) (1898) I.L.R. 23 Calo. 684.
(2) (1910) 1 L.R. 32 All. 525.
(3) (1924) 22 A.L.J. 783.
(4) (1919) 1 L.R. 42 Mad. 873.
(5) (1886) 1 L.R. 14 Calo. 147 (P.C.).

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has just been pointed out by Mr. Rajah Ayyar, in *Ramalinga Chetti v. Ragunatha Rau*(1) it is recognized as the law and practice in England—and there is no reason to suppose that the practice in this country should be different—that a defendant-agent in a suit for an account can recover the balance, if on the accounting a balance is found to be due to him. I must accede to Mr. Rajah Ayyar's contention that a suit for an account is not a suit for compensation for breach of contract. It appears to me to be a suit of an entirely different nature and may have results impossible in a suit for compensation for breach of contract. I may remark that, if such a suit were really a suit for compensation for breach of contract, then all the decisions which I have mentioned that a suit for an account against an agent falls within article 89 of the Limitation Act would be unjustifiable, and it should be remembered that those decisions include two of the Privy Council. A suit for compensation for breach of contract may possibly come within some other article of the Limitation Act than article 115 or article 116. But how could it ever come within article 89? The very wording of article 89 precludes that. Article 89 runs "by a principal against his agent for movable property received by the latter and not accounted for." Is it possible, using English language with any approach to accuracy or even sense, to speak of compensation for breach of contract as movable property received by the agent for his principal? Money received by the agent for the principal is movable property, as was declared in *Asghar Ali Khan v. Khurshed Ali Khan*(2). There is no difficulty about that. But to my mind it is beyond all reason to suggest that a suit for compensation for breach of

(1) (1897) I.L.B. 20 Mad. 418.

(2) (1901) I.L.B. 24 All. 27 (P.C.).

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contract comes within article 89 of the Limitation Act. As the Privy Council has definitely decided that a suit against an agent for an account comes within article 89 of the Limitation Act, that is alone sufficient to show that, when the plaintiff sued for an account in this case and when the defendant asked for an account, it was article 89 which was applicable and not article 116. Both parties might have sued, if they had chosen, for compensation for breach of contract and have brought themselves under article 116; but it happens that they have chosen to sue for accounts, and we must apply the article applicable to the relief for which they have prayed. That being so, in my opinion this appeal must be allowed and the decree of the District Judge restored with costs.

ANANTAKRISHNA AYYAR J.—I agree. The only question that arises for decision in this appeal is one of limitation. As I construe the pleadings in the case, the claim put forward by the plaintiff as well as the defendant is one for an account by the principal against his agent. That is the view which both the lower Courts also took of the pleadings in the case. If so, *prima facie*, article 89 of the Limitation Act would apply to this case, and the only question then is whether article 116 would apply because Exhibit A under which the liability arises is a registered document. Both the lower Courts held that article 116 would not apply to such a case; but the learned Judge (WALLACE J.) held that "there was no obstacle in law to the suit coming under article 116 as well as under article 89 of the Limitation Act." The question is whether that view is correct.

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The learned Advocate for the respondent argued that article 116 applies to the case, for there is a contract in writing registered in the present case (Exhibit A), one party has committed breach of that contract, and the

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other party claims compensation for the said breach, and that the claim is therefore really for compensation for breach of a contract in writing registered. He drew our attention to the decision of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(1) and also to the decision of a Full Bench of this High Court in *Ratnasabapathy Chettiar v. Devasigamony Pillai*(2). The Privy Council held that article 116 applied to a suit for royalties due under a registered lease of certain lands. Reading pages 767 and 768 of the report, it is clear that their Lordships thought that they should accept the interpretation "so often and so long put upon the statute (as to the meaning of the word 'compensation' occurring in article 116) by the Courts in India" and that the decisions cannot now be disturbed. The Full Bench held that "where a mortgage deed containing a personal covenant to pay the mortgage money is registered, article 116 applies to a suit to recover the balance due to the mortgagee after the sale of the mortgage property." In delivering the opinion of the Full Bench, KUMARASWAMI SASTRI J. refers to various decisions of this and other High Courts where it was held that suits to recover money due on registered bonds, suits to recover rent due on registered lease deeds, and suits to recover amounts due in respect of covenants in registered deeds of partnership, were governed by article 116 of the Limitation Act. No reference was, however, made to decisions dealing with article 89 in cases where the documents creating the agency are registered. We have therefore to consider the nature of the suit contemplated by article 89 and to see whether the same could be considered to be a "suit for compensation for breach of a contract" within the meaning of article

(1) (1916) I.L.R. 44 Calc. 759 (P.C.).

(2) (1928) I.L.R. 52 Mad. 105 (F.B.).

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116. No doubt, we should keep in view the fact that the word compensation has been used in a wider sense in the Contract Act and in the Limitation Act. We should also remember that there is generally a distinction established by the Limitation Act in favour of registered instruments, a longer period of limitation being (generally speaking) prescribed in the case of registered instruments. We have therefore to be fully alive to the above features in construing article 89 of the Limitation Act.

Article 89 speaks of

"a suit by a principal against his agent for movable property received by the latter and not accounted for; period of limitation is three years, and time runs from the time when the account is during the continuance of the agency demanded and refused, or, where no such demand is made, when the agency terminates."

The Privy Council decided in *Asghar Ali Khan v. Khurshed Ali Khan*(1) that the expression "movable property" in article 89 includes money. In *Shib Chandra Roy v. Chandra Narain Mukerjee*(2), it was held by HARRINGTON and MOOKERJEE JJ. that a suit by a principal against his agent for an account and also for recovery of money that may be found due from him is a suit for movable property received by the agent on behalf of the principal and not accounted for and is governed by article 89. It was argued that, because the plaintiff prays that an account may be taken first, the sum due ascertained, and the amount so due be also decreed to him, the suit is therefore not one for account but for money. At page 725, MOOKERJEE J. answered the objection in the following terms:—

"As pointed out by Sir BARNES PEACOCK in *Kalee Kishen Paul Chowdhry v. Mussammut Juggut Tara*(3), when it is said

(1) (1901) I.L.R. 24 All. 27 (P.C.).

(2) (1905) I.L.R. 32 Calc. 719.

(3) (1868) 11 W.R. 76.

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that the law imposes an obligation on the agent to render an account of his agency and to account for the monies of his principal, the word 'account' is used in its legal sense and is not confined merely to rendering an account by the agent of what he has done with the monies, but also includes the payment of any balance, which might be found due from him upon taking the accounts. This is substantially in accordance with the observations of Lord ESHER in *Harsant v. Blaine*(1) that the duty of the accounting party is not merely to be constantly ready with his accounts, but also, if the accounts show that he has money to pay over, to be constantly ready to pay. In this view of the matter, article 89 would cover a case of the present description, the object of which is to obtain an account of the monies in the hands of the agent as also to recover the sum due."

What is technically known as "a suit for account" by a principal against his agent has been described in several cases. The agent has to be ready with his accounts, he has to explain the entries in the accounts which require explanation, he has to support the entries by vouchers in proper cases, and he has also to hand over the balance, if any, that might be found due, to the principal. It has also been mentioned in the cases that, if it should turn out that, as a result of the taking of the accounts, some money is due to the defendant-agent, then there should be a decree in favour of the defendant-agent for that amount. See *Collyer v. Dudley*(2), *Hurrinath Rai v. Krishna Kumar Bakshi*(3), *Rahimbhoy Habibbhoy v. C. A. Turner*(4) and *Ramalinga Chetti v. Ragunatha Rau*(5). See also the following regarding the nature of a suit for account: *Kunjo Behary Singh v. Madhub Chandra Ghose*(6) per TREVELYAN J., *Rajhunath v.*

(1) (1887) 56 L.J. Q.B. 511. (2) (1823) 2 L.J. Ch. 15; 37 E.R. 1168.
(3) (1886) I.L.R. 14 Calc. 147, 153 (P.C.).
(4) (1890) I.L.R. 15 Bom. 155, 159 (P.C.).
(5) (1897) I.L.R. 20 Mad. 418. (6) (1896) I.L.R. 23 Calo. 884, 890.

Ganapatji(1), *Parmanand v. Jagat Narain*(2) and *Ram Charan v. Bulagi*(3). See also sections 213 and 218 of the Indian Contract Act. In *Hurrinath Rai v. Krishna Kumar Bakshi*(4), the plaint concluded as follows:—

"There is a balance against him (the defendant) of Rs. 19,925-14-0 for the recovery of which I institute this suit. If by the decision of the Court a larger sum should be proved to be payable to me by him under proofs and papers, the prayer is also for the recovery of the same."

The High Court was of opinion that the suit was virtually one for an account, and the Privy Council agreed with that view. At page 153, their Lordships observed as follows:—

"Nothing could prevent the defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the plaintiff claims it if a larger sum than he specifies should be found due to him. Such a suit is essentially one for account."

In *Rahimbhoy Habibbhoy v. C. A. Turner*(5), the Privy Council remarked, as to the effect of a preliminary decree for an account passed in a suit for account, as follows:—

"It is true that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on these accounts, the defendant is bound to pay it."

The question was also considered in this Court by Sir ARTHUR COLLINS C.J. and SHEPHARD J. in *Ramalinga Chetti v. Ragunatha Rau*(6) whether a defendant could

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(1) (1904) I.L.R. 37 All. 374. (2) (1910) I.L.R. 32 All. 525.
(3) (1924) 22 A.L.J. 873. (4) (1886) I.L.R. 14 Calc. 147 (P.C.).
(5) (1890) I.L.R. 15 Bom. 155, 159 (P.C.).
(6) (1897) I.L.R. 20 Mad. 418.

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obtain a decree for the amount that might be found due in his favour. At page 420, the Court observed:

"If it were true that the suit was a suit for an account in the proper sense of that term, then it would follow, according to the decision in *Hurrinath Rai v. Krishna Kumar Bakshi* (1), which decision illustrates the English practice, that the first defendant would be entitled to have an account taken with a view to obtain a decree for the sum that might be found due to him."

It is therefore clear that in a "suit for account"—properly so-called—the defendant has to render account in the technical sense, and pay the plaintiff the amount that might be found due to him; it is also clear that in such a suit the defendant would be entitled to a decree in his favour for any amount that might be found due to him, as the result of the taking of the accounts. The opinion expressed by PHILLIPS J. in *Narasimha Rao v. Zamindar of Tiruvur* (2) that no decree could be passed in such a suit in favour of the defendant is thus unsustainable having regard to the authorities noticed above, which authorities were evidently not cited before the learned Judge.

Could such a suit be called "a suit for compensation for breach of a contract" within the meaning of article 116? No doubt, no plaintiff ordinarily files a suit for an account unless he also hopes to get a decree for some amount of money in his favour; but it is possible that a plaintiff in a particular case might file such a suit with a view mainly to get possession of the accounts and other papers from the agent and to have the entries explained as is done in suits for accounts; see *Madhusudan Sen v. Rukhal Chandra Das Basak* (3). Does the circumstance then, that, ordinarily, and in a large majority of cases, a decree for money is also prayed for

(1) (1886) I.L.R. 14 Cal. 147 (P.C.). (2) (1919) I.L.R. 42 Mad. 873, 879 880.
(3) (1915) I.L.R. 43 Cal. 248, 260—286.

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in such a case by the plaintiff, who has also to pay court-fee on the amount at which he approximately values the relief, bring the case under article 116? The learned Advocate for the respondent strongly relied on this aspect of the case; but, after having given my best consideration to the arguments, I feel unable to agree with him. In my opinion, "a suit by a principal against his agent for movable property received by the latter and not accounted for" cannot be said to be "a suit for compensation for the breach of a contract." After the decision of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (1), a Full Bench of this High Court, consisting of Sir MURRAY COUTTS TROTTER C.J., KRISHNAN and BEASLEY JJ., had to consider the question whether a suit by a share-holder against a company for recovery of dividend is governed by article 116 of the Limitation Act. After noticing the Privy Council case in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (1), the learned CHIEF JUSTICE observed, at page 482 of *Rama Seshayya v. Sri Tripurasundari Cotton Press, Bezwada* (2), as follows:—

"It is difficult enough to regard that form of words as applicable to a claim for rent. It seems to me clumsy beyond anything that is legitimate to allow the claim of a share-holder for his dividend to be regarded as aptly described by 'compensation for breach of contract, express or implied'."

No direct decision of this Court, on the question we have to decide, has been brought to our notice. In *Venkatachalam v. Narayanan* (3), Sir JOHN WALLIS C.J. and SESHAGIRI AYYAR J. made certain observations relevant to the present question. At page 379, the learned CHIEF JUSTICE observed as follows:—

"The plaintiffs rely on a decision in *Jogesh Chandra alias Dhalu Ghose v. Benode Lal Roy* (4) that where there

(1) (1916) I.L.R. 44 Cal. 759 (P.C.). (2) (1925) I.L.R. 49 Mad. 468.
(3) (1914) I.L.R. 39 Mad. 376. (4) (1909) 14 C.W.N. 122.

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was a definite contract to render an account yearly, article 115 and not article 89 would be the article applicable in the case of unregistered contracts. This case proceeded to some extent on the authority of a decision in *Mati Lal Bose v. Amin Chand Chattopadhyay*(1) that, in the case of a contract in writing registered, article 89 does not apply but article 116. The authority of the latter decision has been doubted in *Shib Chandra Roy v. Chandra Narain Mukerjee*(2) and *Hafezuddin Mandal v. Jadu Nath Saha*(3), and it is not in my view conclusive of the present case."

SESHAGIRI AYYAR J. would seem to go a little further. At page 382, the learned Judge observed as follows:—

"The first to fifth respondents' vakil relied on *Jogesh Chandra alias Dhalu Ghose v. Benode Lal Roy*(4), for the position that, when there is a special contract fixing a date for the rendering of the accounts, the article applicable to suits by principals against agents is 115 and not article 89. The fixing of a date for rendering accounts cannot stop the termination of the agency. The authority relied upon in *Jogesh Chandra alias Dhalu Ghose v. Benode Lal Roy*(4) has been dissented from by MACLEAN C.J., in *Hafezuddin Mandal v. Jadu Nath Saha*(3). Mr. Justice MOOKERJEE in *Shib Chandra Roy v. Chandra Narain Mukerjee*(2) held that article 89 would apply to a case like the present."

The decisions of the Calcutta High Court are not uniform. They are all collected in *Mahamad Mazaharul Ahad v. Mahamad Azimuddin Bhuan*(5), where there is also an interesting discussion about the meaning of the word "compensation" at page 216—though the case itself related to recovery of dower-debt under a registered dower-deed—the Court holding that article 116 applied to such a case. Though the decision in *Venkatachalam v. Narayanan*(6) was passed before the ruling of the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur*(7), the learned Judges

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| (1) (1902) 1 C.L.J. 211. | (2) (1905) I.L.R. 32 Calo. 71. |
| (3) (1903) I.L.R. 35 Calo. 298. | (4) (1909) 14 C.W.N. 122. |
| (5) (1922) 27 C.W.N. 210. | (6) (1914) I.L.R. 39 Mad. 376. |
| (7) (1916) I.L.R. 44 Calo. 759 (P.O.). | |

who took part in the decision in *Venkatachalam v. Narayanan*(1) would seem to be inclined to agree with the view of MACLEAN C.J. in *Hafezuddin Mandal v. Jadu Nath Saha*(2).

Suits for accounts by principals against agents have been held to come under article 89. See *Asghar Ali Khan v. Khurshed Ali Khan*(3), *Hurrinath Rai v. Krishna Kumar Bakshi*(4), *Gabu v. Zipru*(5) and *Girjabai Shivdeo Rao v. Narayan Rao Ganpat Rao*(6). See also *Yerukola v. Yerukola*(7), *Merla Venkanna v. Merla Agasthiiah*(8) and *Madhusudan Sen v. Rakhal Chandra Das Basak*(9), where, at page 256, the Court (MOOKERJEE and ROE JJ.) declined to refer the question to the decision of a Full Bench, and decided that, where there is an agreement to submit accounts annually, a suit against the agent for account is governed by article 89 and not by article 115 of the Limitation Act.

The wording of the corresponding article 117 of Act IX of 1871 was—on a promise or contract in writing registered. The words—for compensation and etc., were introduced by Act XV of 1877. Any argument derived from the change of language goes, if at all, against the respondent's contention.

No doubt there is a saving clause in article 115, which does not find a place in article 116, namely, the words "not otherwise provided for"; but before article 116 can apply the Court must be satisfied that the suit is one for compensation for breach of a contract; and, for the reasons I have mentioned, a suit for an account by a principal against his agent is a suit well known to law and cannot properly be described as a

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| (1) (1914) I.L.R. 39 Mad. 376. | (2) (1908) I.L.R. 35 Calo. 298. |
| (3) (1901) I.L.R. 24 All. 27 (P.C.). | (4) (1886) I.L.R. 14 Calo. 147 (P.C.). |
| (5) (1920) I.L.R. 45 Bom. 313. | (6) (1924) 88 I.O. 975. |
| (7) (1922) I.L.R. 45 Mad. 648 (F.B.). | (8) (1922) 27 C.W.N. 725 (P.C.). |
| | (9) (1915) I.L.R. 43 Calo. 243. |

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suit for compensation for breach of a contract as ordinarily understood. Having regard to the apparent policy of the Limitation Act to provide generally a longer period of limitation to suits based on registered documents (though it was more apparent under Act IX of 1871 than in the later Acts), I should be glad if I had been able to come to the conclusion that article 116 applied to the present case seeing that Exhibit A is a registered document, but, for the reasons already given, I feel myself unable to accept the contention that article 116 is applicable to the present case. Holding that article 89 is the article applicable, the appeal has to be allowed with costs.

[This appeal having been posted to be spoken to this day the Court made the following ORDER:—]

Costs will be allowed both in second appeals and letters patent appeal—in both cases.

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APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice
Bhashyam Ayyangar.

C. KRISHNASWAMI NAIDU (DEFENDANT), APPELLANT,

1930,
September 8.

v.

K. JAYALAKSHMI AMMAL (PLAINTIFF), RESPONDENT.*

Pleadings—Person claiming to be principal sues another as agent for accounts—Other denies relationship of principal and agent—Trial judge disbelieves both parties and holds relationship was one of partnership and orders accounts—Legality of judgment—Prayer in partnership suit for account without asking for dissolution—Granting of.

Where a person claiming to be a principal sued another as his agent for accounts, and that other denied the relationship of principal and agent and added that the plaintiff was given *ex gratia* a half-share in the business which was solely that of the defendant and the trial Judge disbelieving both the parties held that the relationship between them was one of partnership and directed an account to be taken,

Held, that in the circumstances a decree on a partnership basis should not have been given, and certainly not without a prior amendment of the plaint; *Ma Shwe Mya v. Maung Mo Huaung*, (1921) I.L.R. 48 Calc. 832 (P.C.), and *Ananda Chandra Chuckerbutty v. Braja Lal Singh*, (1922) I.L.R. 50 Calc. 292, followed.

Held further, that, if a partner asks for an account without asking for a dissolution, the Court must be satisfied that there are special grounds for granting the prayer, which grounds must be alleged by the plaintiff, and the defendant must have an opportunity of showing cause against. *Kassa Mal v. Gopi*, (1886) I.L.R. 9 All. 120, followed; *Karri Venkata Reddi v. Kollu Narasayya*, (1908) I.L.R. 32 Mad. 76, and *Damodara Shanabhaga v. Subraya Pai*, (1917) 33 M.L.J. 509, referred to.

* Original Side Appeal No. 135 of 1928.

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APPEAL against the judgment of KUMARASWAMI SASTRI J., dated 17th October 1928, and passed in the exercise of the Ordinary Original Civil Jurisdiction in Civil Suit No. 691 of 1926.

T. V. Venkatrama Ayyar (R. Tirumalai Thathachari with him) for appellant.

K. S. Krishnaswami Ayyangar (E. R. Krishnan with him) for respondent.

JUDGMENT.

The suit which gives rise to this appeal was filed by the widow of one Chengayya Nayudu, who died in April 1918, against her maternal uncle for an account of a certain business which she alleged he had conducted as her agent. We are only concerned here with a rice mandi business which the defendant carried on from the time of Chengayya Nayudu's death up to date of suit. The plaintiff's case was that since her husband did not dispose of this business by will, as he did of some other assets, it was hers by right of inheritance and that the defendant, who held her power of attorney, was only her agent. The defendant contended on the other hand that the mandi which Chengayya Nayudu had been conducting was closed a few days before his death and that the subsequent business was the defendant's own, to a share in which the plaintiff had no title. Nevertheless, in consideration of the facts that she had lost her husband, was his relative and was living with him, he had voluntarily given her a half-share, which continued up to October 1918, when the successive arrangements described in paragraph 12 of the written statement were made. He further alleged that accounts had been settled and the plaintiff had received the allowances under this arrangement up to the 1st January 1926. The case was tried by KUMARASWAMI SASTRI J. who found

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that neither the plaintiff nor the defendant was speaking the truth, and decided that each was jointly interested in the business and entitled to a half-share. He accordingly gave a declaration to this effect and referred the suit to a commissioner to take an account. This decision has been attacked before us on the ground that it is consistent neither with the plaintiff's nor the defendant's pleas, and that, of course, is true. It appears that there was no application to amend the plaint nor indeed could there well have been one because this was no example of an inadvertent mis-statement of facts or legal position, but, according to the learned Judge's finding, a deliberate falsification of the truth. A number of issues were framed, Nos. 1 and 4 relating particularly to the rice mandi business. No. 1 was framed in the terms of the pleadings to enquire whether the business belonged to the plaintiff and whether she entrusted it to the defendant for management or whether it had been given to the defendant. No. 4 ran thus: "Was there an agreement to give the plaintiff a share of the profits in the said business as stated in paragraph 12 of the written statement and if so, what are the terms thereof?"

There has been some discussion as to what the learned Judge's finding amounts to, whether it means that the parties were in partnership. Mr. K. S. Krishnaswami Ayyangar for the respondent has done his best to resist that conclusion for reasons which are not very difficult to surmise. It is true that the judgment contains no express reference to a partnership, but it is further true that, if the incidents of such a legal relationship appear to have been found by the Court, a partnership must be inferred. The learned Judge expresses the view in the first place that the business was not transferred to the defendant and that he was

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not merely looking after it on plaintiff's account. He then gives grounds for adopting an intermediate view, involving some arrangement for carrying on the business, and says that all probabilities point to the conclusion that each was to get a half-share, adding his finding that they were "jointly interested". For the respondent, it is sought to add to these findings an averment of the defendant that the plaintiff, who was to get *ex gratia* a half-share, was not to be liable for any losses, but the judgment makes no reference to this and we have no reason to suppose that this condition was held proved. Under section 239 of the Contract Act, partnership is defined as "the relation which subsists between persons who have agreed to combine their property, labour, or skill in some business, and to share the profits thereof between them". We cannot find sufficient reason to doubt that this was the nature of the relationship between the parties which the learned Judge found, and not some other form of contract not specifically recognized or provided for by law, as Mr. K. S. Krishnaswami Ayyangar would suggest.

Thus the question is whether a suit by a principal against an agent can be converted into a suit by one partner against another. There can be no doubt that the two suits are essentially different in character and this circumstance, together with the consideration that the defendant may have been taken by surprise, are the two main grounds upon which decisions on this question have been based. The principles are thus stated in *Ananda Chandra Chuckerbutty v. Braja Lal Singh*(1):—

"The rule that the pleading and proof must correspond is intended to serve a double purpose; first, to apprise the defendant distinctly and specifically of the case he is called upon to answer; and, secondly, to preserve an accurate record of the

(1) (1922) I.L.R. 50 Cal. 292.

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cause of action as a protection against a second proceeding upon the same allegations. The test is, whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence; or, as has sometimes been said, a variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action."

In *Ma Shwe Mya v. Maung Mo Hwang*(1), the Privy Council decided that a claim must be dismissed because the cause of action upon which it was allowed was different from that recited in the plaint, and, in *Sayedani Mahmuda Khaton Chowdhurani v. Mahamaed Elahabad Khan Pani*(2), the same principle was applied by the Board where the plaintiff's claim was found to be "upon a basis wholly different from that upon which the suit was founded". There are a number of cases relating to the amendment of a plaint which applied the same principles. An example of such a case is *Kali Das Chaudhuri v. Sm. Drapaudi Sundari Dassi*(3), which gives effect to the principle that

"Where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation."

Although, therefore, there is some substance in the plea that the defendant may not have been taken by surprise in view of the framing of issue No. 4, there is undoubtedly much authority for the appellant's contention that a decree on a partnership basis should not have been given in the circumstances and certainly not without a prior amendment of the plaint. The matter, however, does not rest there.

It has been said that the plaintiff has been given a decree for an account and it arises for consideration in

(1) (1921) I.L.R. 48 Cal. 832 (P.O.). (2) (1912) 17 C.W.N. 427 (P.O.).
(3) (1917) 22 C.W.N. 104.

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what circumstances such a decree, unassociated with a decree for dissolution, and during the currency of the partnership, can be given. No doubt, in England, the old rule, that the Courts of Equity will not interfere between partners except for the purpose of dissolving the partnership or, if it was dissolved already, of finally winding up its affairs, has been relaxed in modern times. But still the question arises when one partner sues another otherwise than for dissolution, can relief be had without dissolving the partnership? (Lindley on Partnership, 9th Edition, pages 568-569.) A similar statement of the law is to be found in Volume 22, Halsbury's Laws of England, page 71, section 138. The same principle has been applied to such suits in this country, as where, in *Kassa Mal v. Gopi*(1) EDGE C.J. observes :

"It is only under exceptional circumstances that partners can bring such actions against their co-partners, except when the action is for a dissolution of partnership, in which case they may claim an account and payment over of moneys that may be found to be due to them on the account being taken. So far as I am aware, actions between partners, which involve the taking of partnership accounts prior to dissolution, are almost unheard of."

and he proceeds to discuss the English Law on the subject. The same principle was applied in *Damodara Shanabhaga v. Subraya Pai*(2), and was recognized in *Karri Venkata Reddi v. Kollu Narasayya*(3), although the special circumstances of that case justified the Court in interfering. The respondent's learned Advocate scarcely contests the correctness of this position, his contention being, as has been said, that the arrangement between the parties did not amount to partnership. He further undertakes on behalf of his client not to press

(1) (1886) I.L.R. 9 All. 120.

(2) (1917) 33 M.L.J. 509.

(3) (1908) I.L.R. 32 Mad. 76.

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any subsequent claims, but we are unable to regard this as entitled to affect our view of the legal position. There seems no question but that, if a partner asks for an account without asking for a dissolution, the Court must be satisfied that there are special grounds for granting the prayer, and it follows that these grounds must be alleged by the plaintiff, while the defendant must have an opportunity of showing cause against. This condition necessarily remains unfulfilled in the present case, and we are unable to hold that the plaintiff is entitled to a decree for an account in the face of the circumstances that not only has she failed to justify special treatment, but, on the finding of the learned Judge, has falsified her case to the extent of not alleging a partnership at all. In these circumstances, we think there are very special reasons why a decree of the nature under reference should not have been granted upon the pleadings, and with much respect we are unable to support the learned Judge's decision to this extent. We must accordingly allow the appeal and direct that the references to the rice mandi business be expunged from the decree. This will involve the deletion of paragraphs 1 and 2, of the words "either in respect of the said mandi business or" in paragraph 4 and of paragraph 5-a, the remaining paragraphs being renumbered. Costs in the lower Court have been reserved for the final decree. The appellant will get his costs in this Court.

B.C.S.

APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Pakenham Walsh.*

1930,
October 2.

IN RE KRISHNAMA NAICKEN AND ANOTHER
(ACCUSED 1 AND 2), APPELLANTS.*

Indian Evidence Act (I of 1872), ss. 32 and 159—Statement by deceased person—Of circumstances leading to death—Recorded by a witness—But not read over to or signed by deceased—Admissibility of.

A statement by a deceased person of the circumstances leading to his death recorded by a witness but not read over to or signed by such deceased person is admissible in evidence as a record of what the deceased said at the time from which the witness could refresh his memory.

TRIAL referred by the Additional Sessions Judge of Coimbatore Division for confirmation of sentence of death passed upon the first accused and Appeal by accused 1 and 2 against the conviction and sentence passed against them by the Additional Sessions Judge of Coimbatore Division in Case No. 65 of the Calendar for 1930 on the file of the Court of Session of the Coimbatore Division.

George Joseph for appellants.

Acting Public Prosecutor (K. N. Ganpati) for the Crown.

The JUDGMENT of the Court was delivered by BEASLEY C.J.—The two appellants, the first and the second accused in the Court below, were charged with the murder of Krishnama Naicken early in the morning of the 2nd April 1930 at a place called Peedampalli. They were both convicted of the offence and the first

appellant was sentenced to death and the second appellant to transportation for life.

A great many difficulties have been raised in this appeal by Mr. Joseph in the course of his elaborate argument on behalf of the appellants, but really the case presents very little difficulty.

The prosecution case is that, two days before the crime was committed, the first accused quarrelled with P.W. 11, a Palla, and pursued him into the garden of P.W. 10, the father of the deceased. Nothing further happened then. On the next day, the first accused renewed the quarrel and P.W. 11 once more went to the garden of P.W. 10. Here the deceased took the part of P.W. 11 and attempted to strike the first accused and there appears to have been a scuffle. The first accused went away threatening to cut the deceased to pieces for his interference on behalf of the Palla, P.W. 11. Then it is alleged that the wife of the first accused was being ill-treated by him and had decided to leave him and wanted the help of the deceased as escort for her journey and asked the deceased to help her on the Tuesday morning, i.e., the day before the deceased was murdered. Nothing was done, however, until the early morning of Wednesday, the 2nd April, when the deceased was aroused by the first accused's wife and asked to accompany her on her journey. This was at about cock-crow time, and the deceased, who was living in another part of the same house as that occupied by the first accused, his wife, and his brother-in-law, left the house with the second accused and the wife of the first accused to escort her to a village named Pappampatti. According to the evidence of P.W. 5, the widow of the deceased, the first accused's wife said that her husband was ill-treating her and asked the deceased to escort her as far as Pappampatti and the

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* Referred Trial No. 88 of 1930 and Criminal Appeal No. 349 of 1930.

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second accused was standing a few yards off at the time. She attempted to dissuade the deceased from going. He, however, set off with the first accused's wife and the second accused. After they had gone about a mile and had reached a pallam on the way, the first accused came on the scene and attacked the deceased with a bill-hook and thereupon the deceased struck the first accused with his stick. This stick was wrested from him by the second accused and he was then beaten and stabbed. P.Ws. 2 and 3, who are master and servant, were sleeping in a shed in a garden not far off at this time, the shed being a quarter of a mile from the spot where the stabbing of the deceased took place. P.W. 3 had gone out at the request of P.W. 2 to feed the cattle, and both of them heard cries coming from the spot where the deceased was and ran to the scene. In order to get there, they had to cross a bund on the top of which there was a quantity of prickly-pear. This bund and the prickly-pear were of sufficient height to prevent P.Ws. 2 and 3 from seeing anything that was happening on the other side of it, and they do not pretend that they saw anything at all until they had mounted the bund and were going to the other side of it, when they saw both the accused running off. They say that they attempted to pursue them, but that, as they were threatened with the bill-hook, they desisted and went to the scene of the occurrence where the deceased was crying out for help. They found the deceased lying injured in the pallam and he told them what had happened, how he had been beaten and stabbed by both the accused. P.W. 2 directed P.W. 3 to go and inform the uncles of the deceased, whilst he remained with the injured man. The uncles of the deceased are P.Ws. 8 and 9, and they were at this time working in their garden quite close to the house of the deceased and the

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two accused. P.W. 3 told them what had happened. P.W. 8 sent P.W. 9 at once to make a report to the Village Munsif and he himself went to the scene where he found the deceased lying injured, with P.W. 2 beside him. The deceased told P.W. 8 what had happened. He was then put into a cart and taken to the village and from there was taken in a motor-car to the Sular dispensary where P.W. 1, the Sub-Assistant Surgeon, attended to him. At first the deceased's injuries did not appear to be serious, but at 10-30 p.m. he suddenly got worse and, as there was no time to send for a Magistrate, P.W. 1 took a statement from the deceased, Exhibit B, which he recorded, and the injured man died at about midnight. In the meantime, a requisition had been sent to the police by P.W. 1 and the head constable, P.W. 13, saw the injured man, who gave him an account of the occurrence. The Village Munsif, P.W. 12, sent off his reports to the police and to the Magistrate, and, if the stabbing and the beating of the deceased took place shortly before dawn, then, we are of the opinion that there was no undue delay in sending off those reports. P.Ws. 2, 3, 5, 8 and 9 were examined on the same morning, but as P.W. 10, the father of the deceased, could not be found, he was not examined until two or three days later by the Circle Inspector. P.W. 4, the wife of the first accused, was also examined three days later. The inquest was held by P.W. 14, and the post mortem was conducted by P.W. 6. The injuries sustained by the deceased were eight punctured and incised wounds on the head, arms and right leg; and both the bones in the right fore-arm were fractured and the left ankle was broken; so that it is clear that this unfortunate man was brutally beaten. According to P.W. 6, death was due to shock and hæmorrhage of the brain caused by

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these injuries. The first accused also received an injury, because, on examination by P.W. 6, he was found to be suffering from a contused wound on the left side of the forehead. P.W. 4 gave no evidence in chief useful to the prosecution at the Sessions trial and was allowed to be treated as hostile; and, having regard to the fact that she is the wife of the first accused, there is nothing singular in the attitude taken up by her at the Sessions trial. Of course, according to the prosecution case, she was the only eye-witness of the occurrence. She was also hostile in the committing Magistrate's Court. The deceased also gave an account of the affair to his wife, P.W. 5, after she had come on the scene of the occurrence and, as before mentioned, to P.Ws. 2, 3, 8 and the head constable. In all these accounts he named the two accused as his assailants. Reference has been made to the statement of the deceased recorded by the Sub-Assistant Surgeon, P.W. 1. That is Exhibit B. It is very brief and is as follows:—

“One Krishnama Naicken, son of Velappa Naicken of Peedampalli assisted by his brother-in-law, assaulted me with koduval, stick, etc., this early morning at about 4–30 a.m. I was decoyed by accused Krishnama Naicken's wife on plea of helping her from being brutally assaulted by her husband. I believing this to be true went to a pallam near Naliama Naicken's garden. The accused's brother-in-law caught hold of my tuft and the accused cut me with a koduval on my head. I fell down and both assaulted me with koduval and stick. I cried out and then the neighbours came and took me to this dispensary. There was no one else present at the time I was assaulted except the above three persons.”

To P.Ws. 2, 3, 5, 8 and 13 the deceased stated that he was attacked by the first accused, that he beat the first accused with his stick and that the second accused wrested the stick from him and beat him. In Exhibit B, he does not mention that he beat first accused with his stick. Exhibit B was not read over

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to the deceased nor does it bear his signature. In the Sessions Court objection was taken to the admissibility of Exhibit B. P.W. 1 had stated that he questioned the deceased in Tamil and recorded the statement in English, whereupon objection was taken by the pleaders for the appellants. Exhibit B was, however, admitted and the learned Sessions Judge has made a note that the accused's pleaders were offered the opportunity of testing the witness in Tamil by reading him a short piece of Tamil but they declined the offer. Exhibit B is attested by P.W. 1's compounder, who was present throughout the whole of the declaration. In his judgment, the learned Sessions Judge in dealing with Exhibit B states that “it has been attacked but I see no reason to doubt its genuineness”. That is the only reference he makes to that document on the question of its admissibility. It appears therefore that the only objection taken to the document by the appellants' pleaders was that it was not a correct record of what the deceased stated. Here, however, Mr. Joseph has contended that Exhibit B is inadmissible. His argument is that, as it was not actually written by the deceased but was written by somebody else and was not read over to him after it had been so written and does not bear the signature of the deceased, it is not a written statement within the provisions of section 32 of the Indian Evidence Act and is therefore inadmissible as a written statement of the deceased. He agrees that, if such a statement is read over to the deceased and agreed to be correct or is signed by the deceased, then there can be no question about its admissibility in evidence, provided the person who wrote it is put in the witness-box to state that he wrote it. He relies on what P.W. 1 stated in the Sessions Court, namely, “As I found his condition to

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be bad I took a dying declaration from the deceased at 10-30 p.m. and I recorded correctly what he told me. It is Exhibit B. I did not take his signature as his right arm was fractured." His contention is that, this not being the written statement of the deceased or recorded by some one else in compliance with the necessary formalities, the only evidence of what the deceased said can be that of witnesses who state from memory what it was they heard the deceased say. He agrees that those witnesses can be allowed to refresh their memories by reference to any writing made by themselves at the time of the transaction—that is provided for by section 159 of the Evidence Act—and he contends that that is not what P.W. 1 did in this case and that he did not state anything from memory but merely put in Exhibit B. Mr. Joseph agrees that he would not be able to take any exception to the evidence of P.W. 1, if that witness had said that he did not remember the actual words of the deceased and had been allowed by the Court to refresh his memory. His objection, of course, is purely technical and it is obvious that witnesses, who depose to something they heard an injured man say with regard to those injuries shortly before death purely from recollection, are not likely to be so accurate as a record made of the statement at the time. The evidence which is likely to be less accurate is clearly admissible, but when evidence which is more likely to be accurate is tendered, according to Mr. Joseph, it is inadmissible. He has referred to some cases, which, according to him, support his argument and render Exhibit B inadmissible. One of these is *In the matter of the petition of Samiruddin*(1). There it was decided that the dying statement of a deceased person must be taken in the presence of the accused, that if not so taken the writing cannot be

(1) (1881) I.L.R. 8 Calo. 211.

admitted to prove the statement made, and that the statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory. On page 213 the matter is thus dealt with in the judgment of PONTIFEX and FIELD JJ. :

"The piece of evidence to which this observation relates is the dying statement of the deceased Baber Ali. This was recorded by the Deputy Magistrate as a 'deposition'; but it does not appear that Baber Ali was examined in the presence of the accused Samiruddin, and unless he were so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made."

This is relied upon by Mr. Joseph as an authority in his favour because he argues that P.W. 1 did not use the writing to refresh his memory but merely put it in without any attempt to refresh his memory or without having attempted to reproduce from his own recollection the words used by the deceased. Another case referred to by him is *Kunj Lal v. Emperor*(1). The head-note of that case is as follows:—"Witnesses should not be allowed to prove a dying declaration as if it were a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under section 32 of the Evidence Act and that statement is not the document made by the Magistrate but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to

(1) (1922) 67 I.O. 577.

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refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made." But it would appear from the judgment on page 580 that the argument against the reception of the evidence of persons who heard the deceased person make a statement which was recorded in writing was a valuable criticism only, but the Court held that the two witnesses to whom the statements were made by the deceased having been produced in Court and made available for cross-examination, the defect in the form in which the dying statements were taken down did not destroy their value. In that case both the Sub-Inspector and the Magistrate went into the witness-box. It is a very different thing when it is sought to put in a statement by itself without calling the person to whom it was made to give evidence. In the matter of the petition of Samiruddin(1) was dissented from by SPENCER and PHILLIPS JJ. in *In re Karuppan Samban*(2), where it was held that it was not necessary in order to make a dying declaration admissible in evidence that the Magistrate who recorded it be examined as a witness in the case. In the course of the judgment it is stated:

"In *Gouridas Namasudra v. Emperor*(3), it is conceded that an oral statement of a deceased person as to the cause of his death, if made in the absence of the accused, may be proved by any one who heard it made, as well as by the person who recorded it. That is sufficient for the purpose of the case, as Exhibit D has been proved by the Sub-Assistant Surgeon who heard the statement being made and signed it. With all due deference, we are unable to follow the learned Judges who decided *In the matter of the petition of Samiruddin*(1) and *King-Emperor v. Mathura Thakur*(4), when they say that the only way of proving such a statement is by calling a person who

(1) (1881) I.L.R. 8 Calo. 211.
(3) (1908) I.L.R. 38 Calo. 659.

(2) (1915) 31 I.C. 359.
(4) (1901) 6 C.W.N. 72.

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heard it made and permitting him to refresh his memory from the writing under section 159 of the Evidence Act. Whether they are treated as written statements of deceased persons or written records of verbal statements, section 32 (1) allows dying declarations which have been reduced to writing to be admitted as relevant facts. They thus become substantive evidence of the circumstances leading to the deceased person's death when the cause of the death is in question. A statement taken in the absence of the accused from a witness for the prosecution is described as a 'deposition' in section 512, Criminal Procedure Code, but sections 157 and 158 of the Evidence Act show that, if it satisfies the conditions of section 32, it is nevertheless a statement, and as such is relevant whether the absence of the 'witness' is caused by his death or by some other cause which makes him incapable of giving evidence in person."

Mr. Ganpati, the learned Acting Public Prosecutor, contends that, whether the statement recorded is read over or not or whether it is signed, makes no difference, and that the fact that it has been read over and signed by the deponent only makes its evidentiary value stronger, and with this contention we entirely agree. We were referred by Mr. Ganpati to *Emperor v. Balaram Das*(1), where it is stated:

"An objection has been taken that as the Assistant Surgeon neither himself recorded the statement nor read it at the time when it was made, he could not refresh his memory by reference to that statement under section 159 of the Evidence Act. But we hold that the evidence that the deceased used the words contained in the statement given by the witness who can speak to those words by refreshing his memory is not the only way in which the statement of the deceased person can be proved. If the witness who heard that statement made swears that the written statement correctly reproduces the words used by the deceased, this is sufficient to prove that the deceased did use the words contained in that statement. Here the important part of the evidence is that the dying declaration was recorded in the presence of a witness, that it was read over to the deceased in the presence of the witness and was admitted by the deceased

(1) (1921) I.L.R. 49 Calo. 358, 363.

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to be correct. This we think is sufficient. Our view is supported by the case of *Gouridas Namasudra v. Emperor*(1). There the written petition of complaint which contained the statement made by the deceased person as to the cause of his death, was admitted in evidence on being proved by the mukhtear's mohurrir, who had prepared it under personal instructions, and who deposed that the deceased made the statement to him which was correctly recorded in the petition."

The case of *Gouridas Namasudra v. Emperor*(1) was not dissented from in this judgment because in the opinion of the Court the evidence of the Assistant Surgeon fulfilled the test laid down in that case. This case decides that anybody who has heard the deceased make a statement which has been recorded can give evidence of it either by refreshing his memory or from recollection without it. This, however, does not quite meet the point of Mr. Joseph, whose contention is that P.W. 1 neither refreshed his memory nor attempted from recollection to reproduce the words used by the deceased. But upon this point *Partap Singh v. The Crown*(2) is against him. In that case, a head constable produced a document which purported to be the record of a statement made by a dying person and stated that he had recorded the statement correctly as contained in the document and that the deceased was in his senses at the time but did not repeat in his own words what the deceased had said; and it was held that, inasmuch as the surrounding circumstances, and, more especially, the length of the period which intervened between the recording of the statement and the trial of the case rendered it impossible for the constable to recollect and repeat the words used, his statement should be treated as if he had prefaced it by stating categorically that he could not remember what the deceased had said, and that section 160 of the Evidence

(1) (1908) I.L.R. 36 Calo. 659.

(2) (1925) I.L.R. 7 Lah. 91.

Act applies when the witness states in so many words that he does not recollect, and when the circumstances establish beyond doubt that this is so, and that having no specific recollection of the facts he can only testify regarding the contents of the document before him and explain that he recorded correctly what the deponent said at the time. It is not clear whether in this case the statement made by the deceased was read over to the deceased or not but in our view that does not affect the question of the admissibility of the document. On page 96 in the judgment it is stated as follows:—

"In sections 159 and 160 of the Evidence Act a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing and the testimony which he can give of facts stated in the document. If it is merely a question of a man refreshing his memory the document itself is not tendered in evidence, and the witness merely gives evidence in the ordinary way after reading what has been written. Section 160 deals with the case where in spite of having written or read a document under the circumstances described in section 159 the witness has got no specific recollection of the facts therein recorded, but is sure that they were correctly recorded. Where this is the case the witness is still entitled to testify to the facts and the document itself is then tendered in evidence,"

Further on it is stated:

"Section 160 of the Evidence Act applies equally when the witness states in so many words that he does not recollect and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can only testify to the effect that he recorded correctly what the deponent said at the time."

We think that, as the statement was recorded in April and the evidence was not given by P.W. 1 at the Sessions trial until July, P.W. 1 cannot be expected accurately to reproduce the words of the deceased and that he was entitled therefore to put in Exhibit B as a correct record of what the deponent said at the time.

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We guard ourselves from saying that when a dying declaration has been recorded and has been read over to the deponent and agreed to be correct it can be put in by itself and treated as substantive evidence without calling the person who recorded it, as we are of the opinion that the evidence of the person who recorded it or, in his unavoidable absence, of some other person who was present and heard it correctly recorded should always be taken to make the written record admissible. Exhibit B was therefore correctly admitted in evidence in the lower Court as a record of the statement made by the deceased by P.W. 1 from which P.W. 1 refreshed his memory.

[His Lordship then dealt with other contentions urged by the appellants' Counsel and concluded as follows:—]

We agree with the learned Sessions Judge that the evidence proves that both the appellants are guilty of the murder of Krishnama Naicken; and their convictions in the lower Court of that offence must be confirmed. We also confirm the sentence of death passed upon the first appellant and the sentence of transportation for life passed upon the second appellant. The appeal is dismissed.

B.C.S.

PRIVY COUNCIL.*

PONDICHERRY RAILWAY COMPANY, LIMITED,
APPELLANT,

1931,
March 26.

v.

COMMISSIONER OF INCOME-TAX, MADRAS,
RESPONDENT.

[ON APPEAL FROM THE HIGH COURT OF MADRAS.]

Income-tax—Railway outside British India—Working agreement with railway in British India—Receipt of profits—Agent—"Business"—Deduction—Expenditure—Payment as concessionaires—Indian Income-Tax Act (XI of 1922), sec. 2 (4), sec. 4 sub-sec. 1, sec. 6 (iv), sec. 10 sub-sec. 2 (ix).

The appellant Company was incorporated in the United Kingdom in 1869 with a registered office in London, and under a convention with the French Colonial Government constructed a railway in the French Colony of Pondicherry making junction at the frontier of British India with the South Indian Railway Company. By the convention, the appellant Company was to pay to the French Colonial Government half its net profits calculated as therein provided. In 1879 the appellant Company entered into a working agreement with the South Indian Railway Company, whereby that Company was to work the Pondicherry Railway as an integral part of its own line, and out of the receipts make certain payments to the appellant Company in India in rupees. For each of the financial years 1925-26 and 1926-27 the South Indian Company paid sums due under the agreement to their Agent at Trichinopoly, who was also agent for the appellant Company, admittedly, for certain purposes. Under instructions from the appellant Company he calculated and paid to the French Colonial Government the sums due under the convention, and remitted the balance to the appellant Company in London by a bank draft payable there.

Held that the sums paid by the South Indian Railway Company had been "received" in British India (namely, at

* *Present* :—Lord MACMILLAN, Lord SALVESSEN and Sir GEORGE LOWMOORE.

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Trichinopoly) by the appellant Company within section 4 sub-section 1 of the Indian Income-Tax Act, 1922, and constituted the profits and gains of a "business" carried on by them within section 2(4) and section 6(iv) of the Act, so as to render them chargeable to tax in respect thereof; further that the appellant Company was not entitled to deduct the payments made under the convention as being expenditure "incurred solely for the purpose of earning such profits or gains" within section 10 sub-section 2 (ix) of the Act.

[It was unnecessary to decide whether the profits accrued or arose in British India, or were to be deemed to do so, or whether the business was carried on in British India.]

South Behar Ry. Co. v. Inland Revenue Commissioners, [1925] A.C. 476 and *Gresham Life Assurance Society v. Styles*, [1892] A.C. 309, 315, applied.

APPEAL (No. 94 of 1930) from orders of the High Court (March 26 and May 1, 1929) upon a reference under section 66, sub-section 2 of the Indian Income-Tax Act, 1922.

The appellant Company was incorporated in the United Kingdom with a registered office in London, and owned a railway in the French Colony of Pondicherry. The reference and appeal related to the Company's liability to tax for the years 1925-26 and 1926-27 under the above Act of 1922 in respect of sums paid to it by the South Indian Railway Company under a working agreement of 1879, and the appellant Company's right to a deduction of assessment in respect of sums paid by the Company under a convention of 1879 with the French Colonial Government under which convention the railway had been constructed.

The questions referred and material to the appeal, the facts of the case, and the effect of the judgments of the High Court all appear from the judgment of the Judicial Committee.

Micklethwait K.C. and *Scrimgeour* for appellants.—
The profits did not accrue or arise in British India so

as to fall within section 4, sub-section 1 of the Act. The South Indian Railway Company were not agents of the appellants to work their railway. The working agreement operated as a lease: *Sevenoaks, Maidstone, and Tunbridge Railway Co. v. London, Chatham, and Dover Railway Co.*(1). The appellants were residents in England receiving rent in respect of property outside British India. [Reference was made also to *South Behar Ry. Co. v. Inland Revenue Commissioners*(2) and *Inland Revenue Commissioners v. Dublin and Kingstown Railway Co.*(3).] The profits having accrued outside British India, they were not "received in British India" within section 4, sub-section 1, by reason of being brought into British India, there was merely a transmission: *Board of Revenue v. Ripon Press*(4), *Sundar Das v. Collector of Gujarat*(5), and *Re. Rogers Pyatt Shellac & Co. v. Secretary of State for India*(6). By section 4, sub-section 2, it is only in the case of a resident in British India that profits accrued outside are to be deemed to be received on being brought into British India. The evidence does not show that Mr. Rothera received the money on behalf of the appellants, or that he was authorized to do so. He was agent for the South Indian Railway Company, and the money was remitted by bank drafts payable only in London. In any case the appellants are entitled to deduct the payments made to the French Government; they were in the nature of head-rent and were a necessary expenditure. The right to deduct arose under section 10, sub-section 2 (ix) or under section 12, sub-section 2 according as the profits are to be regarded as under the heads "business" or "other sources" in section 6.

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(1) (1879) 11 Ch. D. 625.

(2) [1925] A.C. 476.

(3) (1926) 5 Accountant's Tax Cases 721.

(4) (1923) I.L.R. 46 Mad. 706 (S.B.).

(5) (1922) I.L.R. 3 Lah. 349 (F.B.).

(6) (1924) I.L.R. 52 Calo. 1.

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[Sir GEORGE LOWNDES: Why does not the head "property" in section 6 apply?]

The word "property" cannot be deemed to include property outside the legislative jurisdiction: *Commissioner of Taxes v. Union Trust Co. of Australia*(1).

Dunne K.O. and *R. P. Hills* for respondent.—The profits were derived from a "business" carried on by the appellants, *South Behar Ry. Co.'s case*(2), and upon the evidence they were "received in British India"; consequently section 4, sub-section 1 applies. The Commissioner found that Mr. Rothera received the money in Trichinopoly on behalf of the appellants. The evidence shows clearly that he did so; he was instructed by the appellants to calculate and remit to the French Government what was due to them, and to remit the balance to London. If the profits were received in British India, it is not necessary to decide whether they arose or accrued there. It is however submitted that, having regard to the agreement between the companies, the profits accrued there, even if they did not arise there. How wide the power under the Act of 1922 is to assess a non-resident person through his agent in respect of profits made outside British India appears from *Income-tax Commissioner v. Remington Typewriter Co. (Bombay, Ltd.)*(3) and *Commissioner of Income-tax (Bombay Presidency) v. Bombay Trust Corporation, Ltd.*(4). The profits were not in the nature of a rent. The *Sevenoaks Rly. Co.'s case*(5) is distinguishable, as in the present agreement there was a share of profits to be ascertained. The appellants are entitled to no deduction; they received the whole of the profits,

(1) [1931] A.C. 258.

(2) [1925] A.C. 476.

(3) (1930) I.L.R. 55 Bom. 243; L.R. 58 I.A. 42.

(4) (1929) I.L.R. 54 Bom. 216; L.R. 57 I.A. 49.

(5) (1879) 11 Ch. D. 625.

although they were bound to distribute part to the French Government: *Gresham Life Assurance Society v. Styles*(1) and *Last v. London Assurance Corporation*(2).

Micklethwait K.C. replied.

The JUDGMENT of their Lordships was delivered by LORD MACMILLAN.

For the years 1925–26 and 1926–27 assessments to income-tax and super-tax under the Indian Income-Tax Act, 1922 (No. XI of 1922) were made on "The Agent, Pondicherry Railway Company, Limited, Trichinopoly" in respect of the income derived by the company from its business. On appeal, these assessments were confirmed by the Assistant Commissioner of Income-tax, Southern Range, Madras. The assessee, thereupon, under section 66 (2) of the Act, required the Commissioner of Income-tax for the Province of Madras to refer to the High Court of Judicature at Madras certain questions of law arising with regard to the validity of the assessment. The Commissioner accordingly stated a case in which he referred for the decision of the Court four questions of law, three only of which it is necessary to set out here, viz.,—

"(b) Whether the Pondicherry Railway Company, Limited, which is resident without British India is liable to be assessed to income-tax on the income derived by it from the working of the Pondicherry Railway under section 4 of the Indian Income-Tax Act as income accruing or arising or received in British India.

"(c) Whether the Pondicherry Railway Company, Limited, carries on business in British India within the meaning of the Income-Tax Act? and

"(d) Whether in any event the income of the said Company that is liable to assessment to income-tax is only that portion which is payable to it under the concession between it and the French Colonial Government?"

(1) [1892] A.C. 309, 315.

(2) (1885) 10 App. Cas. 438.

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The Commissioner, as required by the Act, stated his opinion on the questions referred, which was to the effect that questions (b) and (c) fell to be answered in the affirmative and question (d) in the negative.

In the High Court, the learned CHIEF JUSTICE (Sir MURRAY COUTTS TROTTER) was of opinion that questions (b) and (c) should be answered in the negative, but the majority of the Court (ODGERS and BEASLEY JJ.) were of opinion that these questions should both be answered in the affirmative. This accordingly became the decision of the Court. As regards question (d) the Court was unanimously of opinion in the negative.

The assessments having thus been upheld, the Court under section 66-A (2) of the Act certified the case to be a fit one for appeal to His Majesty in Council and it has now been heard by their Lordships on the assessee's appeal.

It is necessary to set out in some detail the material facts. The Pondicherry Railway Company, Limited, was incorporated in the United Kingdom in 1869 under the British Joint Stock Companies Acts for the purpose of constructing a railway in the French Colony of Pondicherry. The registered office of the Company has always been in London. In the year 1878 the Company entered into a convention with the Minister of Marine and Colonies acting on behalf of the French Colony of India whereby a concession was granted to the Company to construct and work a line of railway from the landing pier at Pondicherry to a junction with the South Indian Railway at the frontier of the French territory. The duration of the convention was fixed at 99 years and the Company thereby undertook to construct and work the proposed railway, or to cause the same to be constructed and worked, and assumed various obligations in

regard to it. In consideration of the Company's engagements, the French Minister undertook to pay to the Company in instalments a subsidy of 1,264,375 francs and to provide the requisite land free of charge. The convention further provided as follows:—

“The Company undertakes on its part to make over to the Colonial Government during the whole duration of the concession one-half of the net profits which shall be arrived at by deducting from the gross receipts, the rates and taxes of every kind chargeable to the Company as well as the amount expended in the purchase or hire of rolling stock, the expenditure relating to the maintenance and repair of the lines, of fixed plant and rolling stock; expenses of working and administration; as well as such sums, if any, as with the consent of the Colonial Government may be placed to reserve to cover the cost of heavy repairs of the works of the railway and for the renewal of the ‘material’. But this division shall not commence until after deduction by the Company of a sum of one hundred and fifty-seven thousand five hundred francs (157,500 francs) from the aggregate amount of the net profits during the first years of the working of the line; and this by way of reimbursement for the expenses of administration for which the Company has made itself liable.”

The Company duly constructed the projected line of railway, which was entirely situated in French territory, and effected the junction at the frontier with the system of the South Indian Railway. As empowered in the convention with the French Minister the Company entered into an agreement, dated the 25th March 1879, with the South Indian Railway Company, Limited, whereby the latter undertook to work, manage and maintain the Pondicherry Railway. The agreement in force between the two railway companies at the time of the assessments in question was dated the 30th December 1890. Such agreements between an owning company and a working company are familiar in railway practice and may take various forms. Examples which have come before the Courts are discussed in their legal

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bearings in *Sevenoaks, Maidstone, and Tunbridge Railway Co. v. London, Chatham, and Dover Railway Co.*(1), *South Behar Ry. Co. v. Inland Revenue Commissioners*(2), *Inland Revenue v. Edinburgh and Bathgate Railway Co.*(3), and *Inland Revenue Commissioners v. Dublin and Kingstown Railway Co.*(4). The working agreement in the present case is on simple lines. The South Indian Company undertakes to work the Pondicherry line "as if it were an integral part of their undertaking" and from time to time to pay the gross receipts of the line "into such Government Treasury in India as the Secretary of State may prescribe." It is then provided that "out of the gross receipts of the Pondicherry line there shall be deducted and retained by the South Indian Company for working expenses the same percentage of gross receipts as the traffic of the South Indian Company, including therein the Pondicherry line, is from time to time worked at." After deduction of this percentage for working expenses from gross receipts "the balance shall be ascertained and . . . shall be paid over every six months by the South Indian Company to the Pondicherry Company in India in rupees." Provision is made for dividing between the two companies on a mileage basis the gross receipts from through traffic.

The following paragraphs taken from the stated case indicate the manner in which the terms of the agreement are carried out in practice :—

"10. The Agent of the South Indian Company who is managing its affairs in India keeps accounts at Trichinopoly to show the receipts and expenses of the Pondicherry line and determines the net receipts payable to the Pondicherry Company according to the agreement with that Company.

(1) (1879) 11 Ch. D. 625.
(3) (1926) 8 C. 863.

(2) [1926] A.C. 476.
(4) (1926) 5 Accountant's Tax Cases 721.

"11. The petitioner, Mr. Percy Rothera, who is the Agent of the South Indian Company, is also the Agent of the Pondicherry Company and is addressed by the Secretary of the latter Company in London as such.

"12. Mr. Rothera receives at Trichinopoly on behalf of the Pondicherry Company the profits due to it in accordance with the terms of the agreement with the South Indian Company. This will be seen from the correspondence annexed, Exhibits C and D. Under instructions from the Board of Directors in London of the Pondicherry Company he remits the share of profits due under the convention to the Colonial Government at Pondicherry and remits the balance to the Pondicherry Company in London.

"13. Mr. Rothera as the agent of the Pondicherry Company carries on correspondence with the Directors of the Company in London on matters connected with the working of the convention and the agreement, such as alterations in rates of fares, the preparation of the accounts of the Company and the payment of the share of profits due to the French Colonial Government. He receives an honorarium of £21 a year from the Pondicherry Company 'for services rendered.'

"14. The Chief Engineer and the General Traffic Manager of the South Indian Company are also *ex officio* officers of the Pondicherry Company and receive an honorarium of £10 10s. each. The revenue accounts of the Pondicherry Company are prepared by the Chief Auditor of the South Indian Company acting as Chief Auditor of the Pondicherry Company.

"15. The Pondicherry Company has an office at Trichinopoly with a sign-board."

Exhibit C is a letter, dated the 5th April 1923, addressed from London by the Secretary of the Pondicherry Company to Mr. Scott (Mr. Rothera's predecessor), "Agent, Pondicherry Railway Co., Ltd., Trichinopoly," enclosing a statement of the expenses of administration of the Company in England for the year. The letter proceeds :—

"The figures now furnished will enable you to prepare the revenue account for the year ending 31st March 1923, showing the amount of net profits divisible between the French Colonial

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Government and the Company. When this has been done you will be good enough to pay over to the French authorities the moiety of the net profits in terms of article 6 of the convention and to remit by demand draft to the Board the balance due to the Company."

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Exhibit D is the reply of Mr. Scott, dated the 30th May 1923. It is headed "Pondicherry Railway Company, Limited (Incorporated in England), Agent's Office, Trichinopoly," and Mr. Scott appends the word "Agent" to his signature. In the letter he reports that in conformity with instructions received he has sent a cheque for Rs. 12,498-12-2 to the Treasurer of the French establishments in India and he encloses as the share of the Pondicherry Railway Board a demand draft on the National Bank of India for £1,237 9s. 5d., the equivalent of Rs. 18,525.

A specimen demand draft exhibited to their Lordships was drawn by the National Bank of India at Madras on their London office to the order of the Secretary of the Pondicherry Railway Company.

An affidavit by Mr. Rothera was filed in the Court of the Assistant Commissioner of Income-tax in which he stated, *inter alia*, that the letters from London addressed to him as Agent of the Pondicherry Company related to instructions and orders of the London Board on questions of policy, increase or decrease of rates, the Company's relationship with the French Government, or the preparation of accounts for the Company in London, but had no relation to the actual working of the line. He further stated that he did not control the affairs of the Pondicherry Company but in all that he did on their behalf acted under the instructions of the Board in London where the accounts of the Company were maintained; everything that he did in the actual management and working of the line was done by him

in his capacity as Agent of the South Indian Railway Company.

Turning now to the terms of the Indian Income-Tax Act their Lordships find there enacted in section 4 (1) that the statute is to "apply to all income, profits or gains as described or comprised in section 6, from whatever source derived, accruing or arising or received in British India." In section 6 the heads of income, profits and gains chargeable to income-tax are set out in six categories, of which the fourth is "Business." It is under this head that the appellant Company has been assessed. Section 10 enacts that "the tax shall be payable by an assessee under the head "Business" in respect of the profits or gains of any business carried on by him" and prescribes that such profits or gains shall be computed after making allowance for, *inter alia*, "(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." "Business" is defined in section 2 (4) as including "any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

In the Court below, the question whether the assessed income of the Pondicherry Company accrued or arose in British India within the meaning of the Act was much discussed, and the opinion of the majority of the Judges, as embodied in the order of the Court of 26th March 1929, was that it did so accrue. Their Lordships do not find it necessary to pronounce upon this aspect of the case and have come to no conclusion with regard to it, for they are satisfied that the income in question was "received" in British India within the meaning of the statute, which is sufficient for the determination of the Company's liability.

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The argument presented by Mr. Micklethwait for the appellants was to the effect that the facts when critically examined demonstrated that Mr. Rothera was not the Agent of the Company to receive payment on their behalf from the South Indian Company but was merely their Agent to transmit payment to the Board in London. He submitted that it was the Company in London which received payment from the South Indian Company, not Mr. Rothera in Trichinopoly. The same sum could not be received twice and if it was truly received in London it could not be received also in Trichinopoly. The transmission of the Pondicherry Company's share of the gross receipts in the form of a draft on London, payable only in London, showed that Mr. Rothera's function was limited to that of a mere channel of communication, or, in the phrase of the CHIEF JUSTICE, to that of "a mere post-office."

In their Lordships' view the facts do not support this contention. In the stated case it is found as a fact that "Mr. Rothera receives at Trichinopoly on behalf of the Pondicherry Company the profits due to it in accordance with the terms of the agreement with the South Indian Company." This may no doubt be regarded as a mixed finding of fact and law, if the word "receives" is used in the statutory sense, but it is at least a finding of fact that payment is made to Mr. Rothera at Trichinopoly. Nothing is due to the Pondicherry Company under the agreement with the South Indian Company until the latter has ascertained the gross receipts which the traffic on the Pondicherry line has yielded and has deducted therefrom the prescribed percentage for working expenses. This calculation is effected at Trichinopoly in the office of the South Indian Company. The balance then becomes due and payable to the Pondicherry Company "in India in

rupees." Mr. Rothera no doubt doubles the parts of agent of the Pondicherry Company and Agent of the South Indian Company, which has led to some confusion of functions, but, when his rôles are disentangled, it is clear that when, as Agent for the South Indian Company, he has ascertained the sum due to the Pondicherry Company, he transfers it to himself as Agent for the latter Company, for thereafter he proceeds to deal with it as instructed on behalf of that Company. He does not merely transmit to London a sum of money payable to the Pondicherry Company by the South Indian Company. He has to apportion the sum so payable between the Pondicherry Company and the French Government in terms of the convention and this is not a mere matter of dividing it by two, for, as appears from Exhibit D, the share remitted to London is not the same as the share remitted to the French Government. It is one-half of the net profits as ascertained in terms of the convention that the French Government receives and the computation of this half involves calculation on the part of Mr. Rothera as the Agent of the Pondicherry Company. He is instructed from London to "pay over to the French authorities" their moiety. How he can obey this instruction and pay over what, on the appellants' submission, he has not received requires for its appreciation a metaphysical subtlety remote from the prosaic realm of income-tax law. How, it may also be asked, can he purchase a draft on London unless he has the wherewithal to pay for it? The attempt to present Mr. Rothera as an animated post-office fails when it is realized that his functions far transcend the mere mechanical act of transmitting a sum to its recipient. He is the paid Agent at Trichinopoly of the Pondicherry Company, carrying on their agency in an office bearing their name, and he is entrusted with the

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important duties on their behalf which he himself describes in his affidavit and which are set out in the stated case, not the least important of which is to see to the carrying out of the financial arrangements between the Pondicherry Company on the one hand and the South Indian Company and the French Government on the other hand. If there is no receiving of money by the Pondicherry Company until it is received in London, then the remarkable result follows that, of the sum payable by the South Indian Company to the Pondicherry Company, a substantial part is never received by the latter Company at all, for the portion diverted by Mr. Rothera to the French Government is never received in London, and, if it is not received in Trichinopoly, it is apparently nowhere received by the Pondicherry Company. It certainly is not paid by the South Indian Company to the French Government, for there is no privity between them, and if it is paid, as it is, by Mr. Rothera to the French Government, it can only be so paid by him after he has received it. Moreover, the agreement with the South Indian Company requires that Company to make payment to the Pondicherry Company "in India in rupees." It may be that this might be complied with by a payment made in French India, although their Lordships express no opinion on this point, but at least it is clear that it would not be complied with by a payment in London.

Their Lordships accordingly are of opinion that the income derived by the Pondicherry Company from the payments made to it by the South Indian Company is, on the facts stated, received in British India, within the meaning of the Act, by the Agent of the Pondicherry Company there on their behalf.

That these payments constitute profits or gains of a "business" carried on by the Pondicherry Company

was scarcely contested; and their Lordships, following the decision in the *South Behar Railway Company's case*(1), have no hesitation in so finding. It is unnecessary to go on to consider whether the business is carried on in British India, which is the form which question (c) takes, for it is enough if the profits of a business carried on by the assessee are received in British India, and the place where the business is carried on is not material. The appellants expressed themselves as desirous that the question of where their business is carried on should be left open, in view of possible ulterior consequences, and their Lordships make no pronouncement on the point.

Question (d) relates to the quantum of the assessment. The statute permits the assessee in computing the profits or gains of any business carried on by him to deduct "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." The Pondicherry Company is taken bound in the convention with the French Minister to "make over" to the Colonial Government "one-half of the net profits" of the undertaking arrived at in the manner prescribed in the convention. It is claimed for the Company that when it makes over to the Colonial Government their half of the net profits it is making an expenditure incurred solely for the purpose of earning its own profits. The Court below has unanimously negatived this contention and in their Lordships' opinion has rightly done so. A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point and the revenue is

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(1) [1925] A.C. 476.

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not concerned with the subsequent application of the profits. It was persuasively argued that, inasmuch as the Pondicherry Company as a condition of making any profits must pay over one-half of them to the French authorities and could never itself receive the whole profits, the payment so made was of the nature of a rent payable by the Company or a charge on the undertaking. But the analogy in their Lordships' opinion is imperfect, and the form in which the parties have contracted that the French Government shall participate in the success of the undertaking precludes the deduction claimed. English authorities can only be utilized with caution in the consideration of Indian income-tax cases owing to the differences in the relevant legislation, but the principle laid down by LORD HALSBURY L.C. in *Gresham Life Assurance Society v. Styles*(1) is of general application unaffected by the specialties of the English tax system :

"The thing to be taxed",
said his Lordship,

"is the amount of profits and gains. The word 'profits' I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. But when once an individual or a Company has in that proper sense ascertained what are the profits of his business or his trade, the destination of those profits, or the charge which has been made on those profits by previous agreement or otherwise, is perfectly immaterial. The tax is payable upon the profits realized, and the meaning to my mind is rendered plain by the words 'payable out of profits'."

Their Lordships thus find themselves in agreement with the result of the judgment of the High Court on all material points, but they are not prepared to follow the course adopted below, of answering categorically the questions posed in the stated case, which have not been

(1) [1892] A.C. 309, 315.

so framed as to enable their Lordships by affirmative or negative answers to express their opinion upon the topics to which they desire to confine their decision, and on which alone it is necessary to pronounce for the purpose of determining the appellants' liability. Their Lordships will accordingly humbly advise His Majesty that the order of the High Court of the 26th March 1929 be varied by deleting therefrom the following words:—

"And this Court by a majority being of opinion that the profits and gains of the Pondicherry Railway Company accrued in British India and hence it is liable to be taxed and that the said Company carries on business in British India within the meaning of the Indian Income-Tax Act doth answer questions (b) and (c) in the affirmative."

and substituting therefor the following:—

"This Court doth declare in answer to questions (b) and (c) that the Pondicherry Railway Company, Limited, is liable to be assessed to income-tax for the year 1925-26 and 1926-27 under section 4 (1) of the Indian Income-Tax Act on the income derived by it from the payments made to it by the South Indian Railway Company, Limited, in respect of the working of the Pondicherry Railway as being income received in British India by the Pondicherry Railway Company, Limited, from the carrying on of its business."

And that the order of the High Court of the 1st May 1929 be varied by deleting therefrom the following words:—

"And this Court being of opinion that the yearly payment made to the French Colonial Government is a distribution of profits and not an allowance deductible from those profits doth answer in the negative question (d), viz., 'Whether in any event the income of the said Company that is liable to assessment to income-tax is only that portion which is payable to it under the concession between it and the French Colonial Government.'"

and substituting therefor the following:—

"This Court doth declare in answer to question (d) that in computing the profits or gains of the business carried on by

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the Pondicherry Railway Company, Limited, for the purpose of assessment to Indian income-tax no allowance is deductible in respect of the half share of net profits payable by the Pondicherry Railway Company, Limited, to the French Colonial Government."

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With these variations their Lordships will humbly advise His Majesty that the orders appealed from be affirmed and the appeal dismissed. The respondent will have his costs of the appeal.

Solicitors for appellants: *Freshfields, Leese and Munns.*

Solicitor for respondent: *Solicitor, India Office.*

A.M.T.

APPELLATE CIVIL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Pakenham Walsh.*

ADARI SANYASI (DEFENDANT), APPELLANT,

v.

VADDADI NOOKALAMMA AND ANOTHER (PLAINTIFFS),
RESPONDENTS.*

Vendor and purchaser—Earnest money—Charge on property contracted to be sold in respect of—Purchaser's right to—Refusal by him to complete purchase—Taking possession of property by him from mortgagee thereof instead of from vendor—Effect—Subrogation—Mortgage on property contracted to be sold—Discharge of, by purchaser not completing purchase—Subrogation to rights of mortgagee—Purchaser not entitled to—Code of Civil Procedure (Act V of 1908), O. XXXIV, r. 8—Preliminary decree in redemption suit—Payment made out of Court after, if can be recognized in passing of final decree.

A purchaser paying earnest money and then refusing to complete the purchase does not obtain a charge on the property for the earnest money.

* Appeal against Order No. 886 of 1929.

Semle: the taking of possession by the purchaser of the property contracted to be sold from the mortgagee thereof instead of from the vendors is a breach of the original contract to sell which would by itself be sufficient to destroy any charge on the property which the purchaser might get by payment of the earnest money.

A purchaser of property subject to a mortgage who does not complete the purchase and acquire title as owner of the property does not, by reason of his having paid off the mortgagee, become entitled to be subrogated to his rights.

A payment of the mortgage money out of Court made after the passing of the preliminary decree in a suit brought on foot of the mortgage cannot be pleaded against the passing of the final decree in the suit.

APPEAL against the order of the Court of the Subordinate Judge of Vizagapatam in Appeal Suit No. 62 of 1927 (Appeal Suit No. 99 of 1927, District Court, Vizagapatam) preferred against the decree of the Court of the District Munsif of Yellamanchili in Original Suit No. 316 of 1925.

Y. Suryanarayana for appellant.

V. Krishnamachari for respondents.

The JUDGMENT of the Court was delivered by

PAKENHAM WALSH J.—This is an appeal against the order of remand made by the Subordinate Judge of Vizagapatam in Appeal Suit No. 62 of 1927. The learned Subordinate Judge had passed this order of remand previously on the 10th of November 1927, but he was directed by the High Court to dispose of a petition, Interlocutory Application No. 1295 of 1927, which was for security for costs in the appeal, before disposing of the appeal. A preliminary point is taken by the appellant that he has not done so and that this order of remand must be set aside on that ground alone. We find, however, that in paragraph 4 of his order the learned Subordinate Judge says—

"If it is to be deemed that no definite order was passed one way or the other on Interlocutory Application No. 1295, it

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must be presumed that the order recording the petition was an order declining to call on the appellant to furnish security. In this view of the matter the petition (Interlocutory Application No. 1295) must be deemed to have been dismissed. The petition is therefore dismissed."

As the learned Subordinate Judge has passed a specific order in accordance with the directions of the High Court dismissing the petition, there is no substance in this preliminary point.

Turning now to the main subject-matter of the appeal which relates to the reversal of the finding of the Court of first instance on issue No. 2, which issue had been disposed of by the said Court as a preliminary point, it is necessary shortly to describe the events which led to the institution of Original Suit No. 316 of 1925. The properties in suit were usufructually mortgaged for Rs. 600 on the 14th of May 1913 in favour of one M. Sankariah by the original owners. The mortgagee filed a suit to recover the money and got a decree for the sale of the property which was put up for sale and purchased by the plaintiffs' father on the 17th of December 1914 subject to the usufructuary mortgage. On the 12th of February 1917 the plaintiffs' father entered into an agreement with the defendant (the present appellant) to sell to him this property, and under this agreement an advance of Rs. 50 was paid on the date of the agreement. The plaintiffs' father as auction-purchaser filed a suit against the mortgagee for redemption of the suit lands. He died during the pendency of the suit and the present plaintiffs who are his daughters were brought on record as his legal representatives. There was a preliminary decree passed on 31st July 1918 and three months were allowed for redemption. After the passing of this preliminary decree, on the 19th of August 1918, the first defendant paid the mortgage amount, Rs. 765, to the mortgagee and got a transfer of the mortgage under Exhibit I. In

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1920 the first defendant filed Original Suit No. 117 for specific performance and a decree was given in his favour subject to the condition that he should pay Rs. 530 to the present plaintiffs and take a sale-deed. This was confirmed in Appeal Suit No. 236 of 1921. The defendant did not pay and neither party took any further action in this matter. In 1922 the defendant filed two petitions in the redemption suit, one that he should be brought on record as transferee of the mortgagee's interest and the other that the final decree should be passed. These are Civil Miscellaneous Petitions Nos. 1340 and 1350 of 1921. These two petitions were dismissed by the District Munsif. The present plaintiffs as legal representatives of the original auction-purchaser filed this suit to eject the defendant from two-thirds of the property, which their father purchased, and to recover past mesne profits from him.

The following issues were framed :—

- (1) Whether the plaintiffs have a subsisting title to the suit land?
- (2) Whether the defendant is in the position of a trespasser on the suit land?
- (3) Whether the plaintiffs have a right to take possession of the suit land; if so, whether they cannot get possession without paying the amount mentioned in paragraph 9 of the written statement of the defendant?
- (4) Whether the plaintiffs are entitled to any and what amount of profits?
- (5) To what relief are plaintiffs entitled?

On issue 2 the learned District Munsif found that the defendant was not a trespasser. He therefore held that the suit as brought was not maintainable and dismissed it with costs. On appeal the learned Subordinate Judge held that the defendant was a trespasser. He reversed the finding of the trial Court on this issue

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and remanded the suit for further disposal on the other issues. Against this order the present appeal has been preferred.

We shall, as far as possible, not refer in any way to the other issues in the suit which have not been tried, though, owing to the peculiar nature of issue 2, it is somewhat difficult to avoid conclusions which might affect those issues. The question is whether the defendant has any interest in the property. He claims this under two heads: (i) that by payment of the earnest money Rs. 50 at the time of the agreement to sell by the plaintiffs' father he acquired a charge on the property and (ii) that he having paid the mortgagee should be subrogated to the rights of the latter.

Taking first the charge which he alleges he has acquired by payment of Rs. 50 as earnest money to the plaintiffs' father, it is argued for the defendant that as soon as the money was paid he acquired a charge on the property. *Banvanta v. Bira*(1) is quoted in this connection. The learned Subordinate Judge relied on *Ponnammal v. Pichai Thevan*(2). But it was contended for the appellant that this was opposed to the ruling of the Privy Council in *Dayal Singh v. Indar Singh*(3). The question whether a purchaser by part-payment can obtain a charge on the property depends in our opinion on whether the default in completing the contract rests with him or with the vendor. This is a matter of fact to be found in each case. In *Ponnammal v. Pichai Thevan*(2), the purchaser redeemed a mortgage which was a part consideration for the sale, but he failed to go on with the contract and pay the remainder of the purchase-money. RAMESAM J. held that he had no charge

(1) (1897) I.L.R. 23 Bom. 56, 61.

(2) (1920) 24 L.W. 826,

(3) (1926) L.R. 53 I.A. 214.

on the property even though he had discharged the mortgage. We find nothing in the judgment of the Privy Council which conflicts with this decision. Their Lordships mention section 55 (6) (b), of the Transfer of Property Act (IV of 1882) and say:

"Their Lordships are of opinion that the section applied to the agreement in this case, where the buyer had paid earnest money, and so far from refusing to accept delivery, was pressing for specific performance, and that the agreement did in itself create an interest."

No authority has been shown to us for the proposition that a purchaser paying earnest money and then refusing to complete the purchase has a charge on the property for the earnest money, and any such proposition is on its face quite untenable. It is therefore a question of fact in each particular case as to who is in default. The facts of the present case are somewhat peculiar, because no argument can be advanced that the defendant was willing to carry out the contract from the fact that he sued for specific performance. The purchase price under the contract was Rs. 1,000 and, when he brought his suit for specific performance, his case was that in this the charge for redeeming the mortgage was included. Not only did he claim that the Rs. 765 which he paid to the mortgagee was in part-payment of the Rs. 1,000, but he claimed to have paid the vendor directly a sum of Rs. 315, which both the trial Court and the lower appellate Court found that he had not paid him. It was also held by both the Courts that the purchase price of Rs. 1,000 was only for the equity of redemption and did not include the mortgage. The finding of the trial Court was confirmed on appeal; so that the present defendant had only paid Rs. 470 towards the consideration under the contract of sale Exhibit A. It was also found on

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issue 3 (To what relief is the plaintiff entitled?) as follows:—

“In view of the false allegations of plaintiff that he paid Rs. 315 in excess of what he actually paid it is not possible for defendants to execute a sale deed in plaintiff's favour in accordance with Exhibit A.”

It is clear that on this finding the suit for specific performance was liable to be dismissed. The present appellant had brought that suit to enforce the contract of sale of the property to himself for Rs. 1,000 which was to include his payment of the mortgage. The finding was that Rs. 1,000 was only for the equity of redemption and that the mortgage had separately to be redeemed. No argument therefore can be founded that the present appellant was willing to carry out the contract as found by the Court merely because he sought to sue on the contract as he considered it. Although this decree was confirmed on appeal in 1922, the present appellant took no steps to pay up the remainder of the purchase-money and he has not up to this date offered to do so. In fact, he has got possession of the land from the mortgagee and is resisting the plaintiffs' claim to the property. It is true that the decree in the suit for specific performance fixed no time in which the money had to be paid. In this connection our attention has been drawn to certain remarks made in *Abdul Shaker Sahib v. Abdul Rahiman Sahib*(1). It was there decided that, even if time was fixed in the decree, the Court may extend it. It was remarked that there is no form for a decree for specific performance provided by statute or rule, and that in Courts of Chancery in England the appropriate forms of judgment which have been approved do not contain in the first instance a

(1) (1922) 44 M.L.J. 107.

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limit of time for payment of the purchase-money. In that case there was evidence that the vendor was asked by the vendee to take the amount of purchase-money and he refused. We are clear on the facts of this case that the present appellant is the party obviously in default and even now he is clearly not ready to complete the purchase by paying Rs. 530 which the decree directed him to pay. The principle on which *Ponnammal v. Pichai Thevan*(1) has been decided is exactly the same so far as this is concerned and in our opinion it makes no difference that the redemption of the mortgage in that case was part of the purchase-money and in this case it is not part of the purchase-money. We hold therefore that the appellant has not acquired a charge on the property for the Rs. 50 as earnest money for the contract of sale.

We now come to his claim to be subrogated to the rights of the mortgagee. The first point to be noted is that he got the transfer of the mortgage after the latter had become merged in the preliminary decree in the redemption suit. The decision in *Parvati Ammal v. Venkatarama Iyer*(2) by WALLACE J., sitting as a single judge, is quoted by the appellant in this connection. If, by that decision, it is meant that, after the passing of the preliminary decree in a mortgage suit, payment of the mortgage money not into Court can be recognized in passing the final decree, it must be held to have been overruled by the later decision in *Rasan Chettiar v. Rangayan Chettiar*(3), in which WALLACE J. and one of us laid down that such adjustment made out of Court cannot be pleaded against the passing of the final decree, since the Code distinctly lays down that the payment

(1) (1928) 24 L.W. 828.

(2) (1924) 47 M.L.J. 316.

(3) (1929) 30 L.W. 551.

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must be made into Court. There is no difference in this respect between the decree in a foreclosure suit and the decree in a redemption suit; vide Order XXXIV, rule 8 of the Code of Civil Procedure, which governs redemption suits. The application of the appellant to be made a party to the redemption suit was rightly dismissed by the Court and, whether right or wrong, it has not been appealed against and has become final. The second counter-petitioner in that matter opposed the petition on the ground that the mortgage had been superseded by the preliminary decree. This is mentioned in full in the order of the District Munsif who concludes by saying, "Final decree cannot be made as mortgage debt was discharged". If he means by that, that the mortgage deed was superseded by the preliminary decree, we quite agree. But if he means that the mortgage debt could be discharged by payment out of Court, then it is opposed to the ruling quoted above in *Rasan Chettiar v. Rangayan Chettiar*(1). It is immaterial whether the reason given by the learned District Munsif was right or wrong; the order passed against the appellant has become final.

The appellant had two courses open to him. He might have paid up the remainder of the purchase-money and then, having got the land assigned to him by the plaintiffs, might have had himself brought on record as plaintiff and asked for the final decree, paying the mortgage amount into Court, or, he might have purchased the mortgagee's interest in the preliminary decree, got the decree transferred and applied in the capacity of mortgagee for a final decree to sell the property. It is obvious that in a redemption suit the mortgagee is a decree-holder under the definition of "decree-holder" in section 2 (3) of the Code of Civil

(1) (1929) 30 L.W. 551.

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Procedure. He can therefore transfer his decree, and, on the transfer being recognized, the transferee has the same right to apply for the passing of a final decree. The appellant pursued neither of these courses. Instead, he chose to pay the mortgage debt out of Court, to get possession from the mortgagee, and then to resist the plaintiffs' claim to the property without even offering to pay the plaintiffs the balance of purchase-money.

It has been argued that this taking of possession from the mortgagee instead of from the plaintiffs is really a breach of the original contract to sell, which would, by itself, be sufficient to destroy any charge which the appellant had got by payment of the earnest money on the property. We are not sure that this contention also is not well-founded. No doubt, the property was in the possession of the usufructuary mortgagee at the time it was purchased by the plaintiffs' father and the latter was given only symbolical possession; still it was that symbolical possession that was to be transferred to the appellant under the contract, Exhibit A, which he failed to complete, and, till he had completed the contract, he could not get it. However that may be, as stated above, we are satisfied that the default in completing the contract is on the part of the appellant. But it is argued for the appellant that, as he paid the mortgage money under the agreement to purchase the property, he should be subrogated to the rights of the mortgagee. In this connection the case quoted to us before, *Parvati Ammal v. Venkatarama Iyer*(1), *Butler v. Rice*(2) which was followed in *Tangya Fala v. Trimbak Daga*(3), *Gobinda Chandra v. Parsa Nath*(4), and *Narayana Kutli Goundan v. Pechiammal*(5) have been relied on. The learned

(1) (1924) 47 M.L.J. 816.

(8) (1916) I.L.R. 40 Bom. 646.

(2) [1910] 2 Ch. 277.

(4) I.A.J.R. 1928 Cal. 231.

(5) (1911) I.L.R. 36 Mad. 426, 428.

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Advocate for the appellant, however, concedes that the Madras decisions except that quoted are against him; vide *Govinda Padayachi v. Lokanatha Aiyar*(1), a decision of OLDFIELD and HUGHES JJ., and *Velayudhan v. Nallathambi*(2). There is a very full discussion of the question in *Govinda Padayachi v. Lokanatha Aiyar*(1). The English cases as well as the case in *Narayana Kutti Goundan v. Pechiammal*(3) have been distinguished. We may notice that in *Narayana Kutti Goundan v. Pechiammal*(3) SUNDARA AYYAR J., at page 432, observes as follows:—

“The principle governing the right of subrogation in cases where it is claimed by a person, who without any previous interest in the property discharges a mortgage on it, is expressed in Jones on Mortgages (section 874) thus:—

‘Under the equitable principle of subrogation, one who pays a mortgage debt under an agreement for an assignment or for a new mortgage, for his own protection or for the benefit of another, acquires a right to the security held by the other.’”

He then proceeds to state that in India the scope of the rule appears to be narrower still. The learned Judges in *Govinda Padayachi v. Lokanatha Aiyar*(1) distinguish the English cases *Neesom v. Clarkson*(4), *Kinnaird v. Trollope*(5), *Palmer v. Hendrie*(6) and *Butler v. Rice*(7), as well as *Tangya Fala v. Trimbak Daga*(8) which followed *Butler v. Rice*(7). In all these cases payment had been made by a transferee of property under a mistake as to the ownership of his transferor. The case in *Gobinda Chandra v. Parsa Nath*(9) appears to go far beyond anything laid down even in the English cases. With due respect, we are unable to

(1) (1920) 40 M.L.J. 114.

(2) A.I.R. 1928 Mad. 541.

(3) (1911) I.L.R. 36 Mad. 426, 436.

(4) (1845) 4 Hare 97; 67 E.R. 576.

(5) (1888) 39 Ch. D. 636.

(6) (1859) 27 Beav. 349; 54 E.R. 136 and (1860) 28 Beav. 341; 54 E.R. 397.

(7) [1910] 2 Ch. 277.

(8) (1916) I.L.R. 40 Bom. 646.

(9) A.I.R. 1926 Cal. 231.

agree with what appears to have been laid down there, that a stranger, notwithstanding the provisions of section 74 of the Contract Act, is entitled to subrogation to the rights of the mortgagee to the extent of the money paid by him if he pays off the mortgage debt, even if not asked to do so by the mortgagor. This case came up for consideration before the Madras High Court in *Velayudhan v. Nallathambi*(1) and DEVADOSS J. refused to follow it. In the Madras case, the plaintiff was a vendee under a sham transaction, and it was argued that his position could not be worse than that of a pure volunteer and that a pure volunteer was entitled to be subrogated to the rights of the mortgagee. DEVADOSS J. says:

“This is a startling proposition of law. No volunteer is entitled to pay the debt of another person and claim to charge the amount against him.”

Referring to the Calcutta case, he says:

“The learned Judge, after observing that there is no direct authority for the position, seems to draw support for his position from two English decisions. With very great respect, I am unable to agree with the learned Judge in holding that a mere volunteer is entitled to the benefit of any payment that he might make on behalf of a debtor whether it be to redeem a mortgage or whether it be to pay off a simple money debt; and the cases upon which the learned Judge relies do not warrant such a wide proposition as he has laid down.”

He then proceeds to distinguish these cases on very much the same lines as they had been already distinguished in *Govinda Padayachi v. Lokanatha Aiyar*(2) quoted above. We entirely agree with him that it is a startling proposition that an entire stranger can go round paying mortgage debts without the consent and even against the wishes of the mortgagor and claim to be subrogated to the rights of the mortgagee. In the present case, even by the terms of the contract, the

(1) A.I.R. 1928 Mad. 541.

(2) (1920) 40 M.L.J. 114.

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appellant did not enter into any obligation to pay off the mortgagee, and was not bound to do so, even had he completed the purchase of the equity of redemption. In *Govinda Padayachi v. Lokanatha Aiyar*(1), a case almost exactly similar to the present case, the facts were as follows:—

Properties, which were subject to a hypothecation and to a mortgage with possession, were sold in execution of a money decree against the mortgagors and purchased by a third person. Subsequent to the execution sale, those properties were purported to be sold by the mortgagors to the predecessors in title of the appellants, the consideration for the sale being the discharge of the hypothecation and the mortgage with possession and of a payment of a sum to the mortgagors for payment to the third person as consideration for the repurchase from him of the properties. Appellants discharged only the hypothecation and the usufructuary mortgage amounts and obtained possession from the usufructuary mortgagee; but they did not pay the third person and did not therefore complete their title as owners of the properties. In a suit brought against the appellants by the successor in interest of the third person for possession of the properties, it was held that the plaintiff was entitled to obtain possession and that the appellants were not entitled to insist on (i) their being paid the amounts of the hypothecation and the usufructuary mortgage before being ejected or (ii) the plaintiff paying to the usufructuary mortgagee the amount of his mortgage to complete the plaintiff's right to immediate possession. There was no doubt this difference in that case, that at the time of the sale purported to be made by the mortgagors the latter had no title to the property.

(1) (1920) 40 M.L.J. 114.

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But it was held that the appellants could not also rely upon the equitable principle of subrogation, because there was no authority for extending the principle to a case such as that of a payment made under a mistaken belief in the future acquisition of an interest in property.

In the present case, it is clear that the defendant got the mortgage transferred to him before he had purchased the equity of redemption. Taking his conduct at its best, it may be said that he thought that the sum he had paid was part of the Rs. 1,000, the purchase-money of the land. But, when the Court held that this was not so, he evidently declined to go on with the contract of purchase. Besides, as noted above, there is an important fact in the present case. If he meant to purchase the mortgagee's rights, he should have got the transfer not of the mortgage but of the preliminary decree which had superseded it. If, on the other hand, he wanted to put himself in the shoes of the plaintiffs and redeem the mortgage, he had to go on with the contract, purchase the property from the plaintiffs and get himself substituted for the plaintiffs in the suit. He adopted neither of these courses.

In the result, we hold that the appellant acquired no charge on the property either by his payment of the earnest money of Rs. 50 at the time of the contract for sale which he failed to carry out, or by subrogation to the rights of the mortgagee. That being so, we consider that the Court of first appeal was right in holding that he was a trespasser and the suit as framed was maintainable. We are not here concerned with the other issues which have been remanded by the learned Subordinate Judge for trial.

The appeal therefore fails and is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Stone.

1931,
January 22. MAHANT BAGAVATHI DOSS BAVAJI, DHARMAKARTHA OF
SRI VENKATESAPERUMAL DEVASTHANAM (RIVAL CLAIMANT),
APPELLANT,

v.

M. SARANGARAJA IYENGAR (FIRST CLAIMANT),
RESPONDENT.*

Land Acquisition Act (1 of 1894), ss. 3 (d) and 54—Land Acquisition Court—Chief Judge of Small Cause Court appointed as “its special judicial officer”—If, a principal Civil Court of Original Jurisdiction—Decrees of the said Court—If appealable—Code of Civil Procedure (Act V of 1908), sec. 96—“Awards” and “Decrees”—Distinction between.

A Land Acquisition Court, constituted by the appointment of the Chief Judge of the Court of Small Causes in Madras as its “special judicial officer”, is not a “principal Civil Court of Original Jurisdiction” within the meaning of section 3 (d) of the Land Acquisition Act (1 of 1894), but it is a special Court having its own statutory status which does not follow the status of the Court ordinarily presided over by the person who happens to be appointed as its Judge. Neither section 54 of the Land Acquisition Act nor section 96 of the Code of Civil Procedure confers on the High Court a power to act as a Court of Appeal from the decisions which are not “awards” but “decrees” of the said Court.

Distinction between “awards” and “decrees” of the Land Acquisition Court pointed out.

APPEALS from the decrees of the Special Court at Madras in Land Cases Nos. 19 and 20 of 1925.

T. C. A. Bhashyam and M. E. Rajagopalachari for appellant.

C. Narasimhachari for respondent.

* Appeals Nos. 395 and 396 of 1928.

JUDGMENT.

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On this appeal being called on, a preliminary objection was taken on behalf of the respondent that the appeal was incompetent as no appeal lay from the Land Acquisition Court when that Court, as in this case, was constituted by the appointment of a “Special Judicial Officer.” The objection is founded upon alternative arguments, viz., either (i) the Chief Judge of the Small Cause Court who was the “Special Judicial Officer” appointed in this case (see Local Rules and Orders, page 84) is a *persona designata* so as to make the Court he constitutes fall within no general class from which appeal to the High Court lies, or (ii) by virtue of the fact that the “Special Judicial Officer” appointed was, in this case, the Chief Judge of the Small Cause Court, the Court he constitutes falls within the class of Small Cause Courts, and accordingly in that case also no appeal lies to the High Court.

In our view, in this case, “the Court,” within the meaning of the Land Acquisition Act, was constituted by the Local Government’s appointing a special Judicial Officer to perform the functions of the Court. It follows, therefore, that this was a special Court and was not “a principal Civil Court of Original Jurisdiction,” within the meaning of section 3 (d) of the Land Acquisition Act. The question then arises whether, when the matter in dispute and litigated before such a Court leads not to the making of an “award” but to the pronouncement of a “decree,” any appeal lies to the High Court from the “decree” of such a Court.

Before, however, we consider this matter, it is necessary to advert to the meaning of the term “award” as used in the Land Acquisition Act and to consider whether the trial Court in this matter made an “award” or issued a “decree.”

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There is clearly a distinction between an "award" within the meaning of that Act and a "decree"; see *Ramachandra Rao v. Ramachandra Rao*(1) and *Rangoon Botatoung Company v. The Collector, Rangoon*(2). Many decisions which can be made under this Act are not "awards"; for example, an order made under section 32 is not an "award." Section 54 also clearly distinguishes between "decrees" and "awards."

When one comes to define the term "award" so as to see where the functions of an award end, one finds that the matter has already been fully considered by the Judicial Committee; for, in *Ramachandra Rao v. Ramachandra Rao*(1) their Lordships observed:

"The award as constituted by Statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under section 31, sub-section(2), the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award, . . ."

It is thus apparent that the judgment now appealed from was not an "award" but was a "decree" and is so termed in the memorandum of appeal.

As was pointed out by LORD BRAMWELL in *Sandbach Charity Trustees v. North Staffordshire Railway Co.* (3), cited with approval by the Judicial Committee in *Rangoon Botatoung Company v. The Collector, Rangoon*(2), "an appeal does not exist in the nature of things: a right of appeal from any decision of any tribunal must be given by express enactment." Their Lordships of the Judicial Committee added at 39 I.A., *loc. cit.*

(1) (1922) I.L.R. 45 Mad. 320 (P.C.).

(2) (1912) L.R. 89 I.A. 197, 200.

(3) (1877) 3 Q.B.D. 1.

"A special and limited appeal is given by the Land Acquisition Act from the award of 'the Court' to the High Court. No further right of appeal is given. Nor can any such right be implied."

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The express right of appeal is to be found in section 54 which provides, *inter alia*, as follows:—

"Subject to the provisions of the Code of Civil Procedure, 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall lie in any proceedings under this Act to the High Court from the award, or from any part of the award, of the Court . . ."

Notwithstanding this express limitation and the pronouncement above referred to of the Judicial Committee to the effect that a limited right of appeal alone is given, it is argued on behalf of the appellant that, because section 53 applies the provisions of the Code of Civil Procedure, (and although such application is "save in so far as they may be inconsistent with" the provisions of the Land Acquisition Act), therefore, we must apply section 96 of the Code of Civil Procedure and say that, as "the Court" within the meaning of the Land Acquisition Act falls within the term "any Court" within the meaning of section 96 (1) of the Code of Civil Procedure, therefore, an appeal lies not only from awards but from decrees of "the Court" to the High Court.

Whatever weight there may be in this argument, when one is considering the position where the appeal is from "the Court" where such Court is "a principal Civil Court of Original Jurisdiction" within the meaning of section 3 (d) of the Land Acquisition Act, the point raised by the present objection is not touched, unless one can find the authority which makes the High Court "the Court authorized to hear appeals from the decisions of such Court" within the meaning of section 96 of the Code of Civil Procedure, for, in the absence

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of such authority, there is no competent appellate Court, or, if there be, it is not the High Court.

We invited the appellant's Counsel to indicate where such authority is to be found, and the only authority he could suggest was the authority conferred by section 54 of the Land Acquisition Act. That is to say, as that section says that, subject to the provisions of the Code of Civil Procedure applicable to appeals from original decrees, appeals shall only lie to the High Court from awards, therefore, appeals lie to the High Court from the Court, and therefore the High Court is authorized to hear appeals from "the Court," and, therefore, the High Court is a court authorized to hear appeals within the meaning of section 96 of the Code of Civil Procedure, not only from "awards" but also from "decrees." We cannot so construe the authority conferred by section 54. The authority by that section conferred is an authority to hear appeals from "awards." We can find no other authority conferring upon the High Court the power to act as a Court of appeal from the specially constituted Court from whose decision this appeal is brought. It is urged that this results in an anomaly, because an appeal would have lain had the Court been a "principal Civil Court of Original Jurisdiction." As to whether an appeal would lie in such a case we express no opinion. But, in the present case, it is clear that the court in question was not a "principal Civil Court of Original Jurisdiction." It was a special Court specially constituted. It has its own statutory *status* and does not follow the *status* of the Court ordinarily presided over by the person who happens to be appointed as its judge. No authority has been conferred upon the High Court to hear appeals from such special court except in the case of an "award," and if this results in an anomaly, the remedy is in an

alteration of the law not in a construction of the existing Act which would do violence to the most elementary rules of construction.

It follows that the preliminary objection is upheld, and the appeals are dismissed with costs.

G.R.

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APPELLATE CIVIL.

*Before Mr. Justice Curgenvven and Mr. Justice
Bhashyam Ayyangar.*

THE OFFICIAL RECEIVER OF SECUNDERABAD,
APPELLANT,

v.

GUMIDELLI LAKSHMINARAYANA (DEAD) AND SIX
OTHERS, RESPONDENTS.*

1930,
October 2.

Courts—British Indian and Foreign—Courts of Foreign countries, British Colonies, etc.—Position of, quoad British Indian Courts—Extra-territorial jurisdiction—Foreign Court—Meaning outside Code of Civil Procedure—Vesting order in insolvency by Foreign Court—Operation on insolvent's property within British India—Whether will prevail against previous attachment of property effected by Court in British India—Foreign and domestic receivers.

In the contemplation of the general law of British India, there are only two kinds of Courts—British Indian Courts and Foreign Courts—and whatever is not a British Indian Court is a Foreign Court; so that, *quoad* the Courts of British India, the Courts, for example, of foreign countries, British Colonies, and assigned tracts like Secunderabad stand upon an

* Original Side Appeal No. 55 of 1929.

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equal footing as Foreign Courts, subject, of course, to the test of recognition as competent Courts.

The theory upon which extra-territorial jurisdiction is based is one of authority delegated for this purpose by the ruler of the territory over which it is exercised. But although, in the case of India, the authority so delegated, and the jurisdiction so exercised, is derived through His Majesty from the Governor-General in Council, and although the law may be identical with the law in force in British India, and may be administered by British officers, the Court so erected is a Foreign or extra-territorial Court.

Though under the Code of Civil Procedure, and for its purposes, a "Foreign Court" means "a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council," outside the Code this distinction does not appear to be drawn, and there is no reason to hold that for the purpose, for example, of insolvency jurisdiction it should be imported, nor even if imported, that it would affect whatever conclusions are to be drawn as to the effect of judgments passed by such extra-territorial Courts upon the proceedings of Courts in British India.

In general, a vesting order in insolvency made by a Foreign Court operates upon the property of the insolvent within British India, and will prevail against a prior attachment by creditors of the insolvent's property effected by a Court in British India; and in this matter there is no ground for distinguishing between the rights of a foreign and of a domestic receiver in insolvency.

ON APPEAL from the judgment of KUMARASWAMI SASTRI J., dated 23rd April 1929, and made in the exercise of the Ordinary Original Civil Jurisdiction in Application No. 802 of 1929 in Civil Suit No. 420 of 1922 on the file of the High Court, Madras, Original Side, and Civil Suit No. 510 of 1926 on the file of the High Court, Bombay, Original Side.

S. Varadachari for appellant.

S. Duraiswami Ayyar (A. K. Ramachandra Ayyar with him) for respondents.

JUDGMENT.

CURGENVEN J.—The question of law which this appeal raises is whether a vesting order made by the District Court of Secunderabad prevails against a prior attachment of a decree effected by a Court in British India. In 1922 a preliminary decree for partition was passed in Civil Suit No. 420 of 1922 on the file of this Court. In 1926 a creditor of the plaintiff in that suit, who had obtained a decree in Bombay, attached this preliminary decree. In 1928 the plaintiff was adjudicated an insolvent by the District Court of Secunderabad under the provisions of the Provincial Insolvency Act (V of 1920) which is in force in that area and an order was passed vesting his property in the Official Receiver of Secunderabad.

The legal argument divides into two stages:—

(1) What is the status of the District Court of Secunderabad and (2) what is the effect within British India of a vesting order passed by that Court. The former question presents little difficulty. Although administered by the Governor-General in Council, Secunderabad is part of the Nizam's Dominions, and lies outside British India. Jurisdiction over this area, as over a number of similar areas, is derived from the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), the preamble to which recites that the sovereign "by treaty, capitulation, grant, usage, sufferance, and other lawful means" has jurisdiction within divers foreign countries. Section 1 runs as follows:—

"It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

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By the Indian (Foreign Jurisdiction) Order in Council of 11th June 1902, powers under the Act were delegated to the Governor-General of India in Council for the purposes of constituting Courts and determining the law and procedure within areas extra-territorial to British India; and by a Notification of 1913 the specific Act with which we are concerned, the Provincial Insolvency Act (III of 1907), was declared applicable to Secunderabad. Section 3 of the Foreign Jurisdiction Act provides that

"every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country."

This is the principle upon which the Judicial Committee decided *Secretary of State for Foreign Affairs v. Charlesworth, Pilling & Co.*(1), where the question arose as to what law, the English or the Muhammadan, the Consular Court in Zanzibar should administer. Their Lordships say:

"... throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired, and which is within its limits a Sovereign power. It results that a Judge acting within these limits is a Zanzibar Judge, and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case before him."

The theory upon which extra-territorial jurisdiction is based is one of authority delegated for this purpose by the ruler of the territory over which it is exercised—in the present instance the Nizam. But although, in the case of India, the authority so delegated, and the jurisdiction so exercised, is derived through His Majesty from the Governor-General in Council, and although the law may be identical with

the law in force in British India and may be administered by British Officers, the Court so elected is a Foreign or extra-territorial Court. In the contemplation of the general law of British India, it seems that there are only two kinds of Courts—British Indian Courts and Foreign Courts—and that whatever is not a British Indian Court is a Foreign Court; so that *quoad* the Courts of British India, the Courts for example of foreign countries, British Colonies and assigned tracts like Secunderabad stand upon an equal footing as Foreign Courts, subject, of course, to the test of recognition as competent Courts. It is true, as Mr. Varadachariar points out, that the Code of Civil Procedure does distinguish another class of Court. Under that Act, and for its purposes, a "Foreign Court" means "a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council," so that by virtue of the concluding words a Court such as we are dealing with is not a "Foreign Court" within the definition. Special provisions affecting such Courts are to be found in sections 10, 43 and 45 of the Code dealing with *lis pendens* and the reciprocal execution of decrees. But outside the Code this distinction does not appear to be drawn, and there is no reason to hold that for the purpose, for example, of insolvency jurisdiction it should be imported, nor even if imported, that it would affect whatever conclusions are to be drawn as to the effect of judgments passed by such extra-territorial Courts upon the proceedings of Courts in British India.

The statutory provision which declares that the judgment *in rem* of a competent Court is conclusive proof that any legal character which it confers accrued

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as from the date of that judgment is section 41 of the Evidence Act; and this applies, it is not disputed, to the foreign judgments of a competent Court no less than to domestic judgments. The English Law draws a distinction between the assignment of a bankrupt's immovable property to the trustee in bankruptcy and the assignment of movables, an assignment by a foreign Court of the former kind not operating, and of the latter kind operating, upon property situate in England (Dicey's Conflict of Laws, 4th Edition, Rules 123 and 124). An exception is made in favour of assignments of immovables under the Irish, Scotch and Indian Acts. [*Loc. cit.* Rule 122.] We are not concerned here with the assignment of immovables, and it seems clear that, in general, a vesting order made by a competent foreign Court operates upon property of the insolvent within British India, creating a title in the Official Receiver so invested. This title so operates with effect from the date of the order, the case *Galbraith v. Grimshaw*(1) being sufficient authority in dispute of the proposition that a foreign Receiver may take advantage of any "relating back" provision which his own Act may contain.

Accepting then that the insolvent's property in the decree in Original Suit No. 420 of 1922 vested in the Official Receiver of Secunderabad upon his adjudication on 15th October 1928, the second issue arises, whether such vesting will prevail against the respondent's earlier attachment of that decree. We have heard a good deal of argument upon this point based upon English decisions as to the effect of what in England corresponds most closely to the attachment of a debt in this country, a garnishee order *nisi*. It appears to me that

(1) [1910] A.C. 508.

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the two proceedings differ in one critical particular which vitiates the analogy it is sought to draw. Under rule 1 of Order XLV of the Rules of the Supreme Court, a garnishee may, upon the application of a person who has obtained a judgment against his debtor, be called upon to "show cause why he should not pay to the person who has obtained such judgment" so much of the debt as may be sufficient to satisfy the judgment; and rule 2 declares that service of such an order upon the garnishee "shall bind such debts in his hands." The legal consequences of an order *nisi* have been considered in several cases cited before us, especially with reference to a competing claim in bankruptcy. In *Ex parte Joselyne. In re Watt*(1) JAMES L.J. said:

"The moment the order of attachment was served upon the garnishee the property in the debt due from him was absolutely transferred from the judgment debtor to the judgment creditors. The garnishee could then only pay his debt to the judgment creditor of his original debtor. The property in the debt was transferred, and there was a complete and perfect security the moment the order of attachment was served."

The other two learned Judges of the Court of Appeal, COTTON and THESIGER, L. JJ. expressed the view that by virtue of the order the judgment-creditor became a secured creditor, and that may be a way of putting the position preferable to saying that the property in the debt was transferred. This latter proposition has in fact been dissented from in later cases, for instance in *Chatterton v. Watney*(2). The question of these competing claims again arose in *Galbraith v. Grimshaw and Baxter*(3), where the debtor had been adjudicated bankrupt in Scotland, and the trustee laid claim to a debt in respect of which a garnishee order *nisi* had been passed in England. I have already referred in another connexion to this case, which went up to the House of

(1) (1878) 8 Ch.D. 327.

(2) (1881) 17 Ch. D. 259.

(3) [1910] 1 K.B. 839.

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Lords as *Galbraith v. Grimshaw*(1). In the Court of Appeal, FARWELL L.J. observes of the garnishee order *nisi*, no doubt having in mind the language of JAMES L.J. cited above :

"It does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt to anyone but the garnishor without incurring the risk of having to pay it over again to the creditor."

In this view BUCKLEY and KENNEDY L.JJ. concurred. In the House of Lords, LORD LOREBURN L.C., after dealing with the question of relating back, proposed as a test whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt which had already been made the subject of a garnishee order *nisi*. However appropriate such a test may be in England, it is certain that the rights of a Receiver under either of the Indian Insolvency Acts are not necessarily delimited by it. LORD MACNAGHTEN, by saying that the Scottish Court can only claim the free assets of the bankrupt, had, I think, in view the principle of an equitable charge arising out of the order, and I do not read any of the observations in this case as amounting to a pronouncement that, irrespective of this principle, the Scottish Court, merely because it was a Foreign Court, could not interfere with the claim under the attachment.

Mr. Doraiswami Ayyar has sought to draw some conclusions from two cases in which the respective claimants were the trustee in a foreign bankruptcy—French in the one case and Scottish in the other—and a receiver appointed in execution; *Levasseur v. Mason & Barry*(2) and *Singer & Co. v. Fry*(3). The decisions turn upon the incidents attaching to such a receivership and

(1) [1910] A.C. 508.

(2) [1891] 2 Q.B. 73.

(3) [1915] 84 L.J. (K.B.) 2025.

do not, I think, afford much help in deciding upon the rights of an attaching creditor under Indian Law. It will be clear from LORD ESHER's judgment in the former case that a receivership shares this feature with a garnishee order *nisi*—that it is directed to the satisfaction of the claim of the judgment creditor who secured the appointment of the receiver, and of his claim alone.

It is precisely in this respect that an order of attachment of a debt under the Code of Civil Procedure differs. The difference will be apparent upon a comparison of the form for a garnishee order *nisi* (Form No. 39, Appendix K, Rules of the Supreme Court) and the Form for attaching a debt (Form No. 17, Appendix E, Code of Civil Procedure). In the one the attachment is expressly made with a view to satisfying the judgment debt, and that debt only. The other does no more than prohibit and restrain the garnishee from paying, and his debtor from receiving, the debt until further orders. It is of purely negative effect, designed only to preserve the *status quo*, and cannot operate to create any lien or security in favour of the garnishor. So far as a domestic insolvency is concerned, the priority of an Official Assignee's claim over that of an attaching creditor was pronounced upon by a Bench of three Judges of this Court in *Kristnasawmy Mudaliar v. Official Assignee of Madras*(1). The effect of an attachment, it was observed, following a dictum of the Privy Council in *Moti Lal v. Karrabuldin*(2), was to prevent alienation; it does not confer title. In that case, too, an attempt was made to support the claim of the attaching creditor by reference to English cases dealing with a garnishee order *nisi* but, though recognizing that such

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(1) (1908) I.L.R. 26 Mad. 673.

(2) (1897) I.L.R. 25 Cal. 179 (P.C.).

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cases might have their use by way of analogy, the learned Judges considered that the question had to be decided upon the terms of the Code of Civil Procedure and of the Insolvency Act in force in this country. In Calcutta a contrary view was at first taken in *Miller v. Lukhimani Debi*(1). The judgment is only of interest here because it proceeded upon the principle that the Official Assignee stood in the shoes of the insolvent, and could not occupy a better position. This is very much the *ratio decidendi* adopted by LORD LOBBURN in *Galbraith v. Grimshaw*(2). This Calcutta case was overruled by a Full Bench in *Frederick Peacock v. Madan Gopal and others*(3), similar arguments to those adopted in the Madras case being accepted. Reference may also be made to the Privy Council judgment in *Raghunath Das v. Sundar Das Khetri*(4).

I can find no ground for distinguishing in this matter between the rights of a foreign and of a domestic receiver in insolvency. In each the debtor's property vests subject to any prior equities such as a charge or lien, and no such equities are created by an attachment. Under section 64 of the Code of Civil Procedure, any private transfer or delivery of the property attached is void as against all claims enforceable under the attachment. A vesting order passed by a Foreign Court is, I should suppose, a transfer by operation of law, though not of British Indian Law; at any rate, it is not a private transfer, and therefore it has not to give way to an attachment.

The result will be that the appeal is allowed. The order of the learned Judge continuing the attachment and giving leave to the attaching creditor (now dead and represented by seventh respondent) to execute the

(1) (1901) I.L.R. 28 Cal. 419.

(3) (1902) I.L.R. 29 Cal. 428 (F.B.).

(2) [1910] A.C. 508.

(4) (1914) I.L.R. 42 Cal. 72 (P.C.).

preliminary decree is set aside and the application dismissed. The contesting (seventh) respondent will pay the appellant's taxed costs here and in the trial Court. The remainder of that Court's order as to costs will stand.

BHASHYAM AYYANGAR J.—I concur and have nothing to add on the first question on which my learned brother has held in concurrence with the learned trial Judge that the Secunderabad Court is a Foreign Court for the purposes of this case. I only wish to say a few words on the second question, namely, what is the effect in British India of a vesting order made by the said Court? The jurisdiction or competency of that Court to pass the order of adjudication is not challenged, and it is conceded that, under the order passed by that Court vesting the insolvent's estate in the Official Receiver of that Court, all the movable property of the insolvent situate (even) in British India became vested in that officer. The only point is whether the judgment creditors of the insolvent who had attached the decree in question before the said vesting order was passed are entitled to any lien over it, or "equity" as the learned trial Judge calls it, as against the said officer. On this point the learned trial Judge has observed: "I do not think that such adjudication will put an end to all execution proceedings in British India against the person adjudicated there. So far as British India is concerned, the Official Assignee takes the properties subject to all the equities. I may in this connection refer to *Ex parte Holthausen. In re Scheibler*(1) and *Galbraith v. Grimshaw*(2). It is stated that there is some difference as regards the effect of attachments in British India and English Courts, but I do not think that makes much difference, the principle on which the cases are decided

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(1) (1874) 9 Ch. App. 722.

(2) [1910] A.C. 508.

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being that the trustees in bankruptcy or Official Receiver in a Foreign Court cannot take advantage of the provisions of law applicable to Courts in British India as regards the antedating." Speaking with the greatest respect, I am unable to agree with this decision. It is thoroughly settled that an attachment under the Code of Civil Procedure does not confer any title or create any charge and that it merely prevents and avoids a private alienation but does not invalidate the alienation by operation of law, such as is effected by a vesting order passed on the adjudication of the judgment debtor; see *Kristnasawmy Mudaliar v. Official Assignee of Madras*(1) and *Raghunath Das v. Sundar Das Khetri*(2). If the present were a case of an adjudication and a vesting order made by a British Indian Court, there can be no question that the attaching creditors cannot claim any charge or priority over the Receiver in insolvency. Why should it make any difference on this point because the adjudication and the vesting order were passed by a foreign Court? No Indian authority has been referred to which recognizes any such difference. The learned trial Judge bases his decision on the analogy of similar proceedings in England, but an attachment in this country and what corresponds to it in England have different significance and effect as pointed out in the judgment of my learned brother. Indeed the learned trial Judge himself concedes some difference between the two. He however states that it does not affect the point, the ground given by him being that the provisions of law applicable to Courts in British India as regards the antedating are not available to the Official Receiver in a Foreign Court. Now, the doctrine or law of antedating is had recourse to only for invalidating a prior title which would

(1) (1902) I.L.R. 26 Mad. 673.

(2) (1914) I.L.R. 42 Cal. 72 (P.O.).

otherwise be valid. That doctrine may be relevant, with reference to an English attachment, which creates a charge, but is not relevant with reference to an attachment under the Code of Civil Procedure which, unless followed up by proper subsequent proceedings, does not in any way affect the existing title. In the present case the Official Receiver, Secunderabad, has no need to and does not invoke the help of the said doctrine at all. I think for these reasons that the conclusion of the learned trial Judge cannot be sustained and that the Official Receiver of Secunderabad has a prior claim over the attaching creditors. I agree with the order pronounced by my learned brother.

B.C.S.

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APPELLATE CIVIL.

*Before Mr. Justice Curgenvin and Mr. Justice
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1930,
September
12.

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND TEN
OTHERS (APPLICANT AND RESPONDENTS), RESPONDENTS.*

Presidency Towns Insolvency Act (III of 1909), sec. 7—Insolvent father—Suit by sons for partition of joint family properties—Pending—Application by Official Assignee for declaration that debts of insolvent father binding on sons to extent of their shares in joint family property—Jurisdiction of Insolvency Court acting under sec. 7—Power to direct sale—General rule of limitation for enforcement of sons' liability.

A Court acting under section 7 of the Presidency Towns Insolvency Act (III of 1909) has jurisdiction on the application of the Official Assignee to grant a declaration that the debts of

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an insolvent father are binding upon the sons to the extent of their shares in the joint family property, even though a suit filed by the sons for partition of the property is pending in a Civil Court at the time such an application is made.

Obiter : After such a declaration is made, the Court has the consequential power to direct a sale of the sons' shares in the property.

Generally speaking, and excluding such an exceptional case as the post-partition renewal of a debt by the father, the liability of the sons' share is enforceable in proceedings in insolvency, so long as the father himself may be proceeded against, irrespective of the circumstance that the debt would be time-barred in an ordinary Court. *Morley v. White*. *In re White* (1872) 8 Ch. App. 214, followed.

Balusami Ayyar, In re (1928) I.L.R. 51 Mad. 417 (F.B.), *Sat Narain v. Behari Lal* (1924) I.L.R. 6 Lah. 1 (P.C.), *Official Assignee, Madras v. Narasimha Mudaliar* (1929) I.L.R. 52 Mad. 717 (F.B.), and *Seetharama Chettiar v. Official Receiver, Tanjore* (1926) I.L.R. 49 Mad. 849 (F.B.), referred to.

ON APPEAL from the order of WALLER J., dated 2nd May 1928, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Insolvency Petition No. 201 of 1919 (In the matter of A. N. B. Baluswami Ayyar and A. N. B. Narasimha Ayyar, insolvents).

T. R. Venkatarama Sastri (*N. Rajugopala Ayyangar* with him) for first, second and fourth to eighth appellants.

T. Krishnamachari for third appellant.

V. V. Srinivasa Ayyangar (*V. Varadaraja Mudaliar* with him) for first and eighth to eleventh respondents.

S. G. Sadagopa Mudaliar for third to fifth and seventh respondents.

No one appeared for sixth respondent.

JUDGMENT.

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CURGENVEN J.—The question of law which this appeal raises is whether, during the pendency of a suit for

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partition, the Official Assignee can obtain, in proceedings under section 7 of the Presidency Towns Insolvency Act, a declaration that the debts of an insolvent father are binding upon the sons to the extent of their shares in the family property. The father, Narasimha Ayyar, was adjudicated together with his partner on the 2nd December 1919. A few days earlier, on the 26th November, a partition deed had been executed between himself and his sons, which was held to be void as against the Official Assignee, and this decision was confirmed on appeal by this Court on the 1st August 1922. Meanwhile, in July 1922, the sons filed a suit for partition in the Court of the Subordinate Judge of Madura against their father. On the 5th February 1924, the Official Assignee made the application to the Insolvency Court out of which this appeal arises. It was a notice of motion praying for a declaration that the insolvent's debts were binding upon his sons and for sale of their interests in the joint family property. The matter came in the first instance before KUMARASWAMI SASTRI J. who was in doubt as to the effect of the suit for partition upon the claim made by the Official Assignee and referred the question to a Full Bench. The opinion of the Full Bench is reported in *Balusami Ayyar, In re* (1); RAMESAM and MADHAVAN NAIR JJ. (PHILLIPS J. dissenting) held that the institution of the partition suit put an end to the joint family status and with that to the right of the father to alienate the sons' shares for his debts, thus extinguishing the right of the Official Assignee to effect such a sale. The latter, it was held, took the father's property exactly as it stood with all its advantages and all its burdens and, notwithstanding that he took it as

(1) (1923) I.L.R. 51 Mad. 417 (F.B.).

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it existed at the commencement of the insolvency, yet the division in status effected by the filing of the suit deprived the Official Assignee equally with the father of the power of sale. In his judgment, RAMESAM J. adverts to certain other remedies which might still be open to the Official Assignee. He might, the learned Judge considered, as representing the creditors or associating himself with them, file suits against the sons, obtain decrees and sell the sons' shares also, or again he might apply in the partition suit for the creditors to be made parties and ask for a decree providing for the payment of such debts as were not illegal or immoral. He then adverts to another possible remedy by taking what are called garnishee proceedings in the Insolvency Court itself, adding that this was a matter for the Judge sitting in Insolvency to decide. These observations about a possible alternative course are, it is needless to say, *obiter*. The case then came before WALLER J., who was of opinion that it was open to him to adopt the course last suggested under section 7 of the Presidency Towns Insolvency Act, and he gave the Official Assignee the declaration for which he asked. WALLER J. did not in his judgment grant the further prayer for sale of the sons' shares, and a direction to that effect inserted in the decretal order goes further, we must presume, than his intention. This appeal has now been instituted by the sons and it is contended before us that it is not open to the Insolvency Court to deal with the liability of the sons' shares under the Act.

Mr. T. R. Venkatarama Sastri, for the appellants, bases his arguments largely upon certain general considerations. In the first place, he says the Insolvency Act has for its scope only the distribution of the debtor's property or assets, the term "property" of

course including such property as the Official Assignee by virtue of his special powers may recover under section 55 or 56. The proceeds of a son's liability to pay his father's debts cannot be described as the property of the insolvent, he continues, because in no circumstances would the insolvent be entitled to realize it for his own benefit; the son is not under any pecuniary liability to his father but only to the creditors of the father, so that the Official Assignee standing in the father's shoes cannot lay claim to a payment of this kind as money due to the father. The son's position bears some analogy to that of a surety; and I think it may at once be conceded that in the ordinary acceptance of the term "property" the sale proceeds of the son's share could not be described as the property of the insolvent. Mr. Venkatarama Sastri's second main argument is that, assuming that the Official Assignee could deal with this property as an asset of the debtor, it would not necessarily be divisible equally amongst all the creditors. It might be that the debts due to some of the creditors were tainted with illegality or immorality, or it might be that, while some of the creditors were pre-partition creditors, others were post-partition creditors, and the latter of course would have no claim on the sons' shares. It is urged that equal distribution is of the essence of Insolvency procedure and attention is drawn to the terms of section 49 of the Act, whereby, after certain special provisions, sub-section (5) lays down that

"Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference."

This principle also, I think, must in general terms be conceded.

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For the Official Assignee, it is contended that section 52 (2) (b) affords the necessary statutory authority for dealing with the sons' shares in insolvency. This section defines what is to be deemed the property of the insolvent divisible among his creditors, and the portion with which we are concerned includes as such property

"the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

The specific question with which we are concerned is what capacity had the insolvent to take proceedings to exercise powers in respect of the sons' shares, because whatever capacity he may have enjoyed will, as "property", vest in the Official Assignee and will be at his disposal. It is clear, I think, that the section does not require that the property itself in respect of which the powers are to be exercised should in the ordinary sense be property of the insolvent. So long as he has a capacity to take certain proceedings in respect of some other person's property, that capacity passes to the Official Assignee, and it seems to follow that the proceeds realized by taking advantage of that capacity must themselves become the property of the insolvent. If this were not so, it would lead to the result that, whereas the capacity to take proceedings is an asset, no benefit could accrue to the creditors as the outcome of such proceedings, which appears an irrational position. The effect of this provision would seem therefore in some cases artificially to enlarge the meaning of the term "property of the insolvent" and to include in it funds which according to ordinary tests would not be so classified. It may be pointed out that the next ensuing portion of the section declares to be his property goods in his possession at the commencement of the insolvency in

his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof, which seems to be another artificial extension of the idea.

Whatever difficulty there may be in holding that a sum of money so derived is an asset divisible among the creditors, the position undoubtedly has the support of a Full Bench of this Court. After the Privy Council in *Sat Narain v. Behari Lal* (1) had settled that a son's share in the joint family property does not vest in the Official Assignee upon the father becoming insolvent, it became necessary to decide whether the father's power to sell that property so vested; and this question was affirmatively answered in *Seetharama Chettiar v. Official Receiver, Tanjore* (2). That decision was under the Provincial Insolvency Act which does not contain any counterpart to section 52 of the Presidency Towns Insolvency Act; but the Full Bench was able to hold, even without the aid of a provision in those terms, that the power to sell was property, although the share to be sold was not. Now one of the logical implications of so holding clearly is that the proceeds of such a sale—a sale of property not itself the property of the insolvent—is divisible among the creditors, and is therefore "property of the insolvent" within the meaning and intention of the Act, if, as seems reasonable to hold, only property which can technically be so described is so divisible. It is impossible to avoid seeing the difficulties which attach to this view. How, for instance, is any surplus to be dealt with, when section 76 provides that it is to be returned to the insolvent, whereas it is not in any ordinary sense his property? But, unless we are to adopt a position inconsistent with

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(1) (1924) I.L.R. 6 Lah. 1 (P.C.).

(2) (1926) I.L.R. 49 Mad. 849 (F.B.).

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this Full Bench ruling, I do not see how we can hold that, if in the one case the capacity to sell an undivided share affords sale proceeds divisible in insolvency, the capacity, whatever it may be held to amount to, to take proceedings to realize debts due to the creditors out of a divided share does not afford proceeds equally divisible; and, assuming for the present that the insolvent has the capacity, which section 52 declares to be his "property" or, in other words, to vest in the Official Assignee, it seems necessary to hold, apart from this authority, that the proceeds become "property" in their turn, or at least that they are divisible among the creditors; otherwise, as I have already said, the capacity itself would vest to no purpose. The case must be regarded, I think, as anomalous, because in all ordinary instances of the application of section 52 (2) (b) it will be found that, where the insolvent has a capacity to take proceedings to enforce some power over property, whatever those proceedings realize in the shape of money would be his property in the ordinary sense of the term.

The same Full Bench case bears upon the other main objection raised by Mr. Venkatarama Sastri that the proceeds of a sale of the son's divided share would not necessarily be divisible among all the creditors; because the same condition might attach to the sale proceeds of an undivided share, the father's right to sell this too depending upon the debts not having been incurred for illegal or immoral purposes. This point has not been dealt with by the Full Bench, and therefore it may be said that the decision does not in terms bind us; but here again considerations of consistency seem to require that the rule accepted in the one case should be in conformity with the rule accepted in the other. In defence of it may be adduced the ground that normally

the father's debts would be binding upon the son and the proceeds equally divisible. In a special case where this was not so, it would be for consideration whether the insolvency procedure could be applied to distribute among only those creditors whose claims against the son could be sustained.

Let us now consider what capacity the father has to take proceedings for exercising power over the son's share for the purpose of ensuring the due discharge of the debts. Admittedly he has the power, upon a partition, to require that suitable provision is made for the discharge of the debts out of the estate before it is divided up; indeed, he can insist upon the payment of the debts by sale of a sufficient portion of the family property before the partition of the remainder is effected. And it has not been denied that in the pending partition suit the Official Assignee could take his place and secure the same result. Is it open to the Official Assignee, instead of adopting this course, to get a sale of a sufficiency of the property carried out in insolvency, by means of an application under section 7 of the Presidency Towns Insolvency Act? Such a proposition does, I think, at first sight seem to extend the scope of the section to extreme and perhaps unjustifiable lengths; it virtually requires that the Insolvency Court should constitute itself a Court for the trial of a partition action, and that too when there is already a partition action pending in the ordinary Civil Court. Mr. Srinivasa Ayyangar has rightly enough dwelt upon the very wide language in which section 7 is couched, the only qualifying phrase which needs consideration being the opening words "Subject to the provisions of this Act". I have already endeavoured to deal with the contention that the provisions of the Act require that the subject-matter of an application under the section must be

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"property of the insolvent divisible among his creditors". If the views expressed are not erroneous, I can discover nothing in the provisions of the Act to exclude the enquiry upon this score. RAMESAM J. in *Balusami Ayyar, In re*(1) appears to hold that the test is whether or not the sons are "garnishees", a term not to be found in the Act, but meaning, I think, third persons from whom divisible assets are realizable. The line of reasoning followed above would appear to bring them within this class. Before another Full Bench composed of COURTS TROTTER C.J., ODGERS and BEASLEY J.J., *Official Assignee, Madras v. Narasimha Mudaliar*(2), the scope of section 7 came under consideration, with particular reference to the amended terms of section 36. That specific point does not now concern us, but the learned Judges had occasion to lay down that, whatever might be the practice in England, "the Official Assignee is entitled to proceed by way of motion under section 7 of the Act in those cases where he has a money claim against a stranger to the insolvency". By "money claim" is meant, I suppose, any claim to money which, on realization, would rank as a divisible asset. This gives a very wide extension to the section, so far as the only question we are dealing with—that of jurisdiction—is concerned. So long as its purpose is the realization of assets, it seems that every species of action that would yield such a result can be so brought, discretion being reserved to the Court to decline to exercise jurisdiction in unsuitable cases. Mr. Srinivasa Ayyangar has endeavoured to show by examples the diverse uses to which the section, or the corresponding section in the Provincial Insolvency Act, has been put.

(1) (1928) I.L.R. 51 Mad. 417 (F.B.).

(2) (1929) I.L.R. 52 Mad. 717 (F.B.).

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In *Ramasomayajulu v. Official Receiver, Godavari*(1) an issue had to be tried whether a partition had taken place or not. In *Doraiappa Aiyar v. Official Assignee of Madras*(2) the insolvent had sold certain family property, and had further given his purchaser a mortgage over other family property as security against a challenge of the sale by the other family members. The Insolvency Court was asked to decide whether the sale was or was not binding on the other members, so that it might be ascertained how far, if at all, the security bond was necessary. In both these instances, of course, the object of the enquiry was to determine what was and what was not property of the insolvent, and perhaps they do not take us very far. On the other hand, it is worth note that no decision against the applicability of the section has been cited before us. There is, for instance, no authority for the view that, if it should suit the Official Assignee, as representing the insolvent, to bring what would in effect be a suit for partition, the Insolvency Court would have no jurisdiction to entertain it. In *Morley v. White. In re White*(3), where the creditors of a deceased father filed an administration suit in the Chancery Division and the son petitioned in Bankruptcy, and connected questions arose in each Court with regard to the estates, it was decided by the Court of Appeal that the Court of Bankruptcy was the proper tribunal to determine them.

"The case is one,"

said JAMES L.J.,

"which shews how beneficial is the effect of the 72nd section."

(1) (1925) 23 L.W. 80.

(2) (1921) 42 M.L.J. 141.

(3) (1872) 8 Ch. App. 214.

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(corresponding to section 7 of the Presidency Towns Insolvency Act), and he adds :

"It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made ; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law and a Court of Equity, and there is not a single question stated to us as an important and difficult question arising in this matter which cannot be litigated and determined by that Court of Bankruptcy which the Legislature has thought to be the proper tribunal for the determination of it."

There is no ground for holding that a Court of Insolvency in India has powers more circumscribed than these ; and I cannot find any convincing answer to the contention that, whatever a Court of Law may do, an Insolvency Court, subject to the provisions of the Act, may do under section 7. I think, therefore, that the learned Judge was acting with jurisdiction in giving the declaration asked for by the Official Assignee. We have not to adjudicate upon his power to direct sale of the property, but upon the line of reasoning I have accepted it seems that the Insolvency Court must possess that consequential power.

I think also that he has rightly decided the question of limitation. Generally speaking, and excluding such an exceptional case as the post-partition renewal of a debt by the father, the liability of the son's share is enforceable so long as the father himself may be proceeded against ; and it can make no difference to this principle what rule of limitation the circumstances may render applicable. Nor is it pertinent to say that the debt would be time-barred in an ordinary Court. We have been shown no authority for the view that, while a father's debt is alive in insolvency, any remedy in insolvency against the son may become barred ; and that is the only question we have to decide.

It is represented to us that Schedule A appended to the decretal order, enumerating the liabilities, needs amendment in some respects, but we think that this should be effected through an application to the Judge sitting in Insolvency. We dismiss the appeal with taxed costs on the Original Side scale, to be paid by the Official Assignee, as receiver in the partition suit, out of the appellants' shares in the family property.

BHASHYAM AYYANGAR J.—The Full Bench has, by a majority, decided in this case that the severance of status brought about by the institution of a suit for partition by the appellants against their father, the insolvent in question, extinguished the right of the Official Assignee to sell by himself their shares in the family property to meet the debts of the insolvent.

The main questions in this appeal are, whether the Official Assignee has still any right left "in or over, or in respect of" the said shares in the family property and, if so, how, that is, by what means, he is entitled to utilize it for the benefit of the general body of creditors.

As regards the first question, it is conceded in the leading judgment of the majority of the Full Bench delivered by RAMESAM J.—

"The only remedy lost to the Official Assignee is the right of selling the sons' share by private sale. This is merely a processual right. The substantial right of the Official Assignee to enforce the debts due to the creditors against the sons remains"

Now, there cannot be the least doubt that, even after a division in status, the father has the right to ask and insist that, before a partition is made, all his proper debts be paid out of the family estate and that the sons cannot resist such a demand. This has been laid down by a Full Bench of this Court in *Venkureddi v. Venku Reddi*(1).

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The right of the father just referred to may not be "property" as defined in section 2 (e) of the Presidency Towns Insolvency Act, but it cannot be denied that it is a "power in or over or in respect of property" exercisable by the father for his own benefit. The capacity to exercise and to take proceedings for exercising this power is one of the "particulars" comprised in, and going to make up "the property of the insolvent (father) divisible amongst his creditor" as explained and defined by section 52 of the Act. If authority were needed in support of this statement, it is found in the judgment of the Privy Council in *Sat Narain v. Behari Lal*(1) in which their Lordships observe, at page 6, that the property of an insolvent which by section 17 vests in the Official Assignee must mean only the property which by that section and section 52 is divisible among his creditors, after first pointing out that the power to obtain a partition of the joint family property is a power which the Official Assignee might exercise under section 52 (2) (b).

The conclusion is, therefore, that, notwithstanding the suit for partition and the consequent division in status, the right of the father to have his just debts paid out of the entire family property subsists, and the father being an insolvent, it now vests in the Official Assignee "as property of the insolvent divisible among his creditors".

Going to the second question, it will be noted in the first place that, in the case already cited, their Lordships of the Privy Council, while holding that the insolvency of the father does not of itself vest his sons' shares in the joint family property in the Official Assignee, observe that the Official Assignee may, in a

proper case, make that property available for the payment of the father's just debts "under the provisions of section 52 or in some other way" (page 23). This goes to show that it is open to the Official Assignee to realize or convert into money, the right or capacity referred to already, in the insolvency proceedings themselves, without the necessity to proceed by or in an independent action. The right is given to, and the duty is laid on, the Official Assignee, under section 68 of the Act, to realize the property of the insolvent with all convenient speed. It has been shown that on the insolvency of the father (of divided status), the Official Assignee becomes vested with his right to get all his just debts paid up from and out of the entire family property, before partition. How is this right or capacity, which is property divisible among the creditors of the insolvent-father, to be realized or converted into money? It can only be done by getting the family property of which he is in joint possession, or a sufficient portion thereof, sold. The Full Bench has held that, owing to the division of status brought about by the suit for partition instituted by the sons after insolvency, the father and consequently the Official Assignee also lost the right of private sale. The only other course open to him is, therefore, to obtain a declaration against the sons and get the family property including their shares therein sold by or through Court.

In what Court is this to be done? Is the Official Assignee entitled to get it done through the Insolvency Court itself, or is he bound to seek the aid of a different Court? It was argued that the sons being strangers to the insolvency, the Official Assignee can get any order or relief against them only in or by means of an independent action against them, but this argument does not seem tenable. In the first place, the relief

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(1) (1924) 1.L.R. 6 Lah. 1 (P.C.).

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asked for by the Official Assignee is not against the sons (personally), but their shares in the property of their family, which was being represented by the father-insolvent. Secondly, the sons' shares being undoubtedly liable for all the just debts of the father-insolvent, the sons, who are entitled to get only the balance or surplus, cannot, in so far as they own such shares, be said to be entire strangers to the insolvency. And thirdly, section 7 of the Act gives the widest powers to the Insolvency Court to go into and decide all questions whatsoever arising in any case of insolvency,

"for the purpose of doing complete justice or making a complete distribution of property in any such case."

It must, therefore, be open to the Insolvency Court, in a case of this sort, to declare the liability of the sons' shares in the family property for the proved and just debts of the father-insolvent and make all necessary orders for their realization.

The mere fact that the father alone is the insolvent and the sons are not, does not preclude the Insolvency Court from exercising jurisdiction over the latter to the extent necessary for the realization of all the assets divisible among the creditors of the former. That the jurisdiction of the Insolvency Court extends to the determination of questions affecting persons not parties to the insolvency has been decided in several cases under section 105 of the English Bankruptcy Act (1914), which corresponds to our section 7. In some cases, the Bankruptcy Courts even assumed exclusive jurisdiction, by the issue of an injunction. These cases are collected in the commentaries on section 105 in Williams on Bankruptcy and special reference need only be made to one of them, namely, *Morley v. White*. In *re White*(1). In that case, an administration suit was first

(1) (1872) 8 Ch. App. 214.

filed in the Court of Chancery by a creditor of a testator against the executor, the estate consisting of a business in which the executor, son of the testator, had individually been a partner with the testator. Subsequently, a liquidation petition was filed in the Bankruptcy Court by the executor. A receiver was then appointed in the suit and thereafter a trustee in the liquidation proceeding. Competition having arisen between the receiver in the suit and the trustee in bankruptcy in the matter of the realization of the partnership assets, the Court of Appeal held in favour of the trustee, JAMES L.J. observing as follows:—

"It appears to me that the Court of Bankruptcy is the proper tribunal to determine the questions arising in this matter. The case is one which shews how beneficial is the effect of the 72nd section."

(The reference was to the Bankruptcy Act of 1869, section 72 of which corresponds to section 105 of the Bankruptcy Act of 1914.)

"There are, no doubt, questions between the father's estate and the son's estate which have been mixed up together—questions between the joint creditors of the father and son, the separate creditors of the father and the separate creditors of the son. These questions must be determined somewhere before the assets can be distributed among the creditors. If the orders under appeal are to stand, the result must be that the whole administration of the estate, and its division among the creditors according to their respective rights, will be delayed until the suit is determined. It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made; but the Court of Bankruptcy is armed for that purpose with every power of a Court of Law and a Court of Equity, and there is not a single question stated to us as an important and difficult question arising in this matter which cannot be litigated and determined by that Court of Bankruptcy which the Legislature has thought to be the proper tribunal for the determination of it; and those questions, if decided in Bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same judges sitting under one name instead of under another."

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These observations apply with full force to the facts of this case. They are not merely authority for the position that the Insolvency Court has jurisdiction in the present case to decide on the liability of the sons' shares and direct their realization for the payment of the debts of the insolvent father but to show that, as between that Court and the Court in which the sons have subsequently sought partition of the family property, the former is by far the more proper tribunal for dealing with the said matters satisfactorily and expeditiously.

There is also the direct authority of a Full Bench of this Court in support of a liberal construction of section 7 of the Act. It has been held in *Official Assignee, Madras v. Narasimha Mudaliar*(1) that

"Section 7 of the Presidency Towns Insolvency Act is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than what the insolvent himself would have had, and the Official Assignee is entitled to proceed by way of motion under section 7 . . . against strangers to the insolvency, . . ."

It was said that it is of the essence of the distribution of assets in insolvency that it should be rateable among all the simple creditors of the insolvent and, as the sons' shares in the family property can be made liable only for such debts of the father as are just, that is, not illegal or immoral, these shares cannot be proceeded against and realized in insolvency, but only, if at all, in suits by individual creditors. This contention cannot however be accepted. It will be observed that if this objection were good, it would equally apply against the exercise by the Official Assignee of the power of selling the shares of the sons on the adjudication of their undivided father. But the power of the

(1) (1929) I.L.R. 52 Mad. 717 (F.B.).

Official Assignee to effect such a sale is undoubted and has been upheld by the Full Bench of this Court in *Seetharama Chettiar v. Official Receiver, Tanjore*(1).

It must be held for these reasons that the learned Judge in insolvency had full powers and jurisdiction to grant the declaration asked for by the Official Assignee under section 7 of the Act.

A further point was raised that the debts of the insolvent-father are now barred by time against the sons, and the Official Assignee cannot, therefore, seek to make the latter's shares in the family property liable for them, but there is no force in this argument. It is conceded that limitation ceases to run as against the insolvent as soon as the adjudication is made, so long as the adjudication is in force. The debts are therefore alive as against the father. And this is all that is necessary to enable the Official Assignee to make the sons' shares liable for them in insolvency by appropriate proceedings. The only question is whether the sons' shares can or cannot be made liable in insolvency, and there is really no point of limitation with reference to them so long as the father's debts subsist and the subsistence is not due to any act of the father for which he had no authority such as an acknowledgment made after a division of status.

The decision of the learned trial Judge was not challenged on any other ground. I concur with the order just pronounced by my learned brother.

Attorney for second respondent: *N. T. Shamanna.*

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(1) (1926) I.L.R. 49 Mad. 849 (F.B.).

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice
Anantakrishna Ayyar.

1931,
February 18.

SUBBARATHNAMMAL (PETITIONER), APPELLANT,

v.

SESHACHALAM NAIDU (RESPONDENT), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sec. 7—Guardian of minor's person—Person resident outside British India if can be appointed.

Under the Guardians and Wards Act a person residing outside British India cannot be appointed guardian of a minor's person, as over such a guardian the Court cannot exercise its proper control.

APPEAL against the order of the District Court of Chittoor, dated 10th November 1930, and made in Original Petition No. 18 of 1930.

K. Rajah Ayyar (S. Narasinga Rao with him) for appellant.

S. Varadachari (S. V. Venugopalachari with him) for respondent.

JUDGMENT.

In this case it appears that the appellant is a resident of Mysore. It is clearly against the intention of the Guardians and Wards Act that any one residing outside British India should be appointed guardian of a minor's person, as over such a guardian the Court could not exercise its proper control—see *Batcha Chetty v. Ponnusawmy Chetty*(1). The appellant therefore cannot herself be appointed guardian of the minor under the Act. For this reason, without going into any of the

* Appeal against Order No. 459 of 1930.
(1) (1911) 22 M.L.J. 68.

other questions raised, we find it unnecessary to interfere in the appellant's favour with the order of the learned District Judge. This will not preclude the appellant from seeking any other remedy open to her.

The appeal is dismissed.

A.S.V.

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APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Sundaram Chetti.

[IN THE MATTER OF A MINOR MALE CHILD NAMED
PARTHASARATHI NAIDU.]

SUBBARATHNAMMAL, PETITIONER,

v.

SESHACHALAM NAIDU, RESPONDENT.*

1931
March 26.

Habeas corpus—Writ of—Infant—Court acting under Guardians and Wards Act (VIII of 1890) declares a person fit and proper to be guardian of—Habeas corpus—Whether available for going behind such order and depriving guardian of custody—Intervention of Court by habeas corpus—Illegal or improper detention necessary.

Where a Court of competent jurisdiction has under the Guardians and Wards Act (VIII of 1890) declared a person to be a fit and proper person to exercise guardianship over an infant, the procedure by way of *habeas corpus* cannot be utilized for the purpose of going behind such an order and depriving the guardian so appointed of his custody.

It is only in cases where it can be shown that a minor child is illegally or improperly detained that Courts will interfere by way of *habeas corpus*.

PETITION under section 491 of the Code of Criminal Procedure, 1898, praying the High Court to direct the

* Criminal Miscellaneous Petition No. 175 of 1931.

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respondent herein to produce before it the minor son of the petitioner herein, namely, Parthasarathi Naidu, illegally and improperly detained in the custody of the respondent herein.

K. Rajah Ayyar (V. *Ramaswami Ayyar* and *S. Narasinga Rao* with him) for petitioner, after stating the facts, referred to Bayley on *Habeas corpus*, page 598.

S. Varadachari (S. V. *Venugopalachari* with him) for respondent.—An order was passed by the District Court of Chittoor under the Guardians and Wards Act appointing the respondent guardian of the minor child. Section 491 of the Code of Criminal Procedure cannot override the terms of such an order. The procedure by way of *habeas corpus* is available only in cases of illegal or improper detention. The petitioner may have a remedy under section 39 of the Guardians and Wards Act but she has none under section 491 of the Code. There is no *res judicata* in the matter. As to the nature and extent of *habeas corpus* jurisdiction, see *Rudolf Stallmann, In re*(1) and *Barnardo v. McHugh*(2).

K. Rajah Ayyar in reply.—*Habeas corpus* is a parental jurisdiction and concerns itself with the interests of the child. The Court can act under section 25 of the Guardians and Wards Act and restore the child to the petitioner. As to the practice relating to the matter, see *The King v. Greenhill*(3) and *The Queen v. Gyngall*(4).

The JUDGMENT of the Court was delivered by

BEASLEY C.J.

BEASLEY C.J.—The petitioner here is the mother of an illegitimate minor son, and she has presented this petition praying for the issue of a writ of *habeas corpus* directing the respondent to hand over the custody of that child to her. The child was born on the 11th April last year. It would appear that the petitioner had been living as the respondent's mistress for some two or three years in the respondent's house in which also the respondent's wife lived. The latter was incapable of bearing any

children. There had been previously born to the petitioner two other children both of which died in very early infancy. After the birth of this child the petitioner went to Mysore, it is said, in order to visit her sister who was very ill; and she alleges that she was prevented by the respondent from taking her child with her, and, upon her return to Madras early in July, that he has refused to hand over to her this child. Accordingly, she has presented this petition for a writ of *habeas corpus*.

Some important matters must be referred to. The petitioner presented a petition under the Guardians and Wards Act to the District Court of Chittoor, namely, Original Petition No. 18 of 1930. In that petition, she prayed to be appointed the guardian of the person of the minor child. The respondent here was the respondent in that petition. He put in a counter-petition alleging that the petitioner was not, by reason of her immoral character and other matters, a fit and proper person to be appointed the guardian of the person of the minor child. He added also that he was a fit and proper person, and that he was willing to be appointed the guardian of the person of the minor child, and prayed to be so appointed. The District Judge of Chittoor went into the merits of the case and decided that the petitioner was not the right person to be appointed guardian of the person of the infant, and decided at the same time that the respondent was; and he was accordingly appointed the guardian of the person of the child. The petitioner then brought the matter up to the High Court in Civil Miscellaneous Appeal No. 459 of 1930*, and it was decided by the Division Bench in that case that, as it appeared that the appellant was a resident of Mysore and therefore

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(1) (1911) I.L.R. 39 Cal. 164, 202.

(2) [1891] A.C. 388, 395.

(3) (1886) 4 Ad. & E. 624; 111 E.R. 922.

(4) [1898] 2 Q.B. 232.

* See page 758 *supra*.

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residing outside the jurisdiction of British India, she could not be appointed the guardian of the minor, as over such a guardian the Court could not exercise a proper control, and in support of that view reference was made to *Batcha Chetty v. Ponnusawmy Chetty*(1).

The order of the Appellate Bench then goes on as follows :—

“The appellant therefore cannot herself be appointed guardian of the minor under the Act. For this reason, without going into any of the other questions raised, we find it unnecessary to interfere in the appellant's favour with the order of the learned District Judge. This will not preclude the appellant from seeking any other remedy open to her.”

It is clear that the Appellate Bench did not go into the merits of the case. On the question of jurisdiction they dismissed the appeal, at the same time making the order of the District Court a final one. With regard to the concluding words of that order, we have had addressed to us an argument by Mr. Rajah Ayyar that he has come here really with the benediction of the Division Bench. But it appears to us that those words mean nothing more than that, if the petitioner has got some other remedy, the decision of the Appellate Bench is not to be taken to be a bar to her adoption of such a remedy. The question is whether she has got any such remedy as she seeks here. We have here an order of a Court of competent jurisdiction declaring, on the petitioner's own petition, the respondent to be the fit and proper person to be appointed guardian of the person of the minor child. That order is still subsisting. The respondent, therefore, is declared to be the fit person entitled to the custody of the minor child. The question is whether, under such circumstances, in the face of that subsisting order, it is open to the petitioner to come

(1) (1911) 22 M.L.J. 68.

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here by way of *habeas corpus* and obtain custody of the child. It is quite clear to us that there is no remedy by way of *habeas corpus*, unless it is shown that the retention of the minor child is illegal or improper. When a Court of competent jurisdiction has declared a person to be a fit and proper person to exercise guardianship over the infant, how can it be argued here that the retention by that person legally appointed is either illegal or improper? We are quite satisfied that it was never intended that the procedure by way of *habeas corpus* should be utilized for the purpose of going behind such an order as we have here; and it is only in cases where it can be shown that a minor child is illegally or improperly retained that Courts will interfere by way of *habeas corpus*. We have been referred to the authority of *The King v. Greenhill*(1). But that case really is an examination of other cases into the question as to which party, the husband or the wife as the case may be, was the best person or the better person to have the guardianship or custody of the child; and it is quite clear from a reading of that case that, where a child is in the legal or proper custody of another person, others, be those persons mother, father, or relatives, have no right to come by way of *habeas corpus* for a writ directing the return of the child from the person in whose proper or legal custody the infant is. The only remedy, if any,—indeed there may be none in this case—open to the petitioner is to apply under section 39 of the Guardians and Wards Act. If the petitioner is able to satisfy the Court that the conditions mentioned therein are present in the case, that will be a good reason for asking the Court to take the guardianship of this infant away from the respondent and to put it with the

(1) (1836) 4 Ad. & E. 624; 111 E.R. 923.

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petitioner. Section 25 of the same Act does not assist the petitioner in the least degree. Section 25 merely deals with the case of a child which has been in the custody of, or should be in the custody of, a person appointed guardian, and which leaves or is removed from such custody. Under such circumstances as those, when the legal guardian or the natural guardian makes an application for the return of the child under section 25, the question may be enquired into as to whether it is right that the child should be returned to that person, on the ground that the person who has been appointed guardian or is the natural guardian of the infant is not a fit and proper person to have the child. That section has no application to this case.

This petition must be dismissed.

B.C.S.

APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Sundaram Chetti.*

IN RE SELLAPPA GOUNDAN, ACCUSED.*

1931,
March 5.

Madras Borstal Schools Act (V of 1926), sec. 8—Conditions mentioned in—To be satisfied before Act can be applied—Mere adolescence—Insufficient.

Before the provisions of the Borstal Schools Act (V of 1926) can be applied, the conditions mentioned in section 8 of that Act must be satisfied: it is not sufficient that the offender is adolescent; he should be addicted to criminal habits or tendencies, or be associated with persons of bad character, and be a person likely to benefit by detention in a Borstal School.

CASE taken up on perusal of the record in Sessions Case No. 108 of 1930 on the file of the Court of Session of Coimbatore Division.

* Criminal Revision Case No. 842 of 1930 (Taken up No. 25 of 1930).

Section 8 of the Madras Borstal Schools Act (V of 1926) is as follows:—

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“Where it appears to a Court having jurisdiction under this Act that an adolescent offender should, by reason of his criminal habits or tendencies, or association with persons of bad character, be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the Court, in lieu of passing a sentence of imprisonment, to pass a sentence of detention in a Borstal School for a term which shall not be less than two years and shall not exceed five years:

Provided that, before passing such sentence, the Court shall consider any report or representation which may be made to it as to the suitability of the case for treatment in a Borstal School and shall be satisfied that the character, state of health and mental condition of the offender and the other circumstances of the case are such that the offender is likely to profit by such instruction and discipline aforesaid.”

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

No one appeared for the accused.

JUDGMENT.

The respondent here was charged in the lower Court with having murdered one Palani Goundan, on the 28th June last, by hitting him on the head with the handle of an axe. The facts of the case need not be stated, and it is sufficient to say that the respondent appears to have lost his temper at the interference of the deceased in his quarrel with P.W. 3, and to have acted in the manner described. The learned Sessions Judge convicted him of an offence under section 304, latter part, Indian Penal Code, holding that there was no intention on the part of the respondent to cause the death of the deceased man, and ordered him to be detained in the Borstal School at Palamcottah for five years. He did so because he found that the respondent was an adolescent offender within the meaning of

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section 2 of the Madras Borstal Schools Act (V of 1926). It is quite clear that in the opinion of the doctor, who was examined as a Court witness, the respondent, who gave his age as fifteen, was about twenty years old, and certainly more than eighteen. The learned Sessions Judge agreed with the view of the Public Prosecutor of Coimbatore that this was a fit case for action under the Borstal Schools Act. He has, however, overlooked the fact that, before the provisions of that Act can be applied, the conditions of section 8 of that Act must be satisfied, that is to say, that it must appear to the Court that the adolescent offender should, by reason of his criminal habits or tendencies or association with persons of bad character, be subject to detention in a Borstal institution, instead of having a sentence of imprisonment passed upon him, provided that, before passing such sentence, the Court shall consider any report or representation which may be made to it as to the suitability of the case for treatment in a Borstal School, and be satisfied that the character, state of health, and mental condition of the offender are such that the offender is likely to profit by such instruction and discipline. It is clear that the requisites are that the adolescent offender should be addicted to criminal habits or tendencies or be associated with persons of bad character; and, if he satisfies those requirements, and, if he is a person who is likely to benefit by detention in a Borstal institution, then, he may be sent to any one of the institutions. The view taken in the lower Court seems to be that the only qualification necessary is for the offender to be adolescent within the provisions of the Madras Borstal Schools Act. That is not sufficient. He must come within the other qualifications, and there is no finding here by the learned Sessions Judge nor is there any evidence to show that the

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respondent was a person addicted to criminal habits or was associated with persons of bad character. That being so, the order passed upon him was not the correct order. We have looked at the Prevention of Crimes Act, 1908, the English Act which authorizes a sentence of detention in Borstal institutions, and also the Criminal Justice Administration Act of 1914, section 10, which enables Courts of summary jurisdiction to send youthful delinquents to Borstal institutions. It seems quite clear to us that the scheme of those Acts is to deal only with young offenders who have been previously convicted or who are shown to have criminal tendencies or to be associated with criminal persons. The wording of the former is the same as the Madras Borstal Schools Act, and we think that exactly the same considerations apply here. Under these circumstances, the order of the learned Sessions Judge was clearly wrong, and we have therefore to substitute for his order our own sentence. The act committed was one, as the learned Sessions Judge finds, without premeditation. The offender is a young man, and we think that the justice of the case will be met by sentencing him to rigorous imprisonment for three years. We accordingly set aside the order of the lower Court with regard to sentence, and substitute therefor a sentence of three years' rigorous imprisonment.

B.C.S.

APPELLATE CRIMINAL.

*Before Mr. Justice Jackson.*1931,
March 12.IN RE NARAYANA NAICK AND SEVEN OTHERS
(ACCUSED), PETITIONERS.*

Code of Criminal Procedure (Act V of 1898), sec. 259—Private complaint—Whether abates on death of complainant—Death of complainant after framing of charge—Application under section 259 to acquit accused—Order by Magistrate that the case should proceed—Validity of.

There is no principle of general application that a private complaint abates on the death of the complainant.

Where a complaint under section 166, Indian Penal Code (Act XLV of 1860), was filed by a private person against certain persons, and a charge under that section was framed by the Magistrate, and the complainant died, and the Magistrate was moved to acquit the accused under section 259 of the Code of Criminal Procedure (Act V of 1898), and the Magistrate ordered the case to proceed, *held* that, after the charge was framed, the Magistrate had no discretion in the matter, and that his order was right.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sheristadar-Magistrate of Avanashi, dated 26th December 1930, and made in Criminal Case No. 204 of 1930.

A. C. Sampath Ayyangar for *T. R. Srinivasa Ayyar* for petitioners.

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

JUDGMENT.

Petitioners were complained against by a private person and charged under section 166, Indian Penal Code, a non-cognizable non-compoundable offence.

The complainant then died.

* Criminal Revision Case No. 59 of 1931.

The Magistrate was moved to acquit the accused under section 259 because the complainant was absent, and he ordered the case to proceed. This petition is to revise that order.

The Magistrate's action is within the four corners of section 259, because, after the charge is framed, the Magistrate has no discretion in the matter.

But *Quarishi Sahib v. Begum Sahiba*(1), the ruling apparently which the Magistrate says does not apply (he should give the reference to any ruling which he mentions), lays down as a general principle, on page 89, that criminal proceedings instituted by a private complainant abate on such person's death. I have been able to find no such principle in the Code.

It is argued on behalf of petitioners that death is unlike other absence, because a party frivolously complained against will have no redress. But a complete disappearance may be as effective as death, and anyhow, after a charge has been framed, there is not much question of frivolity and vexatiousness.

In *In re Ramasamier*(2), *AYLING J.* has held that there is no abatement of a criminal case on the death of the complainant.

In *U Mo Gaung v. U Po Sin*(3), a case is ordered to proceed despite the complainant's death.

In the circumstances, it cannot be said that there is a principle of general application that private complaints abate upon death; and the point was rightly decided by the lower Court.

The petition is dismissed.

B.C.S.

(1) (1922) I.L.R. 46 Mad. 88.

(2) (1915) 16 Cr. L.J. 712.

(3) (1928) I.L.R. 6 Rang. 664.

APPELLATE CIVIL.

*Before Mr. Justice Sundaram Chetti.*1931,
February 17.MAHOMED KANNI ROWTHER (SECOND RESPONDENT),
PETITIONER,

v.

NAINA MAHOMED ROWTHER AND ANOTHER (PETITIONERS),
RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. I, r. 8—Representative suit by sole plaintiff—Death of plaintiff pending—No abatement under O. XXII by reason of—Application by person on whose behalf also suit brought, to continue suit—Maintainability—Limitation for making such application—Art. 181, Limitation Act (IX of 1908)—Applicability—Dismissal of suit for default before expiry of three years prescribed by art. 181—Jurisdiction of Court as to.

A suit filed by a sole plaintiff on behalf of himself and others having the same interest, as members of a community, with the necessary permission of the Court under Order I, rule 8 of the Code of Civil Procedure is a representative suit. There can be no abatement of such a suit under Order XXII of the Code by reason of the death of the sole plaintiff therein. On his death, any person on whose behalf also the suit was filed can apply to the Court to be added as a plaintiff for continuing the suit within three years under article 181 of the Limitation Act of 1908. Before the expiration of that period, the Court has no jurisdiction to dismiss the suit for default.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908) and section 107 of the Government of India Act, against the order of the Court of the District Munsif of Madura Town, dated 5th September 1929, and made in Interlocutory Application No. 50 of 1929 in Original Suit No. 3 of 1928.

Watrap S. Subrahmanya Ayyar for petitioner.

A. V. Narayanaswami Ayyar for respondents.

* Civil Revision Petition No. 1633 of 1929.

JUDGMENT.

This is a revision petition filed by the defendant against the order of the District Munsif of Madura Town, directing the addition of the respondents 1 and 2 as plaintiffs, and permitting them to continue the suit.

The suit was instituted by one Musafar Rowther, on behalf of himself and other members of the community of Melagar Uraimuraigars of Ghoripalayam, and the necessary permission of the Court under Order I, rule 8 of the Code of Civil Procedure was also obtained. The suit is therefore a representative suit. The proper cause title for such a suit is—

“Musafar Rowther, on behalf of himself and all the other members of the community—Plaintiff,

v.

Muhamad Kanni Rowther—Defendant.”

The aforesaid Musafar Rowther died at the end of May 1928. His son intervened with two applications to be added as a plaintiff, but both of them were dismissed; the first, on the ground that, in a representative suit of this kind, the son of the deceased who filed such a suit could not claim that the right to sue survived to him, and the second, on the ground that he was not a member of the community on whose behalf the suit was filed. On the very day on which the Court dismissed his second petition, the District Munsif dismissed the suit itself, stating that he would not wait for another application by some other person, and that there was no plaintiff on record. This dismissal was on 20th November 1928. The present application was filed by the respondents on 3rd January 1929, under Order I, rules 8 and 10, and section 151, of the Code. This was granted by the lower Court, and the propriety of that order is now questioned in this revision petition.

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It is rightly conceded that, in view of the suit being a representative suit, there could be no abatement under Order XXII of the Code of Civil Procedure by reason of the death of Musafar Rowther. If the Court had held that the suit abated, that order would be *ultra vires*. On the death of Musafar Rowther who filed the suit on behalf of himself and others having the same interest, as members of the community, any person on whose behalf also that suit was filed can apply to the Court to be added as a plaintiff for continuing the suit. There is no article in the Limitation Act specifically providing the period of time within which that application should be put in. The opinion expressed by ABDUR RAHIM J. in *Sivagurunatha Chettiar v. Ramaswamy Iyengar*(1) seems to be that there is no limit of time for an application under Order I, rule 8 of the Code of Civil Procedure to be made a party to the suit. But in the decision of a Division Bench in *Krishnaswami Iyer v. Seethalakshmi Ammal*(2) SADASIVA AYYAR J. is of opinion that the residuary article 181 of the Limitation Act, fixing a period of three years, would apply to such an application. It is clear that, even in a representative suit under Order I, rule 8 of the Code, any person seeking to be added as a party, on the ground that the person who filed the suit is dead, or has rendered himself unfit to be entrusted with the conduct of the suit, must make an application to the Court for that purpose. If he is so brought on record, he will be *eo nomine* the plaintiff who can continue and conduct the suit. This being an application for which no special period is provided for, article 181 should reasonably apply to it, and I prefer to follow the opinion of SADASIVA AYYAR J. It is an elementary principle that a suit should not be dismissed on the

(1) (1911) 11 M.L.T. 257.

(2) (1918) 9 L.W. 166.

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death of a sole plaintiff, till the expiration of the period fixed for his legal representative to come in; vide also *Kissen Gopal Karnani v. Suklal Karnani*(1) for the application of this principle in a case where the plaintiff was adjudged an insolvent. In the present case, after the death of Musafar Rowther, any other member of the community could apply to be added as plaintiff within three years under article 181. Before the expiration of that period, it seems to me, the Court had no jurisdiction to dismiss the suit for default. Though the suit is a representative suit for the purpose of making the whole community bound by the decision given in the suit, it cannot be said that the other members of that community were *eo nomine* plaintiffs on record, so that the Court could dismiss the suit, on 20th November 1928, for default, on account of the non-appearance of any of them. It has been held in *Udmi v. Hira*(2) that the suit or appeal would not abate if one of such persons should die, and there is no need to bring in his legal representative. The order of the lower Court dismissing the suit on 20th November 1928 must be deemed to be one passed without jurisdiction, and there is no need to set it aside. If it is an order of dismissal for default under Order IX of the Code which is not a nullity, it has got to be set aside within thirty days. Otherwise, it is no bar to the present application which has been filed within three years of the death of Musafar Rowther.

The order in question is right and this civil revision petition is dismissed with costs.

A.S.V.

(1) (1926) I.L.R. 53 Cal. 844.

(2) (1920) I.L.R. 1 Lah. 582.

PRIVY COUNCIL.*

1931,
June 26.

B. ISWARAYYA (RESPONDENT), APPELLANT,

v.

SWARNAM ISWARAYYA (PETITIONER), RESPONDENT.

[ON APPEAL FROM THE HIGH COURT AT MADRAS.]

Divorce—Judicial separation—Permanent alimony—Power of Court to increase alimony—Indian Divorce Act (IV of 1869), sec. 37.

Upon the true construction of section 37 of the Indian Divorce Act, 1869, a Court, which has made an order on a husband to pay to his wife, who has obtained a decree for judicial separation, monthly or weekly sums for her maintenance and support, has power to make subsequent orders on the husband for payment of increased amounts.

APPEAL (No. 39 of 1930) from an order of the High Court (February 15, 1928) varying an order of the District Judge of East Tanjore at Negapatam (March 8, 1927).

The main question arising upon the appeal was whether, under section 37 of the Indian Divorce Act, 1869, the Court, having already made an order that a husband, whose wife had obtained a decree for judicial separation, do pay to her a monthly or weekly sum as permanent alimony, could make an order increasing the amount of the payments.

The High Court (PHILLIPS and REILLY JJ.) affirmed the view of the District Judge that the Court had power to increase the alimony previously ordered to be paid; the order of the District Judge was varied, however, in the manner, and for the reasons, appearing from the judgment of the Judicial Committee.

* Present:—Lord RUSSELL of KILLOWEN, Sir GEORGE LOWNDEN, and Sir DINGSHAW MULLA.

Subba Rao for appellant.—An order for permanent alimony having already been made, the Court had no power to make an order increasing the amount to be paid. Section 37 empowered the Court to make only “an order”, not, as earlier in the section, generally to “order”. Nor does the section contain the words “from time to time” used as to orders under sections 41 and 42. Further, while section 37 contains an express provision whereby a husband can obtain an order suspending or modifying the order made, there is no express provision as to increasing the amount ordered to be paid. As section 37 deals expressly with the making of orders for permanent alimony, the principles and rules followed in England cannot be applied under section 7 to add a power not given by section 37. In any case the High Court should not have increased the amount of the alimony in the absence of an appeal by the respondent. The power of an appellate Court under Order XLI, rule 33 of the Code of Civil Procedure, should be exercised sparingly; *Akimannessa v. Bepin Behari*(1) and cases there cited referred to.

T. Bucknill for respondent.—Under section 37 of the Indian Divorce Act, 1869, the Court has power at any time after a decree for judicial separation to make such order for permanent alimony as is just in the circumstances at the date of the wife's application. There is nothing in the section making the Court *functus officio* once it has made an order. The words “from time to time” appear in sections 41 and 42 because the sections were taken from section 35 of the English Matrimonial Causes Act, 1857. If there is any ambiguity as to the power under section 37, the respondent prays in aid the principles and rules of the Courts in England, which by section 7 are to be applied. The Ecclesiastical Courts in England, to whose jurisdiction the Divorce Courts succeeded, always exercised power to increase the alimony ordered to be paid to a wife who had obtained a decree for separation *a mensâ et thoro*; *De Blaquiére v. De Blaquiére*(2). That power was exercised by the Court after the Matrimonial Causes Act, 1857, in the case of a wife who had obtained a decree for judicial separation; *Covell v. Covell*(3), and it is now statutory under the Matrimonial Causes Rules, 1924, rule 63, and the Judicature (Consolidation) Act, 1925, section 190, sub-section (4). An order for maintenance upon a

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(1) (1915) 22 C.L.J. 397.

(2) (1830) 3 Hagz. Eco. 322, 329; 162 E.R. 1173, 1175.

(3) (1872) L.R. 2 P. & D. 411.

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decree for dissolution of a marriage is to be distinguished. In such case there was no power to increase the amount until it was provided by statute in 1907; *Rawlins v. Rawlins*(1). The appellate Court having disallowed the sums ordered to be paid for the maintenance of the children, the case was a proper one for an exercise of its power under section 151 and Order XLI, rule 33 of the Code of Civil Procedure, 1908, by increasing the sum to be paid to the wife for her maintenance although she had not appealed.

Subba Rao in reply.—Section 7 of the Act does not apply to procedure: *Ramsay v. Boyle*(2).

The JUDGMENT of their Lordships was delivered by LORD RUSSELL OF KILLOWEN—

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The principal question which is raised for decision by this appeal is whether, under the Indian Divorce Act (IV of 1869), the Court, having once made an order granting permanent alimony to a wife who has obtained a decree for judicial separation, has power to make a subsequent order increasing the amount of such alimony. In addition, some points of minor importance are involved, as will subsequently appear.

The respondent, having obtained a decree for judicial separation against her husband, the appellant, applied for permanent alimony under section 37 of the Act. Upon that application, an order was made on the 1st February 1922, by which the husband was ordered to pay to the wife Rs. 120 a month for her life. An order was also made against him for the payment of Rs. 120 a month in respect of the four children of the marriage. The wife and children appealed. Pending the appeals, the means of the husband had apparently permanently improved; for the High Court at Madras (while holding that they should not interfere with an order which was rightly made in the circumstances which existed at its date, and dismissing the appeals)

(1) (1865) 4 Sw. & Tr. 158; 164 E.R. 1477.

(2) (1903) I.L.R. 30 Cal. 489.

used the following language:—"In view of the increase in his pay and improved circumstances, and in view also of the greater age of the children, there are good grounds for giving them more. It will be open to the lady and children to go back to the learned Judge at Tanjore, and ask for an increase in the alimony, as from such date as they may be advised."

The High Court's order dismissing these appeals is dated the 28th January 1925. In the following year two petitions were presented in the Court of the District Judge of East Tanjore, viz., a petition by the four children under section 42 of the Act praying for a sum of not less than Rs. 300 a month for their maintenance; and a petition by the wife praying for a sum of Rs. 260 a month for alimony.

The District Judge made one decree on the two applications. It is dated the 8th March 1927, and orders the husband to pay to the wife at the rate of Rs. 310 per mensem (Rs. 30 for the eldest girl and Rs. 40 for each of the other three children—in all, Rs. 150 plus Rs. 160 to the wife) towards the maintenance and education of the children and for alimony. It further orders that the Rs. 150 be paid for the maintenance and education of the children until each of them attained the age of 21, or until the girls got married.

The husband appealed to the High Court against this decree. The learned Judges of the High Court were of opinion that since the children had all ceased to be minors within the meaning of the Act, no provision could be made for them; but, on the other hand, they thought that, upon the facts of the case, the District Judge could and should have fixed the wife's alimony at Rs. 260 a month. In these circumstances, notwithstanding that the wife had not filed any appeal or objection, they ordered the husband to pay alimony to

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the wife at the rate above mentioned. This they did in purported exercise of the powers conferred by Order XLI, rule 33 of the Code of Civil Procedure. The decree is dated the 15th February 1929, and it orders that the husband do pay to his wife Rs. 260 a month from the 18th March 1926.

From this decree the husband appeals to His Majesty in Council, and contends that the appeal should succeed upon some or all of the following grounds:—

(1) That the Court, having by the order of the 1st February 1922, fixed the wife's alimony at Rs. 120 a month, had no power to make any subsequent order increasing the amount of such alimony.

(2) That the High Court had no power under Order XLI, rule 33, to vary the amount (Rs. 160 a month) which the lower Court had by its order of the 8th March 1927 decreed in favour of the wife.

(3) That in any event no sum beyond the Rs. 120 a month originally fixed was justified by the facts of the case.

In relation to this third point, their Lordships think that this case is eminently one in which they should adhere to their practice of not interfering in any question as to amount of alimony or maintenance, that being a matter with which the Courts in India are better qualified to deal.

The other two contentions, however, raise substantial questions for consideration.

The first point depends upon what is the true construction and effect of the Act, of which the relevant provisions may conveniently be set out.

Section 7 enacts:

"Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules

which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

Section 37 provides:

"The High Court may, if it thinks fit, on any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, and the District Judge may, if he thinks fit, on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable; and for that purpose may cause a proper instrument to be executed by all necessary parties.

"In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable:

"Provided that, if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court seems fit."

Section 45 provides:

"Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure."

The District Judge seems to have relied upon the provisions of section 7 of the Act as enabling the Indian Courts to increase permanent alimony, by "taking the principles and rules of the English Courts as a guide." The High Court, on the other hand, considered that under section 37, upon its true construction, the power of the Court was not confined to the making once and for all one single order for the payment of a weekly or monthly sum by way of permanent alimony to a wife.

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With this opinion of the High Court their Lordships find themselves in agreement.

The first branch of section 37 confers upon the Courts power to order a husband to secure to the wife a gross sum or an annual sum. That power arises in the High Court in either of two events, viz., a decree for dissolution, or a decree for judicial separation obtained by the wife. It arises in the District Judge in either of two events, viz., the confirmation of his decree for dissolution, or a decree for judicial separation obtained by the wife.

Then follows the branch of the section which is applicable here. It commences with the words "In every such case the Court may . . ." These words should, their Lordships think, be interpreted in relation to a District Judge thus: "The District Judge on the confirmation of any decree of his declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife, may . . ." The power which is then conferred is a power to make an order on the husband to pay to the wife monthly or weekly sums for her maintenance and support. The amount thereof is made to depend upon the Court's opinion of what is reasonable, an opinion which must obviously depend upon facts, which may vary from time to time. A power of this nature is, *prima facie*, not one which ought to be exercisable once and once only; and, unless the wording of the Act is such as to indicate beyond doubt that once the power in favour of the wife has been exercised it is spent and gone for ever, their Lordships think that the section should be construed in such a way as will keep the power on foot.

It was, however, urged that the wording of the Act compelled the adoption of the stricter view, reliance

being placed upon (a) the use in this part of the section of the singular noun "an order" as contrasted with the phrase in the earlier part "may . . . order," and the words which occur in other sections giving the Court power to make orders "from time to time", and (b) the insertion in the section of the express proviso in favour of the husband.

In their Lordships' opinion these features, relevant though they be to the appellant's contention, are insufficient to sustain it. The words "the Court may make an order" do not seem to differ materially from such words as "the Court may order", or "the Court may make any order," or "the Court may make such order . . . as the Court thinks just", and do not of themselves necessarily mean "the Court may make one order and no more"; nor do they necessarily acquire this meaning simply because in other parts of the Act and in other connections the words "from time to time" have been inserted. The express proviso, while it may be said to suggest the exclusion of a power to increase in favour of the wife, is certainly not conclusive. Indeed, its insertion in the section might well be accounted for on the following ground, viz., that, but for its presence, it might have been argued that husbands could not be applicants to the Court under a section the sole object of which was to benefit wives.

In the result their Lordships are of opinion that upon the true construction of section 37, where a decree of judicial separation has been obtained by the wife, and the District Judge has made an order on the husband for payment to the wife of a monthly or a weekly sum by way of permanent alimony, there is still power in the Court to make an order or orders for the payment of larger sums by the husband if the circumstances are such as to justify an increase in the amount of the alimony.

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So far, their Lordships have dealt with this portion of the case simply upon the true construction of section 37 as it stands, and apart from any historical consideration of the matter. They think it right, however, to add some observations from another point of view, confirmatory of the opinion which they have formed as to construction.

Section 7 of the Act (which occurs under the heading "Jurisdiction") makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Court in England then acted and gave relief. It is therefore not irrelevant to enquire how matters stood and stand in England in relation to this question.

By the Matrimonial Causes Act, 1857, a new Court of Record was established, to which was transferred the jurisdiction in matters matrimonial then vested in Ecclesiastical Courts in England. A decree for a judicial separation was substituted for the old decree for a divorce *a mensâ et thoro*, and the new Court was given power in certain cases to decree the dissolution of a marriage. Section 22 provided that in all proceedings (other than proceedings to dissolve any marriage) the Court should proceed and act and give relief on the principles and rules of the Ecclesiastical Courts, but "subject to the provisions herein contained and to the rules and orders under this Act."

Provision was made by section 32 for the maintenance of the wife after dissolution of the marriage. This particular question had not arisen before the Ecclesiastical Courts, for the jurisdiction to dissolve the marriage was new. The Ecclesiastical Courts had not been concerned with making provision for a woman who had ceased to be a wife. By section 32 the Court was given power on a decree for dissolution to order the husband to secure

by deed to the wife a gross sum or an annual sum, and to suspend the pronouncing of its decree until the deed had been executed. This provision (which it will be observed took the form of a secured sum) is strictly not alimony, though inaccurately so called in the marginal note to the section, but permanent maintenance. Under that section there was no power to make any subsequent order. The section, by its terms, pointed to one order in relation to one deed, pending the execution of which the dissolution decree could be suspended. Further, it will be observed that the section could have no effective operation against a husband who had no property on which the payment of a gross or annual sum could be secured, but who, nevertheless, was in a position to make a monthly or weekly payment to the wife during their joint lives. To remedy this defect the Matrimonial Causes Act of 1866 was passed, section 1 of which provides in relation to a decree of dissolution :

"In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable: Provided always, that, if the husband shall afterwards from any cause become unable to make such payment, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as to the Court may seem fit."

Accordingly, in 1869 the position under the English Acts in relation to making provision for the permanent maintenance of a wife after a dissolution decree stood thus : there was power to order such provision in the form of securing a gross sum or an annual sum ; there was a further power to order such provision in the form of ordering payment by the husband of monthly or weekly sums ; there was power in the husband to apply for a modification in his favour of this last-mentioned

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order ; there was no power in the wife to apply for any increase in the provision made for her. Such a power was conferred upon the wife for the first time by the Matrimonial Causes Act, 1907. This Act, which was passed for the purpose of extending the power of providing permanent maintenance to cases of nullity, repealed section 32 of the Act of 1857, and section 1 of the Act of 1866, but re-enacted their provisions in one comprehensive section. This section (section 1) applied to all cases of decrees for dissolution or nullity of marriage, and contained a provision that, where the Court had made an order on the husband for payment of monthly or weekly sums, "and the Court is satisfied that the means of the husband have increased, the Court, may, if it thinks fit, increase the amount payable under the order."

The position in England as regards permanent alimony (properly so called) stood and stands upon a different footing. The Ecclesiastical Courts had and exercised power to order variations in the amount of alimony from time to time, either by way of increase or reduction.

"Where there is a material alteration of circumstances a change in the rate of alimony may be made. If the faculties are improved, the wife's allowance ought to be increased, and if the husband is *lapsus facultatibus*, the wife's allowance ought to be reduced."

De Bluquiere v. De Blaquiere(1).

Section 17 of the Act of 1857 enacted that application for restitution of conjugal rights or for judicial separation might be made by petition to the Court or to a Judge of Assize as therein mentioned, who "may decree such restitution of conjugal rights or judicial separation accordingly, and where the application

is by the wife may make any order for alimony which shall be deemed just." It will be noted that in this section the power given is to make "any order", not "to make from time to time any order," or "to make any order or orders". On the face of the section the power is to make one order. Nevertheless, it has never been doubted that the Court had power, and the Court has always exercised a power to increase or reduce the amount of permanent alimony, where the altered circumstances of the case required it. This can only be upon the footing that the words in section 17 "may make any order for alimony which shall be deemed just" did not restrict the power of the Court to the making of one order and one order only. The Court could not have obtained the revisional power of the Ecclesiastical Courts by virtue of section 22 of the Act of 1857, if "any order" in section 17 meant one single order only ; because section 22 only operates "subject to the provisions herein contained."

Thus in 1869 the position in England in regard to permanent alimony was this, that before 1857 the Ecclesiastical Courts, and subsequently the Court established in that year, possessed and exercised in favour of a wife who had obtained a decree for judicial separation and an order for permanent alimony, a power in proper circumstances to increase the amount of that alimony. This position, which continues to the present time, now rests on section 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, which provides :

"(4) Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the Court may make such order for alimony as the Court thinks just."

Their Lordships fully realize that an Indian Act does not fall to be construed in the light of statutes

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(1) (1830) 3 Hagg. Ecc. 322, 329 ; 162 E.R. 1173, 1175.

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enacted by another legislature. But this is a case in which the Indian Act makes express reference to the Court in England to which the relevant jurisdiction of the Ecclesiastical Courts was transferred, and to the principles and rules on which that Court acts and gives relief. If it had been intended that the Courts in India, acting under this Act, should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lordships feel that this intention would have been declared in express and unequivocal terms.

The matter is no doubt complicated by the fact that section 37 of the Indian Act includes both the case of a decree for dissolution and the case of a decree for judicial separation obtained by a wife. It enables the Court in each such case (1) to make an order on the husband to secure and (2) to make an order on the husband to pay. It may be that if, under the section, there is power to increase the amount of permanent alimony to be paid to a wife who has obtained a decree for judicial separation, there is also power to increase the amount of permanent maintenance ordered to be paid on a decree for dissolution. In other words, the section may have conferred upon the Courts in India a power which the Court in England did not enjoy until the year 1907. Their Lordships express no opinion as to this. The point does not now arise; and, if the Act of 1869 is ever amended, it may never arise. All that their Lordships now decide is that upon the true construction of section 37, a Court which has made an order on a husband for payment to his wife (who has

obtained a decree for judicial separation) of monthly or weekly sums for her maintenance and support, has power to make subsequent orders on the husband for payment of increased amounts.

The only other point which remains for consideration is that which arises under the Code of Civil Procedure.

Order XLI relates to appeals, and rule 33 thereof is (so far as material) in the following terms:—

“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.”

None of the authorities cited in argument appear to their Lordships to resemble the circumstances of the present case. There was here no reason why the wife should appeal from the order which the District Judge had made: there was every reason why she should be satisfied therewith. On the other hand, once the appellate Court felt constrained to cut out all payments to the wife for the maintenance and education of the children, it was open to that Court to take the view that complete justice could not be done unless the amount ordered to be paid to the wife for alimony was increased. The appellate Court in fact took that view; and their Lordships are not prepared to say either that the view could not properly be taken, or that effect could not be given thereto by exercising the powers conferred upon an appellate Court under Order XLI, rule 33.

For the reasons appearing in this judgment, their Lordships are of opinion that this appeal should be

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dismissed with costs and they will humbly advise His Majesty accordingly.

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

Solicitors for respondents: *Walker, Martineau & Co.*
A.M.T.

APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Sundaram Chetti.*

1931,
March 6.

IN RE MARUDAMUTHU PADAYACHI *alias* MOTTAYYA
PADAYACHI (2ND ACCUSED), PETITIONER.*

Indian Evidence Act (I of 1872), sec. 30—Construction in favour of accused—"Proved"—Interpretation of—Two accused jointly tried—Prosecution case closed—Questions under sec. 332 of Code of Criminal Procedure (Act V of 1898)—Confession by one of the accused admitting his guilt and stating other accused also guilty—Admissibility under sec. 30.

Section 30 of the Indian Evidence Act (I of 1872) creates a very marked exception to the fundamental principles of Criminal Law and as such must be strictly construed in favour of an accused person.

The word "proved" in the section must be interpreted to mean proved before the case for the prosecution comes to an end, i.e., proved either in the course of the prosecution case or proved in some proceeding previous to the trial.

Hence, a confession made by one of two accused jointly tried in a case, admitting his own guilt and stating that the other accused was also guilty, after the close of the prosecution case, when questions under section 332 of the Code of Criminal Procedure (Act V of 1898) were put to him, is not admissible under the section.

Emperor v. Mahadeo Prasad, (1923) I.L.R. 45 All. 323, followed.

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

* Criminal Revision Case No. 524 of 1930.

revise the judgment of the Court of Session of West Tanjore Division in Criminal Appeal No. 21 of 1930 preferred against the judgment of the Court of the Joint-Magistrate of Kumbakonam in Calendar Case No. 70 of 1930.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioner.

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

JUDGMENT.

BEASLEY C.J.—The appellant with another accused BEASLEY C.J. was convicted by the Stationary Sub-Magistrate, Kumbakonam, of theft of money and jewels from a closed receptacle, under sections 461 and 380, Indian Penal Code. The case was forwarded by him to the Joint-Magistrate of Kumbakonam for sentence, because the first accused in the case was a juvenile. The Joint-Magistrate upheld the conviction of both the accused, and sentenced the first accused to be detained in the Borstal School, Palamcottah, for a period of two years, and the second accused to undergo rigorous imprisonment for six months under each of the sections 461 and 380, Indian Penal Code, the sentences to run concurrently. An appeal was taken from that judgment by the second accused to the Sessions Court of West Tanjore. The learned Sessions Judge dismissed the appeal and confirmed the conviction and sentence of the second accused, the appellant. The case was then taken up to the High Court in revision, because, in all the three Courts, a confession made to the Sub-Magistrate in Court, after the close of the case for the prosecution when questions under section 332, Code of Criminal Procedure, were put to him, was considered. In that confession, the first accused admitted his own guilt and

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also accused the second accused, the appellant here. The question raised was whether under section 30 of the Evidence Act the confession of the first accused, who was jointly tried with the appellant here, could be considered by the Court against the appellant. It is quite clear that that confession was so considered and formed the basis of the conviction of the appellant. There was other evidence to which we do not propose to refer, since, if the legal point taken here prevails, the case must be sent back to the Sessions Court for a reconsideration of the facts of the case apart from the confession made by the first accused. When the case came before our learned brother JACKSON J., he considered that, in view of certain decisions to which I shall refer later, the matter should come up before a Bench of two Judges and hence its appearance here before us. The cases to which reference has to be made are a decision of AYLING J. in *In re Bati Reddi*(1), a decision of WALSH J. in *Emperor v. Mahadeo Prasad*(2), a decision of WALLER J. in *Govinda Naidu v. Emperor*(3), a decision in *Empress v. Ashootosh Chuckerbutty*(4), and a decision of the Bombay High Court in *Emperor v. Cooper*(5). It must be stated that the observations of Sir RICHARD GARTH C.J. and the other Judges in *Empress v. Ashootosh Chuckerbutty*(4) were possibly *obiter* with regard to this question, and moreover the facts in that case were that the confession made by the co-accused in that case was made previous to the trial. In *Emperor v. Mahadeo Prasad*(2), which is a decision directly in point, the facts of the case being similar to those here, WALSH J. held that such a confession could not be considered by the Court as against the other accused person or persons, under section 30 of the

(1) (1913) I.L.R. 38 Mad. 302.

(3) A.I.R. 1929 Mad. 285.

(2) (1923) I.L.R. 45 All. 323.

(4) (1878) I.L.R. 4 Calc. 483 (F.B.).

(5) (1930) 32 Bom. L.R. 747.

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Evidence Act. This view was approved of by WALLER J. in *Govinda Naidu v. Emperor*(1). The decision in *In re Bati Reddi*(2) of AYLING J. takes the contrary view, but on a perusal of that case it is clear that the point does not seem to have been fully discussed; at any rate, no detailed reasoning has been given by the learned Judge. In *Emperor v. Cooper*(3) which is a decision of a Division Bench, BROOMFIELD J., it is clear, comes to the decision with considerable hesitation that such a confession can be considered under section 30 of the Evidence Act. I think that the greatest weight must be attached to the decision of WALSH J. in *Emperor v. Mahadeo Prasad*(4), where the position is very clearly and ably discussed by that learned Judge. He says amongst other things:

"In the first place an accused is entitled to know what the evidence against him is before he is called upon for a defence at all, and the closing of the case for the prosecution is no mere form but, with certain exceptions, closes the door to any further evidence against the accused."

Again at page 325:

"To use, therefore, a statement made in the dock by one accused against the other in a joint trial, offends against at least two of the fundamental principles of the Criminal Law. The Legislature in India saw fit to create an exception which is contained in section 30 of the Evidence Act. In my opinion that must be construed with reference to the fundamental principles to which it creates an exception. If the section is carefully read, I think nobody, bearing in mind the fundamental principles which I have just mentioned, ought to have any difficulty in coming to the conclusion that what is contemplated is formal proof by the prosecution of a confession previously made. The only objection I can see to such an interpretation is that I am inserting in the section the words 'as part of the case for the prosecution.' But such words would be tautologous and a draftsman, in my opinion, would consider it superfluous to insert them, because the only thing that an accused person has to meet in a criminal

(1) A.I.R. 1929 Mad. 285.

(3) (1930) 32 Bom. L.R. 747.

(2) (1913) I.L.R. 38 Mad. 302.

(4) (1923) I.L.R. 45 All. 323.

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trial is the case for the prosecution and such additions thereto as he may have voluntarily added by his own statement and those of the witnesses whom he calls in his defence."

With these observations I entirely agree. Section 30 of the Evidence Act creates a very marked exception to the fundamental principles of the Criminal Law and a such must be strictly construed in favour of an accused person. This is a view which I have expressed on more than one occasion. That being so, we have to decide what is meant by the section and to read the words in it strictly. The section says that, when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is "proved," the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. There is no difficulty in interpreting the word "proved." That must mean proved before the case for the prosecution comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial. In my view, there is no difficulty in construing that section in that way, and that is my interpretation of it. Under these circumstances, I am bound to hold that the confession of the first accused made from the dock in the magisterial proceedings could not be considered by the Court as against the appellant here, and it must accordingly be ruled out. With regard to the facts of the case, as already stated, I do not propose to consider them, because the best course is to send the case back to the Sessions Court for a decision by the learned Sessions Judge upon the facts of the case, excluding the confession of the first accused wrongly admitted.

SUNDARAM CHETTI J.—I agree.

B.C.S.

APPELLATE CIVIL.

*Before Mr. Justice Wallace and Mr. Justice Krishnan
Pandalai.*

MALYAM PATEL BASAVANA GOWD AND THREE OTHERS
(PLAINTIFF AND LEGAL REPRESENTATIVES), APPELLANTS,

1930,
October 23.

v.

LAKKA NARAYANA REDDI AND ANOTHER (DEFENDANTS
1 AND 2), RESPONDENTS.*

Ryotwari village—Government river—Customary supply of water for irrigating lands in such a village by channels drawn from—Interference of the right by ryots of another ryotwari village—If actionable by ryots of former village without proof of actual damage—Rights of ryots of a ryotwari village against Government for the customary supply of water for irrigating their lands—Sub-surface water of a Government river—Rights of ryots in—Distinction between English and Indian Law as regards underground streams.

Where the ryots of wet lands in two Government ryotwari villages, situated on opposite sides of a Government river, were drawing their customary supply of water for irrigation from channels which were taken off at particular points in the river bed, and the ryots of the village, the head of whose channel was the lower one of the two, moved the head nearer to the head of the other channel, so as to interfere with the natural flow of water to that channel, and the ryots of the other village sued the interfering ryots for a declaration of their rights and for an injunction restraining them from such action,

Held (1) that a ryot in a ryotwari village acquires a legal right to the water when it reaches his customary channel for the irrigation of his lands, and not merely when the water has reached his fields;

(2) that, in the circumstances of the case, the channel of the plaintiffs, taking off sub-surface water from a definite point in the river bed and leaving the bed at a point lower down the

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river, was not so undefined as not to give rise to a cause of action on interference by another ryot;

(3) that the principles of the English Law regarding underground streams (defined or undefined), do not apply to irrigation channels taking sub-surface water in India, as the conditions in England are different from those in India; consequently, even though a river-channel, which is the customary source of irrigation for a ryot's wet land recognized by the Government, has its supply of water from the sub-surface water of a river-bed, still it is water in which, under the law of this Presidency, there can be a legal right in favour of the ryot; and

(4) that, in the case of an interference with such a channel supplied with sub-surface water, the ryot whose rights to such supply are interfered by another ryot, has a cause of action against the latter, apart from proof of actual damage, and a right to an injunction, if he establishes probable prospective damage by such interference.

Where the sub-surface water of a river bed is the Government source of supply for irrigation channels of certain ryotwari wet lands, the Government cannot shelve its duty of seeing to the equitable distribution of this supply between the ryotwari tenants under each channel source; and, in the case of interference by one ryot with the sub-surface supply to the customary channel of another ryot, the Government is bound to see that the channel of the latter is not interfered with by the former, unless and until the Government supply some other equally efficient source of irrigation for the latter.

APPEAL against the decree of the District Court of Bellary, dated 27th February 1929, and passed in Original Suit No. 45 of 1926.

L. A. Govindaraghava Ayyar for appellant.

V. S. Narasimhachari for first respondent.

Government Pleader (P. Venkataramana Rao) for second respondent.

JUDGMENT.

WALLACE J.

WALLACE J.—This suit was filed by the plaintiff, as representative ryot of the ryotwari Malyam village, against defendants 1 and 2, as representative ryots of

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the ryotwari Kanekal village, for a declaration of the right of the plaintiff's village to take water to its fields from the point A in the Hagari river, shown on the plan, Exhibit E-1, without any interference from the defendants, and for consequential injunction to ensure that right. These two villages lie on opposite sides of the Hagari river, Malyam on the east and Kanekal on the west. Both villages have registered wet land irrigated by the river by channels therefrom which are recognized as their irrigation source. When there is water flowing in the river, each village gets its supply direct from channels taken off from the river banks. When the surface flow in the river ceases, the ryots have been in the habit of tapping the sub-soil flow and leading it to the main channel. The Malyam ryots claim that it has been their custom and right to tap the river-bed sub-soil water at the point A, and the custom of the Kanekal ryots to tap that water at the point D, and the plaintiff asserts that, in January 1924, the Kanekal ryots came some 500 yards further up stream than usual, to the point K, close to the point A, and, by starting their channel there, drew off from the Malyam channel a considerable portion of its former supply, so that its normal supply was seriously diminished and the wet crops of Malyam suffered in consequence. The suit was filed, therefore, in order to prevent the Kanekal ryots from coming higher up stream than the point D. The lower Court, the District Judge of Bellary, found and in fact took it practically for granted—as it was not seriously contested—that the usual custom was as contended for by the plaintiff, namely, that the Malyam channel took off at the point A and the Kanekal channel at D, and that the Kanekal ryots in 1924 broke the usual custom by coming up to the point K. But he held that the plaintiff had no legal right to compel

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the Kanekal ryots to remain at the point D, and further that the plaintiff had failed to prove any damage in consequence of the defendants' action, and he dismissed the suit. The plaintiff appeals.

[His Lordship found that the Secretary of State, who was joined as third defendant on the initiative of the trial Court, was not a necessary party and struck him out of the suit, since no relief was sought for against him.]

The trial of the suit in the lower Court shows an inadequate appreciation of some important points at stake, and in consequence information is lacking on some of these. The plaint is couched in too vague terms and that led to an equally vague written statement. The lower Court ought to have directed the plaintiff to be more specific in stating the legal character of the right he claims. It ought further to have elicited in evidence whether the area over which the plaintiff claims the right to water is all registered wet double crop, since the time of the year to which the suit claim relates is the time of the second crop. The area claimed by the plaintiff in the plaint as entitled to water, namely, 150 acres, is considerably larger than the registered double crop area in his village according to the Settlement Register of 1927, and, to judge from the figures in the Tahsildar's report about that time, Exhibit IV, seems to represent rather the area on which double crop was raised than the registered double crop area. This difficulty has not been resolved, but it may be that the whole area has permission to take Government water. It appears to be, although that is also not certain, compounded double crop wet (see Exhibit IV) with the rate of assessment fixed accordingly. It is further not as clear as it might be whether the plaintiff channel and the defence channel are in all their lengths the channels authorized by

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Government for the conveyance of water to the respective villages. Exhibits B and C, official notes in 1890 for the settlement of 1893, indicate that the recognized channels for Malyam and Kanekal are actually channels which start in the river bed at points approximately the present points A and D, and this opinion, as regards D, is endorsed by the Tahsildar in his report, Exhibit IV, in 1924. Exhibit B indicates the recognized Government channel for Malyam as *Thalaparisha*, i.e., river-bed channel-head, and Exhibit C indicates the Government channel for Kanekal as a fountain head in the river near Gangalapuram. To some extent we have been hampered in hearing the case by these shortcomings. But, in view of the long time the case has been pending, it does not seem worth while to postpone decision in order to call for further information, and I have taken for granted, what at least does not seem to have been contested, that the wet area for which the plaintiff claim is put forward is registered wet or at least permitted wet, apparently compounded double crop, and that the authorized irrigation channel for Malyam and Kanekal are those which have been usually taken off in the river bed itself at the points A and D respectively.

The general law of this Presidency governing the rights to water as against Government of a ryotwari wet landholder is well settled and admits of no doubt. The ryot is entitled to be given such supply of water as is necessary and sufficient for the irrigation of his registered wet fields. He must accept that supply from the irrigation source approved by Government as the source of supply for his fields, and he must accept the method or machinery by which Government supplies that water. He has no right to insist that his supply shall come in any particular source or any other source than that recognized by Government or that it shall come by any

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particular channel, nor can he prescribe against Government for such right by user otherwise for any length of time. It is open to Government to alter at any time the manner and method by which it supplies the necessary water to him and he has no grievance or cause of action thereon. It follows that between him and Government there is something in the nature of a contractual obligation under which Government undertakes to regulate, distribute and furnish to him his necessary supply in the manner authorized by it as the proper and usual manner until and unless Government has provided him with another equally efficient. The leading cases on this subject are; *Kristna Ayyan v. Vencatachella Mudali*(1), *Ramachandra v. Narayanasami*(2), *Sankaravadivelu Pillai v. Secretary of State for India in Council*(3), *Rama Odayan v. Subramania Aiyar*(4), *Fischer v. The Secretary of State for India*(5), and *Nynappa Servai v. Veeran*(6). It has never been very definitely laid down whether this right is of the nature of a proprietary right or a contractual right, nor is it necessary to distinguish so long as the nature and scope of the right is clearly defined. It is not a mere right to water so that, as the defendants here contend, the ryot has no right whatever recognizable in law until the water has actually reached his field, and therefore the only remedy for him if the water in his usual irrigation channel has been abstracted by a neighbour whose land is irrigated by a different channel would be to petition Government for his proper supply of water. Government by undertaking the obligation to supply him with water also undertakes that it shall be at his disposal by the usual and customary method, that is by channel constructed either by Government or by

(1) (1872) 7 M.H.O.R. 60.

(3) (1904) I.L.R. 28 Mad. 72.

(5) (1908) I.L.R. 32 Mad. 141.

(2) (1892) I.L.R. 16 Mad. 333.

(4) (1908) I.L.R. 31 Mad. 171.

(6) (1908) I.L.R. 32 Mad. 423.

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the ryot or both, until and unless some other method is adopted. This obligation by Government is in certain cases subject to the reciprocal obligation of the ryot to keep the main channel free from silt and sometimes himself to construct the minor inter-field channels. By custom certain main channels are ear-marked by Government for certain villages or areas of wet cultivation. As between two such villages or areas each taking off from the same source by its own channel, the right of each to water, be it contractual or proprietary, as against Government is to its necessary and sufficient supply, and as against each other, to that supply so soon as that supply has passed into its own channel ear-marked for it. The same principle *mutatis mutandis* applies to individual wet ryots of the same village *inter se*. To accept the defendants' contention that each wet land ryot has no legal right as against another in the water ear-marked for him in his own channel until the water actually reaches his fields, would lead to the consequence that any wet ryot can not only with impunity but with the direct approval of the law abstract from his neighbour's channel the whole of the water intended for his neighbour's field, provided he does it before that water has reached his neighbour's field. That would be a disastrous proposition for the Courts to uphold and fortunately it has, so far as I can see, no support in law or in precedent. While, therefore, the wet ryot cannot insist as against Government that he has any right to have his supply carried by any particular channel and cannot object to Government altering the channel of supply, he has a right as against other wet ryots and even, subject to Government's right to give him an equally efficient supply, as against Government to the protection of law for that supply once it has passed into the channel at present ear-marked for his supply. That is

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the general principle and I have to see if any of the circumstances of this case alter its application.

The plaintiff founded his plaint which, be it remembered, was framed before Government was made a party, on a claim that the Malyam ryots had by their long user and open enjoyment acquired a prescriptive right to take to their lands from the point A all the water which would naturally come to A without interruption by anyone else, and that that right had been infringed by the defendants' action in moving the head of their channel from D to K. It is clear from what has been said that no such prescriptive right can be acquired. One ryot cannot prescribe against another or against Government for supply by any one particular channel. His user of a particular channel is in no sense adverse to the user by another of another channel, since each uses it by authorization of Government. Nor is it an easement by which he is conveying property of his own over a servient tenement. The plea of easement was in fact abandoned in the lower Court. The most that the plaintiff can claim against defendants is that he and the other ryots of Malyam village have a legal right, contractual or proprietary, to have their usual supply furnished by the channel implicitly or explicitly recognized by Government as the usual method of supply for the time being, until and unless an equally efficient supply and method of supply are adopted. But if that customary supply and manner of supply according to this contractual or proprietary right has been interfered with, not by Government but by private parties, such interference, *prima facie*, is an invasion of the plaintiff's rights and will give rise to a civil cause of action. On this point, see *Ramachandra v. Narayanasami*(1), *Rama Odayan v. Subramania Aiyar*(2),

(1) (1892) I.L.R. 18 Mad. 333.

(2) (1908) I.L.R. 31 Mad. 171.

which will be dealt with later, and *Adinarayana v. Ramudu*(1) which clearly recognizes that wet field owners have this right to the water of their supply channels, while these exist as definite channels.

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Against this conclusion the defendants contend, first, that the plaintiff acquires no legal right to the water until it has reached his field, a contention with which I have already dealt; second, that, in this case, the ordinary Presidency law as set out above, will not apply because these river bed channels from A and D are too undefined and uncertain to be the subject-matter of any legal right; third, that the water tapped is sub-soil water and, in that, no property rights accrue; fourth, that no action will lie without proof of actual damage, which, they contend, has not been proved. As to the second point the argument must be that the course of the channels is too indefinite to justify the conclusion that they are intended to be the sources of supply to the villages. But obviously this cannot stand on the facts proved. On the evidence there can be no doubt, as the District Judge has found, that Malyam-village was in the habit of taking its channel at point A and the Kanekal ryots at the point D until the crucial year 1924. Defendants' own witnesses admit that the usual point of take-off for their channel was opposite to the hamlet of Gangalapuram in Kanekal village, i.e., somewhere near D. These witnesses in fact assert that the Kanekal village ryots had not even in 1924 gone higher up than D; but that was obviously a false case, and need not be pressed against them here. I take it that until 1924 Kanekal village had usually taken off at the point D, and that points A and D are sufficiently definite and familiar to the villagers. This matter seems to me concluded by the

(1) (1912) I.L.R. 37 Mad. 304.

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fact which appears from Exhibits B and C already noted, that these river bed channels taking off at A and D are the recognized Government sources of supply. If these are definite enough for Government and ryots so to recognize them, they are definite enough for all practical purposes. The points B and E where the two channels leave the river bed seem also to be fixed points. I think the contention that the channels are too undefined to give rise to a cause of action is not justified.

On the third point it is sought to apply the principles of English law applicable to underground streams defined and undefined as set out chiefly in *Acton v. Blundell*(1), and later cases, *English v. Metropolitan Water Board*(2) and *Chasemore v. Richards*(3) cited by the respondents, and *Grand Junction Canal Co. v. Shugar*(4) cited by the appellant. It is urged by the respondents that no one can predicate, or prescribe for, a proprietary right or easement in underground streams. Although both sides have to a certain extent relied upon English cases, my considered view is that conditions in England are so different to those in the district of Bellary that I deprecate calling in aid English law on this subject and confess that I do not myself find it of any assistance here. In the first place, irrigation rights such as have been set out above to supply of water for irrigation from recognized Government sources are unknown in England and such rights are therefore unknown to English law. Secondly, the running of a river current down its natural bed in the dry season a few inches below the sandy surface is a phenomenon unknown in England. The underground water to which the English cases apply is usually water between layers of subterranean rock or clay so hidden that no one can guess

(1) (1843) 12 M. & W. 324; 152 E.R. 1223.

(2) (1859) 7 H.L.C. 349.

(3) [1907] 1 K.B. 588.

(4) (1871) 6 Oh. App. 483.

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what their course is. In this country, it is fairly safe to say that the under-current of a river is probably flowing down the river bed and that its course is defined in the sense that one will probably be able to tap it somewhere in the river bed, and the water thus is found in, and has not left, the recognized irrigation source, namely, the river. Finally, the English cases are usually contests between owners of the surface property under which the subterranean water originally was and the owner of the surface under which it was subsequently found and the crucial question was whether the ordinary rights of ownership extended to such water. Here there is no question of rival owners of the surface lawfully using their own lawful property and claiming that ownership of the surface imports ownership of and property in sub-soil water, but a question of the rights of rival claimants to water which is the property of a third party, namely, Government. No doubt the principles of these English cases have been referred to and applied by this High Court in *Adinarayana v. Ramudu*(1), but there the question was whether the plaintiff could claim rights in water which merely spread over his neighbour's field casually and not in a defined channel. The parties to that suit were Zamindari ryots and no question arose of the rights of ryotwari ryots to the water of a river bed in a sub-surface channel which is their recognized source of irrigation. In the present case it seems to me amply proved on the facts that the river channels customarily taking off from A and B are the recognized sources of irrigation for the wet lands in Malyam and Kanekal respectively, and, in my view, it makes no difference in the law applicable that the Government supply of water in the river bed sinks at

(1) (1912) I.L.R. 37 Mad. 304.

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times below the surface. Government has, by recognizing these channels, recognized that the sub-surface water is part of the recognized supply which it is their duty to have conveyed in sufficient quantity to the respective wet areas. So that, even if it is "underground" water, it is underground water in which, by the law of this Presidency, there can be a legal right, and to which plaintiff has a legal right.

The position is much as if the river were a large well or a subterranean pond from which authorized channels took off at various recognized points for irrigating various wet areas. I am not pointed to any authority which has laid down that, if a ryot entitled to water in such an irrigation source abandons his customary channel and opens another in such a way as to cause loss or likelihood of loss of supply to another ryot in his customary channel, the latter has no action against the offending ryot. On the contrary, it has been held in several cases that he has such a right. In *Ramachandra v. Narayanasami*(1) damages were awarded against a ryot who had induced Government to open for his benefit a new channel which materially diminished the customary water supply of another's land. In *Rama Odayan v. Subramania Aiyar*(2) an injunction was awarded against some ryots who had wholly cut off another ryot's usual channel supply by blocking the entrance of the channel. The ruling in *Narasappayya v. Ganupathi Rao*(3) is not in point, because there neither the plaintiff nor the defendant had any right to the water of the pond and had therefore no right to prevent the other taking, if he could, the whole of it. Isolated passages in *Mahankali Lakshminah v. Karnam Narayannappa*(4) are strongly relied upon by the respondents,

(1) (1892) I.L.R. 16 Mad. 333.

(3) (1913) I.L.R. 38 Mad. 280.

(2) (1908) I.L.R. 81 Mad. 171.

(4) (1918) M.W.N. 276.

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but the general *ratio decidendi* does not assist them, for there the point was whether the plaintiffs could maintain an action on a mere threat of the defendants to interfere with a channel which was not the recognized channel of irrigation, though they had taken water from it without objection from Government for a long time, and it was held that the plaintiffs' claim of a possessory right in the water of this channel, which possessory right had been threatened, could not stand. This was negatived because plaintiff did not prove any right to take water by that channel at all and had not made Government a party to the suit to give Government an opportunity of saying whether they recognized the plaintiffs' right to the water of this channel or not. If any point be made that in *Mahankali Lakshminah v. Karnam Narayannappa*(1) Government had by acquiescence for some time authorized water being taken by the unauthorized channel, that is not the case here, as Government distinctly pleads that they did not authorize the defendants to come to the point K. I therefore find that the defendants' ground of contention No. 3 is not made out and is no bar to the maintainability of this action.

[His Lordship dealt with the evidence on the fourth contention and came to the conclusion that the Malyam ryots had not proved actual damage and that, in cases like the present, when the whole water-supply had not been cut off but only some of it, and when there had been general shortage of supply, it was very difficult for a party to prove the precise amount of diminution caused by the action of others or the precise extent of the particular damage caused by that diminution and proceeded:—]

However, it seems to me unnecessary to pursue this point further, since I am of opinion that, on the facts of

(1) (1918) M.W.N. 276.

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this case, the plaintiffs have a cause of action apart from proof of actual damage, and that they have a right to an injunction if they establish probable prospective damage. Even as early as *Kristna Ayyan v. Vencatachella Mudali*(1), INNES J. held that there was no cause of action for injunction, "because no case of prospective damage had been made out upon the facts," and KERNAN J. held that it must be proved that "damage has accrued or must necessarily accrue." In *Rama Odayan v. Subramania Aiyar*(2) damage was presumed because the entire supply was cut off. But the ruling is that a plaintiff is entitled to succeed "if the act is such as to be likely to cause damage to him." Decision on this point must be guided by the report and the evidence of the expert commissioner examined in the case rather than by the vague surmises of lay witnesses. The public works department executive engineer's opinion as set out in his evidence as P.W. 6 and his report, Exhibit E, seem to me quite clear, namely, that the supply of water in the Malyam channel is likely to suffer if the Kanekal channel is taken near the point K. He says in effect that in the case of such channels tapping sub-surface currents in the river bed there is always a likelihood of the lower channel drawing off water from the higher so long as the former takes off from any point above the level where the latter leaves the river bed. It is true that he says—and it is obvious—that he cannot predicate the exact extent of the diminution without actual experiment. The District Judge, I think, has been unduly impressed by that admission. For, that in all probability the Kanekal channel will prejudicially affect the supply in the Malyam channel if it comes further up the river than the point D which is opposite the point B where the Malyam channel leaves the river, there can, on the

(1) (1872) 7 M.H.C.R. 60.

(2) (1908) I.L.R. 31 Mad. 171.

Engineer's opinion, be no doubt. Thus we find—and it strengthens my acceptance of the Engineer's conclusion—that the actual customary practice has been in accordance with what the expert thinks is necessary to preserve the customary supply in the Malyam channel. That is, if the location of the channels for Kanekal and Malyam had been designed by an Engineer, he would have placed the heads of them in their present customary positions at A and D. In these circumstances, it seems to me that the plaintiff is entitled to have these retained in their customary position, and to have an injunction restraining the defendants from taking off their channel in the river bed at any point higher up than the point D, so long as the plaintiff's village has the head of its channel at A and so long as it is not supplied by Government with an equally efficient supply for its registered wet lands. I would therefore reverse the decree of the lower Court and grant the plaintiff an injunction in these terms and direct that each party bear his own costs here and below.

In the view I have taken that the sub-surface water of the river bed is the Government source of supply, it is clear that Government cannot shelve its duty of seeing to the equitable distribution of this supply, and that the revenue divisional officer was not justified in his refusal to interfere, when the ryots of Malyam approached him with complaints of shortage of water, on the ground set out in his order in Exhibit IV that "there is no water flowing in Hagari and this is not a case of regulation of water." It appears to me clearly the duty of Government, until and unless they supply other equally efficient sources of irrigation, to see that the heads of the recognized channels at A and D are not carried further up stream but remain as they are, and that any attempt to alter the customary position

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should be penalised as an unauthorized interference with the rights of others equally entitled to the water of the river for their registered wet lands. I have noted above that I think Government ought to be struck out of the case as an unnecessary party and order accordingly. I would direct that Government bear its own costs in the case.

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KRISHNAN PANDALAI J.—As the case involves some novel features and we are differing from the learned Judge below I shall state my reasons for our decision.

[His Lordship, after stating the facts and discussing the evidence, came to the conclusion that, according to custom, the Malyam ryots started their spring channel at the point A and that the Kanekal ryots started theirs at the point D and that by the action of the latter in 1924 the water in the Malyam channel did diminish and as a consequence their crops suffered, and proceeded:]

But the respondents contend that even if the plaintiffs have proved that they suffered diminution of water in their channel by reason of the defendants shifting their channel, they are not entitled to any relief. The grounds of this contention are: (i) plaintiffs must prove not merely diminution of water in their channel but diminution of the quantity of water which plaintiffs as ryotwari tenants are entitled to, i.e., the quantity which is necessary for cultivation of their registered wet lands and there is no proof of that character in the case; (ii) the plaintiffs' case was based on a prescriptive right, which can only be proved by sixty years' enjoyment against Government and there is no such proof even if ryotwari tenants can prescribe against Government for necessary water for their holdings; (iii) the plaintiffs' rights to water are only against Government and even if defendants interfere with that supply plaintiffs have no cause of action against them but must only apply to

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Government for water; (iv) according to law the plaintiffs can have no claim in law to percolating water flowing in undefined channels which the defendants drew off by deviation of their own channel and therefore plaintiffs can have no right to a declaration or injunction in respect thereof.

The first point raised for the respondents raises questions of fact—what is the registered wet area for which the plaintiffs are entitled to water from Government and whether the plaintiffs were taking by their Malyam channel more than they were entitled to when the defendants by their act diminished that supply?—which were never raised by them in the lower Court and on which therefore no issues were raised and no evidence taken. It is, therefore, sufficient to say that the respondents cannot now be allowed to raise new defences of fact on which there has been no trial; but all the indications are that, as regards the second crop cultivation of 1924 which is in question, the plaintiffs were at no time in a position to draw off more water than was necessary for that crop for their registered wet lands. No one—not even the revenue officer—suggested that such was the case. On the contrary, it seems to have been understood and conceded by all that there would not have been enough water in any case. The Masolwari accounts of that crop both in defendants' and in plaintiffs' village (Exhibits 5 and 8) show that the crops yielded ranged from 1 to 8 annas—which is practically conclusive that there was a general shortage of water. This objection therefore fails.

The second and third points relate to the nature of the plaintiffs' right and may be dealt with together. The right of ryotwari landholders as against Government to water necessary and sufficient for cultivation of their registered wet lands and their right to take it

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from the accustomed or recognized source of supply till other reasonable and sufficient sources are provided have been settled by a series of decisions of this Court; *Kristna Ayyan v. Vencatutchella Mudali*(1), *Ramachandra v. Narayanasami*(2), and *Sankaravadivelu Pillai v. Secretary of State for India in Council*(3). There has been controversy as to whether the right is a contractual right as held in *Fakir Muhammad v. Tirumalachariar*(4), or whether it is a proprietary right as observed in *Sankaravadivelu Pillai v. Secretary of State for India in Council*(3). Whatever the legal character of the right, it is now settled that Government themselves cannot interfere with the accustomed mode of supply unless and until they substitute another and equally efficient mode, and if they do, will be legally liable to the injured ryot; *Rama Odayan v. Subramania Aiyar*(5); and that third parties like other ryots similarly interfering will be likewise liable; *Ramachandra v. Narayanasami* (2) and *Rama Odayan v. Subramania Aiyar*(5).

The contention of the respondents that only Government is liable in such cases was sought to be supported by the decision in *Mahankali Lakshmiah v. Karnam Narayannappa*(6) which is no authority for that proposition. "To understand the meaning of that decision it is necessary to know what the facts and the points for decision were"; *Hari Bukhsh v. Babu Lal*(7). In that case the defendants had been the lessees of plaintiffs' land for about thirty years and during that time had used for the cultivation of the plaintiffs' land water from a channel which was not the registered source for those lands but was the registered source for

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the defendants' own lands. This was apparently a matter of convenience. After the termination of the lease the defendants refused to allow the continuance of the same arrangement for irrigating plaintiffs' land and plaintiffs sued for an injunction restraining defendants from interference with what was claimed as an easement or growing easement. The Government was not made a party. In these circumstances it was held that the registered source of supply to plaintiffs' lands being different and no arrangement or sanction from Government for what was done during the tenancy being proved, no allegation of easement or growing easement was of any avail as a cause of action and the suit must fail. That decision has no application to this case in which the facts are different and therefore the questions for decision are different.

The respondents' argument is however right to the extent that the plaintiff erroneously founded the plaint on a right of easement. The ordinary right of ryotwari landholders against Government to water sufficient to irrigate their fields is not an easement within the meaning of section 4 of the Indian Easements Act as it is not a right to do or continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. Section 2 of the Act expressly saves the rights of Government in the water of natural rivers and streams from the operation of the Act. The rights of ryotwari landholders to water for their holdings is an incident of ryotwari tenure whether it be regarded as having a contractual or proprietary origin. Whether ryots may by prescription or otherwise acquire a right against Government to more water or to take it in a particular way does not arise in this case. Therefore there is no question in this case of dominant and servient heritage

(1) (1872) 7 M.H.C.R. 60.

(2) (1894) I.L.R. 28 Mad. 72, 74, 81.

(3) (1898) I.L.R. 31 Mad. 171, 173.

(4) (1899) I.L.R. 16 Mad. 323.

(5) (1876) I.L.R. 1 Mad. 255.

(6) (1918) M.W.N. 276.

(7) (1924) L.R. 51 I.A. 168, 168.

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essential to easements. Nor is the right of ryots to enjoyment of their rights of water undisturbed by other ryots an easement as against the holdings of those ryots. But it is the ordinary right of all who have rights to the undisturbed enjoyment of those rights, undisturbed by acts which the doers have no right to do. The plaintiff therefore was subjecting himself to an erroneous and gratuitous limitation when he founded his claim on prescription as apparently his advisers did in the lower Court, as the language of the first issue shows. But this error does not furnish an answer to the suit based as it ought to be on a better and more complete right which the facts establish. The arguments submitted by the respondents furnish no answer to the plaintiff's claim when the legal relations following from the established facts are properly conceived.

The most plausible of the respondent's objections is the one based on the well-known rule of law that as between owners of land no one has a right of property in water flowing underground in undefined and unknown channels by percolation, as a consequence of which one owner has no right of action against another who by sinking wells or by other works on his own land draws off and appropriates the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him. And this, even when it is done from an improper motive or maliciously; *Chasemore v. Richards*(1), *Acton v. Blundell*(2), and *Mayor, etc., of Bradford v. Pickles*(3). But as stated by LINDLEY L.J. in *Ballard v. Tomlinson*(4):

"The reasons for the distinction (between water in defined and visible channels and water percolating through the soil and not yet in any defined visible channel) must be borne in mind,

(1) (1859) 7 H.L.C. 349.

(3) [1895] A.C. 587.

(2) (1843) 12 M. & W. 324; 152 E.R. 1228.

(4) (1885) 29 Ch. D. 115, 125.

or the decisions establishing it may be misunderstood, and be made the basis of reasoning, leading to results which are as startling as they were unforeseen."

The argument of the respondents is that, even according to our finding, what they have done is only to prevent the water borne in the sandy bed of the Hagari which might otherwise have percolated through unknown and undefined interspaces of the sand into the Malyam channel from reaching it and it is urged that, on the authorities above referred to, they cannot be legally prevented from doing so. There are several answers to this contention.

In the first place, the right of taking underground water and in exercise of that right of abstracting all the water that may percolate into your land in undefined channels from the surrounding lands belongs to the owner of the soil, and can only be exercised by works done on your own property. You cannot go on your neighbour's land, dig there, and take the underground water found there, and justify your action because water was running underground in undefined channels. That would be trespass as against the owner and would be also actionable at the instance of those who have rights against the owner to the water you abstract. The respondents are not owners of the bed of the Hagari which belongs to Government and they cannot invoke the doctrine of percolating water in their aid. The plea of the Government is that they have not authorized the acts of the respondents and are therefore not responsible for them.

Secondly, the Government themselves who are owners of the bed of the Hagari would not be justified in diminishing the supply of the Malyam channel on the plea that they were entitled as owners to draw off the underground percolating water, seeing that they were

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bound to maintain the supply of that channel in fulfilment of their obligation to their ryots (the appellants) till they furnished another equally efficacious substitute. And this on the broad ground that no one may derogate from his own grant or take advantage of his own wrong. The Government being bound by law to furnish water to the appellants for their cultivation and to substitute another sufficient source of supply before interfering with the registered source customarily in use, which *ex hypothesi* is the water percolating into the Malyam channel, would be presumed to have bound themselves not to do anything to interfere with the existing source of supply till they had found the substitute. And though, according to the theory of the decisions about percolating water, no one, not even the owner of the soil under which it flows, has any property in such water till it actually reaches a defined channel and therefore there is no infringement of any right of property by appropriating what belongs to no one in particular, yet it is possible for an owner to be guilty of breach of contract if, by appropriating underground percolating water from his land he causes diminution of a supply which he is obliged by law to maintain. The decision of the House of Lords in *M'Nab v. Robertson*(1) shows that this is possible, though the actual decision of the Court was that even if such contract were implied, as to which some of their Lordships expressed doubt, there was no proof of damage. The question on which their Lordships differed was whether water oozing (seeping) through a marshy area from a spring to a pond was included within the term 'streams' used in a demise. This was negatived by the majority. But the lessee also urged alternatively that the lessor must be

(1) [1897] A.C. 129, 138.

deemed to have contracted not to diminish the supply of water actually available to the land demised at the date of the demise. On this point Lord WATSON said :

"I see no reason to doubt that such a contract right as the appellant alternatively claims, seeing it may be the subject of express stipulation may also be derived by reasonable implication from the terms of the lease." (Page 136.)

Lord SHAND said that he was disposed to hold that there is such an obligation implied and that although the water in question was not directly conveyed there was an obligation on the part of the landlord not to diminish the water-supply. (Pages 138-9.)

Lord DAVEY, like Lord WATSON, felt the difficulty of implying the obligation not to diminish the supply of water in the case of a demise which expressly mentioned certain sources but otherwise did not disagree with the opinion that such an implication was possible. (Page 142.)

We are not hampered by the express language of any deed from giving effect to the relations between ryotwari tenants and the Government, according to the meaning and intent of the parties, and the justice of the case, and, I feel no doubt that, having regard to the obligation of Government not to interfere with existing sources of water till a sufficient substitute was found by them, would be bound not to do anything to diminish that supply while it lasted. It follows that Government itself would not find justification in the doctrine of percolating water for diminishing the supply of water in Malyam channel and that the Defendants can find no justification in it for producing that result.

Finally, I share with my learned brother, doubts about applying the doctrine of percolating water flowing underground in undefined channels as settled by English decisions to the water carried in the sandy bed of an Indian river in the dry months between monsoon and monsoon. This feature of our rivers is due to the

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physical features of the country and other natural causes. The monsoons produce floods and torrents of a rapidity not known in Western Europe. The tropical heat produces rapid evaporation. But after the floods have subsided and the sands dried up in the scorching sun, the cunning river still saves up in her sandy mantle ample store of life-giving water which only requires the thin covering to be pushed aside to come to the relief of the thirsty villager and his crop. Some of these rivers have no flow at all in the dry weather. More frequently there is a straggling thin stream winding along the bed. Shall we say that all water under the river sand is percolating water flowing in undefined channels? Or shall we say that the river remains an underground 'stream' covered with a coating of sand—the flow being still continuous though slow and invisible—a body of water still flowing within the defined channel of the river bed? The distinction between the two cases is not whether the water is found above or below the ground or whether the movement of water particles is or is not scientifically to be ascribed to percolation; but the distinction is whether the water can as a whole be reasonably spoken of as moving in one direction within a definite and known channel. Having regard to the description of a stream given by Lord WATSON and Lord HALSBURY in *M'Nab v. Robertson*(1), I respectfully submit that the question is not capable of a general answer applicable to all conditions to be found on the globe, and that the doctrine of percolating water being *publici juris* must be applied to Indian rivers with due regard to the reason of the rule—which is ultimately one of convenience. As explained in the English cases, if a man who sank a well was to be held liable for the diminution of water in

(1) [1897] A.C. 129.

the wells of surrounding properties, to what distance is this liability to extend? The water in the next garden may not be affected but owing to some underground fissure of which no one knows anything, the water in some distant properties may be affected. There could be no reasonable method of fixing liability of such results. The doctrine, useful because convenient in such cases, becomes unmeaning where the result of drawing water from one place in a water-bearing river bed, at another not distant place can be easily foretold from experience. The water of such rivers drawn off by channels like the Malyam and Kanekal channels is recognized by the law of the land as the registered source of irrigation for hundreds of villages all over the Presidency. The ryots are expected and required to resort to such sources and only to such sources for water and if they transgress, as unfortunately they too often do when water is scanty, they are penalized in all the ways permitted by law. The duty of Government with respect to water derived from such sources stands on the same footing as that concerning other public sources of irrigation. The land-revenue derived from the properties irrigated from such sources must be considerable. The result of holding that the water of such rivers is subject to the rules of underground water percolating in undefined channels would be to create such confusion in the Civil and Revenue Law of this Presidency that, in the absence of any authority binding on me, I should be most reluctant to do so. For this reluctance I derive much support from the way modifications of English doctrines relating to water have been recognized by the highest authority to suit Indian conditions. In *Srinath Roy v. Dinabandhu Sen*(1),

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(1) (1914) I.L.R. 42 Cal. 489; L.R. 41 I.A. 221.

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the Privy Council held that the English rule which connects the subjects' rights to an exclusive fishery in tidal navigable water with the limits of the Crown's ownership is not applicable to Bengal. In *Secretary of State v. Raja of Vizianagaram*(1), their Lordships in applying to the river Gōdāvari the English rule as to accretions observed that the actual rate of progress necessary to satisfy the rule is not necessarily the same as in the case of English rivers. Having regard to the difference in climatic conditions between England and this Presidency and to its necessary results, it seems not so unreasonable to assimilate the legal incident of streams flowing in known channels, whether over or underground, to rivers like the Hagari, as well during the dry months as in the monsoon months. Perhaps we may adopt the observation of Lord SUMNER in a sense somewhat different from that in which it occurs in the context :

" Sometimes there is no water in these water-courses, and sometimes what there is does not course, nor are they ever fed by springs ; but these circumstances are not critical. A river may be fed by the rains directly, without any intermediate collection of the water in the bowels of the earth, and still be a river, and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is accustomed to become dry." ;

see *Stollmeyer v. Trinidad Lake Petroleum Company*(2). His Lordship was there referring to the riparian rights in the water of a river in Trinidad during the months when it was running, and no question arose about any water retained in the sandy bed after the surface flow had ceased. Though this observation was not intended to apply to the present question, it shows that necessary modifications must be applied to the English law of flowing water to make it applicable to

tropical countries. The respondents' Advocate has not drawn my attention to any Indian decision on this point nor have I found any bearing any similarity to this case.

In the lower Court it seems to have been too easily taken for granted by every one that water which is not visible on the surface must be percolating water flowing in undefined channels, and the plaintiff's Advocate thereupon conceded that he could not prescribe for an easement in such water. It has been pointed out that there is no question of easement in the case. Probably due to this misapprehension, the evidence does not disclose that any particular attention was paid to the aspect of the case now under discussion. The learned Judge refers to a statement of the plaintiff that there are no fixed head springs, that "the course of the channels, are not marked and that the depth of them varies with the rainfall." But, in Exhibit B which contains the information collected in 1890 for the last settlement, the source of irrigation for the Malyam village is described in column 7 under the heading 'Talaparisha. Where does it originate and how is the canal formed', and the information recorded is that it 'originates from the river Hagari close to the village of Marri (Rachmarri) (whence) the canal was dug ; and from there it runs for a mile in the river and extends as far as the wet land. Percolation water flows throughout the canal.' Similarly the corresponding entry in Exhibit C for Kanekal village is that 'there is a fountain head formed in the river Hagari near Gangalapuram, hamlet of this village, and a canal was dug along the very edge, wherefrom are formed small canals feeding the wet lands.' The expression *Talaparisha* means head springs in the bed of a river from which such channels begin and it is significant that it is the description used for the source of both channels. As to the use made

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(1) (1921) 1.L.R. 45 Mad. 207.

(2) [1915] A.C. 485, 491.

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by the learned Judge of the statement that the course of the channels is not marked and that their depth may vary, this is to a certain extent unavoidable as the river bed is sandy, but that the source and course of the channels is sufficiently identifiable is seen from his own finding under the second issue that the places (where the channels are annually dug) are generally in much the same neighbourhood. That the ryots have no difficulty in this matter is clear from the statement of Mr. Ireland that at his inspection he was informed by them that the line A B C in the plan represented the line of the Malyam channel and D E F that of the Kanekal channel. As to the way water is derived in these channels he says that in rivers like the Hagari with small supply each channel must have its own catchment area to give it the necessary supply and cannot afford to have that area encroached upon, as such encroachment would in his opinion adversely affect its supply.

On the best consideration I can give to the matter, I am not able to accept the contention that the water to which the plaintiff is laying claim is governed by the rule laid down in English decisions as to percolating water flowing underground in undefined channels. I have already given grounds for holding that even if the water were to be regarded as governed by that rule the respondents could derive no benefit from the argument.

In the result, I think that the appeal should be allowed. I agree to the orders proposed by my learned brother.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

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VEERAYI AND TWO OTHERS (RESPONDENTS), RESPONDENTS.*

1930,
December 8.

Partition suit—Joint purchasers of property on the understanding that each was to have half the property and one of them, who paid more than his share of the purchase-money, was to be repaid the excess by the other—Partition suit by latter or transferee from him with notice in regard to property purchased—Payment of excess amount paid by defendant if may be made condition of decree for possession in.

The first and second defendants jointly purchased certain property, the first defendant paying Rs. 840 and the second defendant Rs. 60, the understanding being that each was to have half the property and that the excess money paid by the first defendant was on behalf of the second defendant and repayable by him. The first defendant subsequently redeemed a usufructuary mortgage on the property and paid the whole of the mortgage money and took possession. Just prior to that redemption the plaintiff bought the second defendant's share in the property with notice of the payment of the excess amount of Rs. 140 by the first defendant.

In a suit brought by the plaintiff for redemption of his share of the usufructuary mortgage and for partition and delivery of possession of his separate share in the property, held that, even if the circumstances of the payment of Rs. 140 out of the purchase-money by the first defendant for the second were not those in which the first defendant could be subrogated to any vendor's charge, the suit being one for partition, the equity arising in favour of the first defendant from his payment for the second could, even without any charge, properly be enforced by the Court, and that the plaintiff could therefore be ordered to pay to the first defendant the sum of Rs. 140 before getting possession of his half share.

* Letters Patent Appeal No. 8 of 1928.

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APPEAL under clause 15 of the Letters Patent against the judgment and decree of PHILLIPS J., dated 17th August 1925 and passed in Second Appeal No. 265 of 1923 preferred to the High Court against the decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 60 of 1921 (Original Suit No. 367 of 1919, Court of the Principal District Munsif, Manamadura).

A. V. Narayanaswami Ayyar for appellant.

K. V. Sesha Ayyangar for respondents.

JUDGMENT.

Assuming that the circumstances of the payment of Rs. 140 out of the purchase-money by the first defendant for the second defendant, which are not fully disclosed by the record before us, are not those in which the first defendant could be subrogated to any vendor's charge, this being a suit for partition, even without any charge the equity arising in the first defendant's favour from his payment for the second defendant can properly be enforced by the Court—*cf. Swan v. Swan*(1) and *Leigh v. Dickeson*(2). The plaintiff is a transferee from the second defendant and is found to have had notice of this payment of Rs. 140 by the first defendant.

We see no sufficient reason to differ from the learned Judge's decision except that there does not appear to us to be any reason for allowing interest at a higher rate than 6 per cent. The interest allowed on Rs. 140 in the first defendant's favour from 5th May 1914 to 22nd July 1918 will be reduced to that rate, amounting to Rs. 35-3-0.

In other respects the appeal is dismissed. The appellant will pay the first respondent's costs.

A.S.V.

(1) (1819) 8 Price 518; 146 E.R. 1281.

(2) (1884) 15 Q.B.D. 60.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

O. R. M. M. S. P. S. V. SEVUGAN CHETTIAR AND 3 OTHERS 1930.
(SIXTH RESPONDENT AND LEGAL REPRESENTATIVES OF SIXTH November 3.
RESPONDENT), APPELLANTS,

v.

M. A. K. KASI alias MURUGAPPA CHETTIAR AND
34 OTHERS (PETITIONERS, CREDITORS), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), sec. 38—Composition scheme—Court's approval of—Matters to be considered—Assent of requisite majority of creditors—Opposing creditor's failure to accept offer made to him—Accounts—Insolvent's failure to maintain proper—Effect.

A composition scheme under which one of the creditors was to take over the whole of the insolvent's property on condition of his paying 6 annas in the rupee to all the creditors was approved by the District Judge on three grounds:—(1) that the requisite majority of the creditors had approved of the scheme; (2) that it was represented for those creditors that the Official Receiver's administration of the estate of the insolvent under the Act would lead to considerable delay and expense; and (3) that the opposing creditor did not accept an offer of the same terms made to him in the course of the proceedings.

It appeared, however, that in approving of the scheme the District Judge (1) had overlooked the fact that the Official Receiver had reported against the scheme and had represented that it was not beneficial to the creditors, (2) had not himself considered whether the scheme was a fair scheme, (3) had not commented upon the fact that the insolvent's conduct in connection with the insolvency had been bad, (4) had not paid due attention to the fact that the creditor who agreed to take over the insolvent's assets on the terms proposed was a very near relation of the insolvent, (5) had ignored the probability that the scheme was a device to enable the insolvent to buy back his own assets at a profitable figure and to make a profit out of his insolvency, and (6) had not himself considered the

* Appeals against Order Nos. 219 of 1927 and 361 of 1925.

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question of what profit the proposed scheme would be to the creditors.

Held that the scheme was not one which should have been approved.

Under section 38 of the Provincial Insolvency Act the assent of the requisite majority of the creditors is not by itself a sufficient reason for approving a scheme. Even if there is that assent, the court must exercise its judicial discretion before approving the scheme—that is a discretion founded on sufficient reasons after considering all aspects of the case and ascertaining the facts as far as possible.

The opposing creditor's failure to accept the offer made to him is not by itself a ground for approving of the scheme.

On a question as to whether a scheme should be approved, the insolvent's failure to maintain proper accounts is one of the most serious matters to be taken into consideration.

APPEAL against the order of the District Court of Rāmnād at Madura, dated 5th November 1926, and made in Interlocutory Application No. 595 of 1924 in Interlocutory Petition No. 18 of 1923. APPEAL against the order of the District Court of Rāmnād at Madura, dated 27th February 1925, in Miscellaneous Petition No. 28 of 1925 (Interlocutory Application No. 447 of 1924 in Interlocutory Petition No. 18 of 1923).

T. R. Ramachandra Ayyar (with him *S. R. Muthuswamy Ayyar*) for appellants.

S. Varadachariar (with him *P. Hari Rao, N. Rajagopalan, and R. Srinivasa Ayyangar*) for respondents.

JUDGMENT.

REILLY J.

REILLY J.—This is an appeal against an order of the District Judge of Rāmnād approving of a composition scheme under section 38 of the Provincial Insolvency Act. The insolvent in this case was adjudicated on the 31st August 1923. In December 1924 he submitted a draft scheme of composition, which was not approved. In September 1926 he submitted a second

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scheme with three alternative proposals, the third being that the whole of his property should be assigned to any person who agreed to pay 6 annas in the rupee to all the creditors. The seventeenth creditor in the case, who is the husband of the insolvent's paternal aunt, offered to take over the insolvent's assets on those terms. The sixth creditor, who had obtained a decree against the insolvent for Rs. 51,000, objected to the proposed scheme; but the requisite majority of creditors in number and amount accepted the scheme. When the matter came before the District Judge, it appeared that claims amounting to Rs. 2,71,000 had been proved. In November 1926 the District Judge approved of the scheme after making a slight alteration about the calculation of interest due to the creditors and annulled the adjudication of the insolvent. He gave the seventeenth creditor, whose offer he accepted, two months to pay into Court an amount equivalent to 6 annas in the rupee on the proved claims. It now appears that the seventeenth creditor did not deposit the whole of the amount in Court; but within two months he deposited about half of it and produced before the District Judge acknowledgments from the other creditors that they had been satisfied to the extent of 6 annas in the rupee. The sixth creditor, who objected to that scheme, has appealed against the District Judge's order, and he maintains that the scheme should not have been approved. A number of other creditors have appeared before us as respondents, and it is represented for them that they are still satisfied with the scheme and have no desire that it should be upset. The ex-insolvent and the seventeenth creditor also oppose the appeal.

Now, when we look at the learned District Judge's order in the matter, it appears that he took three points into consideration. The first was that the requisite

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majority of the creditors had approved of the scheme. The second was that it was represented for those creditors that, if the Official Receiver administered the estate of the insolvent under the Act, that would lead to considerable delay and expense. The third point was that in the course of the proceedings the learned District Judge offered the assets of the insolvent to the objecting creditor (the appellant here) on the same terms, that he should take the whole of the assets and pay 6 annas in the rupee to the other creditors, and that he was not willing to accept that offer.

The learned District Judge was certainly right in taking into consideration as a matter of great weight the fact that the majority of the creditors were in favour of the scheme. It happens that in this case both the insolvent and all the creditors are Nattukottai Chettis; and, as has been represented for the respondents here, it may be supposed that they are persons quite capable of guarding their own interests. But against that we must notice that none of those creditors except one had a claim anywhere approaching that of the sixth creditor in magnitude; and we cannot ignore the possibility that the other Chetti creditors may have been influenced in accepting the scheme by pity or friendship or what they regarded as good policy in the matter. As for the suggestion that, if the Official Receiver had administered the estate, there would have been great delay, that was a matter within the control of the Court and the Official Receiver as an officer of the Court. I do not think the learned District Judge should have paid very much attention to that. Nor should he have regarded it as of serious weight that, if the Official Receiver administered the estate, there would be a small commission to be paid upon his dividends. That is part of the ordinary machinery of the Court, which is

not to be set aside for any such consideration. As for the offer which the learned District Judge made to the sixth creditor, it has been explained to us that in this particular case the sixth creditor was not in a position to take advantage of that offer. It is admitted that only one part of the assets of the insolvent was immovable property in this Presidency. That is a valuable house in Karaikudi. The rest of the assets were either land in Burma or amounts due from a business which the insolvent was carrying on in Burma or amounts due from another business in Guroon in the Malay States, in which he was the chief partner, having a five-eighths share, or, as is suggested for the sixth creditor, money which the insolvent had secreted somewhere. It is quite clear in the circumstances that the sixth creditor would have had very great difficulty in realizing any part of the assets except the house in Karaikudi and possibly the land in Burma unless the insolvent was willing to help him, which it was not at all likely he would do. And apart from that I do not think that the learned District Judge was justified in putting the sixth creditor on any such terms. The sixth creditor made no offer to take over the assets on those terms, and he certainly could not be required to do so. The business of the Court in an insolvency is to see that the assets are administered through the ordinary and proper machinery of the Court, not to require nor even invite any creditor or other person to take over the estate on certain terms and carry out the functions of the Court for it.

Those were the considerations which the learned District Judge took into account when he approved of the scheme. But, although it was quite proper for him to be influenced by the wish of the majority of the creditors in respect of this proposed scheme, he ought,

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I think, to have realised that the wish of the creditors by itself was by no means a sufficient reason for approving of the scheme in the circumstances. That was clearly brought out by the Court of Appeal in *Ex parte Merchant Banking Company of London*. In *re Durham*(1) and *In re Burr*. *Ex parte Board of Trade*(2). Under our own Provincial Insolvency Act, section 38 restricts the power of the Court to approve a composition scheme by certain conditions. If those restrictive conditions are fulfilled, the last clause of the section provides that the Court may then either approve or disapprove of the scheme. That means that, although the section has provided that no scheme shall be approved unless the requisite majority of the creditors consent, still, even if there is that consent of the creditors, the Court must exercise its judicial discretion before approving of the scheme, that is a discretion founded on sufficient reasons after considering all aspects of the case and ascertaining the facts so far as possible. Now it appears to me that in this case there were a number of circumstances which the learned District Judge overlooked. There is nothing in his order to suggest that he took into consideration the facts that the Official Receiver had reported against the scheme and had represented that it was not beneficial to the creditors and not a proper scheme to be approved. Nor is there anything, secondly, in the learned District Judge's order to show that he himself considered whether this was a fair scheme. The scheme was that the whole of the insolvent's assets should be assigned to the seventeenth creditor, who should pay the other creditors 6 annas in the rupee. Now the insolvent had represented that his assets were worth a lakh and a half. I do not think that, as has been

(1) (1881) 16 Ch. D. 623.

(2) [1892] 2 Q.B. 467.

suggested for him, we can take it that that is likely to have been an exaggeration of the value of his assets, as he gave that value not only at the beginning of the insolvency proceedings but when he was putting forward his first scheme. If his assets were worth a lakh and a half, they would have produced about nine annas in the rupee on the proved debts. The learned District Judge does not appear to have observed that fact. Nor does he appear to have made any attempt to satisfy himself that the assets disclosed by the insolvent, making up a lakh and a half, were all the assets available. Thirdly, the learned District Judge has not commented upon the fact that the insolvent's conduct in connection with the insolvency had been bad, and he does not appear to have taken it into consideration. The records show that after his adjudication the insolvent failed to appear before the Official Receiver when summoned to do so and assist him in the administration of the estate. That is a very serious matter. Besides that the insolvent professes not to have any accounts or documents to show what was due to him from that Guroon business, in which he had a five-eighths share. He said vaguely that about Rs. 25,000 was due from it. It is very difficult indeed to believe that the insolvent, a Nattukottai Chetti money-lender, who had a preponderating share in a business in the Malay States, where he admits he never went himself, did not keep regular and complete accounts of what was due to him from that business and could not have produced them before the Official Receiver. One of the most serious offences which have to be taken into consideration when there is a question whether an insolvent should be discharged or a scheme should be approved is the failure to maintain proper accounts. Apart from the Guroon business the insolvent, though he has produced accounts showing

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that about Rs. 46,000 were due to him from the business which he was conducting in Akyab, has produced no accounts of his receipts or expenditure at Karaikudi, his headquarters. He maintains that he conducted no business at Karaikudi, and there is no evidence that he actually did so. But it is highly improbable that he had no accounts of his receipts and expenditure there. The learned District Judge does not appear to have considered whether it was right that an insolvent who had behaved in this way should be rehabilitated by the approval of a scheme and the consequent annulment of his insolvency. It is certainly not for the Court to whitewash an insolvent who behaves like that and to set him on his feet again, so that he may at once start a new business. Fourthly, the learned District Judge does not appear to me to have paid due attention to the fact that the seventeenth creditor, who has taken over the whole of the assets of the insolvent under this scheme, is a very near relation of the insolvent. In the circumstances that appears to me a very suspicious thing. Fifthly, the insolvent at a very early stage in the proceedings, when he propounded his first scheme, naively admitted that his purpose and hope was that he should be enabled to start business again. Now it is one of the objects of insolvency legislation that an insolvent, who has placed the whole of his property at the disposal of his creditors for distribution in the insolvency proceedings, should after a due interval be discharged and have a chance of starting again in life, so that he can use his talents and knowledge and experience and, if he has the opportunity, start a new business. But what kind of business are we to suppose that this insolvent wanted to start? This insolvent is a money-lender, and, so far as I can gather, the business which he wanted to start as soon as this scheme was put through

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and his insolvency was annulled was a money-lending business. A man cannot start a money-lending business without some capital and some considerable amount of cash in hand. When we take those two things together, the fact that the creditor who has taken over all the assets is a very near relation of the insolvent and the fact that the insolvent proposed to start a new money-lending business, surely that raises a very grave suspicion that the seventeenth creditor was only a mask for the insolvent and that the insolvent was buying back his own assets at a profitable figure and was so making a profit out of his insolvency, the very trick against which JAMES L.J. in *Ex parte Merchant Banking Company of London. In re Durham*(1) said that Courts must be on their guard. Lastly, the learned District Judge does not appear to me to have asked himself the question of what profit would this proposed scheme be to the creditors? It would provide them with six annas in the rupee. The house at Karaikkudi was valued by the insolvent at from Rs. 75,000 to a lakh of rupees at that time. With the land in Burma and the amount of Rs. 25,000 which the insolvent said was due to him from his Guroon business, even if there had been nothing else of value in his estate, more than six annas in the rupee should have been paid by the Official Receiver. If the insolvent had remained an undischarged insolvent, he would have had an inducement to assist the Official Receiver in getting in the rest of his assets for the further benefit of the creditors, an inducement which disappeared entirely when the scheme was approved.

In those six respects it appears to me that the learned District Judge has failed to take into consideration important aspects of the matter; and he has

(1) (1881) 16 Ch. D. 623.

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fallen into an error in looking at the case as if the approval of the creditors to the proposed scheme was an overmastering reason to influence him. In my opinion the learned District Judge was not well-advised in approving of the scheme, and in the circumstances it was not a scheme which should have been approved.

If this appeal had come before us within a short time after the learned District Judge's order had been made, I should have had no hesitation in expressing my opinion that his order should be set aside. But it happens that we are hearing this appeal four years after the learned District Judge's order. That unfortunate delay and its consequences cannot be ignored when we are considering what is the best course to be adopted now. All the creditors who have proved their claims except the appellant here, the sixth creditor, took their money under the scheme four years ago and have been enjoying it. The seventeenth creditor paid that money under the order of the Court, and, if the District Judge's order is now set aside, he will be entitled to claim restitution with interest on the amounts that he paid. To upset the payments made to all those creditors four years ago in that way would be likely to lead to confusion; and it is represented to us that there might be considerable difficulty in working it out. One of the creditors, we are told, has been adjudged an insolvent; others are dead, and their representatives have not been brought on record. Obviously, there would be great difficulties and possibly considerable hardship if all that was now to be upset. But, if we were assured that the assets now available would produce six annas in the rupee, I am not sure that I should think that enough to prevent me from proposing that the District Judge's order should be set aside. However, we have to remember that all this

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time has elapsed and that claims which the insolvent might have pursued in 1926 may not be of any avail at this date. And apart from that the main asset in this country, the house at Karaikkudi, we may not unreasonably fear in consequence of unfavourable times has fallen very much in value, and we are not at all sure that it will realize anything like Rs. 75,000 to-day. So, whatever we may think about the propriety of the learned District Judge's order made in November 1926, there are obvious difficulties in trying to put the clock back; and, if we attempted it, we might be acting unjustly to the creditors in trying to put right what the learned District Judge did wrong in 1926. I regard it as a very unfortunate feature of the case that this insolvent should have been freed by reason of the annulment of his insolvency on the approval of such a scheme as this. But the law is that, if the scheme is approved, *ipso facto* the insolvency is ended; and, although the insolvent may have got a most undeserved advantage in that way by having his scheme approved, we could not properly at this date set that right by anything which would be unjust to his creditors. In the circumstances, though with considerable regret, it appears to me that we cannot properly interfere with the learned District Judge's order at this date. But I think it will be proper that we should require the costs of the sixth creditor in this appeal to be paid by the seventeenth creditor and the ex-insolvent.

ANANTAKRISHNA AYYAR J.—I entirely agree. I wish however to add a few words of my own, because I think that the learned Judge's order does not disclose that due weight has been attached to the provision of law that the responsibility of sanctioning a composition is on the Court. The learned District Judge has given three reasons in support of his order. The second of

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the reasons, namely, that administration through the agency of the Official Receiver is likely to cause undue delay should not be taken to be a circumstance peculiar to this case. If the learned Judge thought that any peculiar circumstances existed in this case, which were likely to cause undue delay, the remedy was in his own hands.

Another reason mentioned by the learned Judge, namely, that the sixth defendant, to whom a similar offer was made, was not prepared to accept the same, is in my opinion no ground at all by itself for approving the scheme proposed by the insolvent. Every creditor is *prima facie* entitled to have the estate of the insolvent administered in the manner prescribed by law through the agency of the Court. There are manifest advantages accruing to creditors by the said course being adopted. The Official Receiver is given special powers and facilities which are not available to the ordinary creditors. Therefore, to draw any inference from the circumstance that a creditor of the insolvent to whom an offer was made to take over *en bloc* all the assets of the insolvent declined to accept such an offer is by itself no ground for holding that the proposed scheme is beneficial to the general body of creditors. I think that the main consideration which weighed with the learned Judge was the first reason assigned by him in his order, namely, that the scheme was approved by a majority of the creditors of the insolvent. I think that the learned Judge has attached too much weight to that circumstance in this case. No doubt, in the absence of consent by the statutory majority with reference to number and amount of the debt, an arrangement like the one mentioned in section 38 could not be accepted by the Court. But such consent is only one of the many facts that the Court would have to take

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into consideration. No doubt it is an important circumstance to be taken into account. But at the same time it is material to remember that the consent of the majority of the creditors referred to in the section is not the consent of the majority of all the creditors to whom the insolvent owes debts. It is only the consent of the majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader before the Court. No doubt, if all the creditors of an insolvent were to agree to any particular course, there is ordinarily an end of the matter. The Court may take it for granted that nothing better could possibly be done in the case, and may straightaway sanction the proposal, unless the insolvent had some very good grounds to urge to the contrary. But the consent of the statutory majority mentioned in the section is not the same as the consent of the real majority of all the creditors of the insolvent. Apathy of creditors to go to Court in matters relating to insolvency is well-known. In fact, even in England learned Judges had to remark that creditors generally would rather like to take the chance of getting whatever they could than take active steps and contest matters in Court. In *Ex parte Campbell*. In *re Wallace*(1), this is what BRETT M. R. said with reference to the general attitude taken by the creditors there :

"It is not generosity on the part of creditors, it is mere laziness ; when they think a debt is a bad one they would rather write it off at once than take any trouble about the debtor's estate."

That being so, the Indian Act specifically provides that the responsibility in the matter of approving a composition proposed by the insolvent is upon the Court. It may be asked why the Court should trouble

(1) (1885) 15 Q.B.D. 213, 217.

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itself when the majority of creditors as mentioned in section 38 agree to a proposal. I have given one reason why the Court should really judicially consider the matter in spite of the above circumstance. A statutory majority does not really mean a majority in fact of the number of creditors either as regards number or as regards the amount of their debts. In England I find that a notion prevailed at one time that, if a majority of creditors agreed to a composition, the Court had nothing further to do in the matter but to sanction the same. In *Ex parte Merchant Banking Company of London*. In *re Durham*(1), that was the view entertained by BACON C.J. At page 630, we find the following:—

“There is no part of the Act of Parliament, and no feature in the administration of bankruptcy, which says that the voice of a creditor, voting in a minority, shall be heard against a resolution of a majority.

There is no principle, reason, or authority suggested why the unquestionable power of the majority to decide upon what is best for their interests should be overruled by the Court, or any notion that the Court can make a better bargain for them than they can make for themselves.”

The Court of Appeal had to consider the correctness of that position on appeal from the decision of BACON C.J. In delivering the judgment of the Court of Appeal, JESSEL M.R. observed at page 635 that the rule laid down by the learned Chief Judge was not the correct rule. After observing the practice which prevailed in the Chancery Division, when the Court is called upon to administer estates of infants, or when it is called upon to approve or sanction arrangements come to under the Companies Act or under the Bankruptcy Act, the learned Master of the Rolls stated as follows:—

“I never heard the proposition doubted that where the approval or sanction of the Court is required—whether in an

administration suit on behalf of infants or persons incapacitated, or in a partnership suit where there is a sale of assets, or under the Companies Acts, where it is of constant occurrence to sell assets or to approve of arrangements—that it is the duty of the Judge fairly to investigate the objections brought before him to the proposed arrangements, and to give his opinion upon them judicially, of course, and with sufficient reasons. I never heard that proposition doubted. Therefore, on general principles, unless there is some decision to the contrary, I should say that this section means what it says, that the resolution of the creditors is to be subject to the approval of the Court, to be given or withheld according to the weight and sufficiency of the reasons which are brought before the Judge to induce him to give or withhold that approval.”

The other learned Judges also gave similar reasons why the Court should not blindly accept the proposal made by the majority. In Halsbury's Laws of England, Vol. II, page 81 (paragraph 125), this is how the law is stated:

“The wishes of the creditors may also be regarded, but they are not to override the discretion of the Court.”

It therefore seems to me that in this, as in other matters, that arise in the administration of an insolvent's estate, the wishes of the creditors, though undoubtedly an important matter to be taken into account, are by no means to be taken as conclusive or in any way as relieving the responsibility that rests upon the Court to see that any order it passes, whether in the matter of approving a scheme or otherwise, is supported by the evidence on record and is clearly for the general benefit of the creditors of the insolvent. The same view was held in *In re Burr*. *Ex Parte Board of Trade*(1). I do not however propose to quote passages from that judgment.

It is thus clear that the learned Judge in this case has, in my opinion, attached too much weight to the

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(1) (1881) 16 Ch. D. 323.

(1) [1892] 2 Q.B. 467, 473, 477.

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circumstance that a majority of creditors of the insolvent accepted the proposal before the Court, and did not duly consider the other circumstances in the case.

Having come to the conclusion that the Court has also to consider the other evidence in the case and the other circumstances disclosed by the record, I think it is clear that some prominent facts have not been duly considered by the learned Judge. The insolvent is a Nattukottai Chetti. He is a businessman. He has got money-lending, etc., businesses in Arakkan and Guroon. His case is that he never went outside the Madras Presidency, and yet he does not produce any accounts of the Guroon business. The business at Guroon is carried on in his name. He owns 5 out of 8 shares in the same. It is absolutely certain that the insolvent would have received, in the usual course of business, statements of accounts from time to time with reference to the Guroon business. He has not produced any of those papers or accounts. He had the audacity to state, in the affidavit that he filed in Court, as follows: "I apprehend that my agents and partners in Arakkan and Guroon will never show any response to the mere letters which the Official Receiver or I may write to them." I think it is (to say the least) a most ill-advised statement made on behalf of the insolvent. Instead of assisting the Court he thought that he had discharged his duty by swearing to an affidavit like that and by not producing his accounts.

Again there is reference in the records that were read to us of transactions at Karaikudi. The insolvent himself admits that during the course of about 4 years he received Rs. 19,000 and odd at Karaikudi. The circumstance that no accounts of Guroon or Karaikudi are produced is a matter which ought to have been duly considered by the learned Judge before approving of the

arrangement put forward by the insolvent. For ought one knows, there may be (or ought to have been) some cash available at Karaikudi, if the accounts had been produced. Without knowing more about the state of the business at Guroon, the Court could not properly pass an order approving or disapproving of the arrangement that was proposed by the insolvent. The creditor who agreed to purchase the whole concern was a near relation of the insolvent. In the absence of accounts, it was not possible to fix a fair price. The Official Receiver in his report has urged some reasons against accepting the proposal.

These are undoubtedly very relevant considerations if we look at the thing from the point of view of the creditors generally. In considering their effect on the insolvent, the debtor, it is necessary to see whether a person, who has been carrying on large business, and who has not produced all the material accounts, should be given a discharge so that he may again set up business at once. The effect of accepting the composition arrangement would be, under section 39, to annul the adjudication, with the results that would follow from the same. Non-production of accounts has been declared by Judges, time after time, to be the most serious offence that a trader could commit, especially in matters relating to insolvency. In *Ex Parte Campbell*. In *re Wallace*(1), BRETT M.R. made the following observation:

"In my opinion, the not keeping of books is one of the greatest offences which can be committed by a trader. It is said that it is a very common thing for traders not to keep books; it may be so in the case of traders who become bankrupt. It shews the utter recklessness of a man who does so; it shews that he is carrying on business with an utter disregard of the interests of any one but himself."

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Therefore, if as a matter of fact the insolvent did not keep accounts, that circumstance shows the recklessness of the person in the matter of carrying on his business. If, on the other hand, he kept accounts but did not produce the same, then the Court should not be too ready to help such insolvents in the matter of getting their adjudications annulled. Having regard to the relationship between the insolvent and the seventeenth creditor, and having regard to the extreme anxiety shown by the insolvent to start a fresh trade which he could do only after the scheme is approved by the Court, it seems to me that the present is a case where the Court should very carefully scrutinize the proposal before sanctioning the same. That persons in the position of the present insolvent should not be too readily set at large, with a view to start fresh trade at once, was the opinion entertained by some learned Judges in England; and, in *In re Burr. Ex Parte Board of Trade*(1), this is what Lord ESHER M.R. stated with reference to what should be the guiding principle of the Court in such matters (though mere delay in granting discharge might not at all—by itself—be sufficient punishment to such insolvents):—

“It would be of the worst possible example if he could escape from those consequences, and obtain his discharge without the delay which would be certainly imposed if the bankruptcy proceedings were to go on, even if he were to pay more than 7s. 6d. in the pound.”

Courts are entitled to have regard to commercial morality and general public interests in sanctioning composition and schemes of arrangement proposed by the insolvents; see *In re Flatau. Ex Parte Official Receiver*(2) and *In re Hester. Ex Parte Hester*(3). See also Halsbury's Laws of England, Vol. II, page 80. For

(1) [1892] 2 Q.B. 467, 475.

(2) [1893] 2 Q.B. 219.

(3) (1889) 22 Q.B.D. 632, 639.

the above reasons, I am inclined to think that the order passed by the learned District Judge does not duly take into consideration those matters; and, under ordinary circumstances (not complicated by effects of delay and intervening circumstances), it seems to me that this is a case where we should interfere with the order passed by the lower Court. But, in disposing of the appeal before us, we have to remember that four years have elapsed from the date of the lower Court's order, and in the interval the seventeenth defendant would naturally have been dealing with the assets and business of the insolvent and with the debts, etc., due to him. It is not clear to me that interfering with the lower Court's order at this stage in this case would ultimately materially benefit the general body of creditors. In these special circumstances, the appeal has to be dismissed. I agree in the order as to costs proposed by my learned brother.

[Civil Miscellaneous Appeal No. 361 of 1925 was dismissed without costs.]

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APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Sundaram Chetti.

1931,
February 17. IN RE APPACHI GOUNDAN (IN P.R.C. NO. 20 OF 1930 ON THE
FILE OF THE COURT OF THE STATIONARY SUB-MAGISTRATE
OF PALLADAM, FIFTH ACCUSED).*

*Code of Criminal Procedure (Act V of 1898), sec. 435 (4)—
“Made”—Meaning of—Not only “made” but “entertained and decided”—Revision petition to District Magistrate against order of Sub-Magistrate discharging one of several accused, rest having been committed to the Sessions—Endorsement by District Magistrate that application to Sessions Judge convenient—Petition withdrawn and another presented to Sessions Judge—Latter whether competent.*

Where a petition was presented before a District Magistrate to revise the order of a Stationary Sub-Magistrate who had discharged one amongst several accused persons, the rest having been committed to the Sessions by him and the District Magistrate made the endorsement “As I am informed that the records are in the Sessions Court and the time is too short to get them to enable me to consider this case, I think it would be convenient if this application were presented to the Sessions Judge” on the petition, and the petition was thereupon withdrawn, and another petition was presented to the Sessions Judge, *Held*, that the petition to the Sessions Judge was competent, as the word “made” in section 435 (4) of the Code of Criminal Procedure (Act V of 1898) should be construed to mean not only “made” but “entertained and decided”.

CASE referred under section 438 of the Code of Criminal Procedure, 1898, for the orders of the High Court, by the Sessions Judge, Coimbatore, in his letter D. No. 1032, dated 13th February 1931.

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

* Criminal Revision Case No. 120 of 1931.

JUDGMENT.

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GOUNDAN,
In re.

Before the Stationary Sub-Magistrate of Palladam there were six accused persons charged with the murder of one Narayana Goundan on the 27th of September last. Of these, five accused were committed to the Sessions but the fifth accused was discharged by him. As, in the opinion of the prosecution, the same evidence which established a prima facie case against the five accused also did so against the fifth accused, an application was made to the District Magistrate to revise the order of the Stationary Sub-Magistrate. When the petition was put in on the 24th January last the District Magistrate dealt with it in the following manner as will appear from his endorsement on the petition, “As I am informed that the records are in the Sessions Court and the time is too short to get them to enable me to consider this case, I think it would be convenient if this application were presented to the Sessions Judge”. After that the petitioners thought that the better course would be to withdraw the petition and accordingly the petition was withdrawn and another petition presented to the Sessions Judge of Coimbatore. When the matter was gone into by him objection was taken by the Advocate for the fifth accused that the Sessions Judge was not entitled to hear the petition by reason of section 435 (4) of the Code of Criminal Procedure which states :

“If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.”

And it was argued that, as an application had been made to the District Magistrate under section 435, Code of Criminal Procedure, the Sessions Judge had no power to entertain a similar application. The learned Sessions Judge has in considering that objection taken

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the literal meaning of the word "made". In his view when the application was presented it was made, notwithstanding the fact that the District Magistrate declined to go into the merits of the application and said that the more convenient course would be to re-present the application to the Sessions Judge. We are unable to take the same view as the learned Sessions Judge has taken. We think that, particularly when the facts of the case are applied to the consideration of the subsection, the word "made" means not only "made" but "entertained and decided". We are of the opinion that making an application does not merely mean presenting a petition to the Magistrate or the Sessions Judge but it must mean something more, i.e., that the application must be heard and determined. In this case the facts are very strong. It was much more convenient in the opinion of the District Magistrate for the Sessions Judge to entertain the application; otherwise he would have entertained it himself. We certainly think that it would be a very odd state of affairs if, after the Magistrate acted in the way he did, no further steps could be taken by the petitioners to revise the order of the Stationary Sub-Magistrate. That, in our opinion, is clearly wrong. We are of the opinion that it was open to the petitioners to present an application to the Sessions Judge and that it is open to the petitioners to re-present the same application to the District Magistrate. We accordingly make the order that the District Magistrate is to take this application again on his file and dispose of it according to law.

B.O.S.

APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice
Bhashyam Ayyangar.

C. KANNAMMAL AND TWO OTHERS (PLAINTIFFS), APPELLANTS
IN BOTH, 1930,
November 30.

v.

KANAKASABAI MUDALIAR alias MADURAI MUTHU
MUDALIAR (DEFENDANT), RESPONDENT IN C.C.C. APPEAL
No. 30 OF 1927.

JAYALAKSHMI AMMAL (DEFENDANT), RESPONDENT
IN C.C.C. APPEAL No. 31 OF 1927.*

Madras City Tenants' Protection Act (III of 1922)—"Building"
—Shed erected on land belonging to another, used as
firewood depot—Whether included in term—Applicability of
Act—Restriction of scope of Act by preamble—Attitude of
mind referred to in preamble—Whether duty of deciding
imposed on Court—Whether such attitude, test of possession
of legal rights.

A shed, erected on land belonging to another and used as a firewood depot before the coming into force of the Madras City Tenants' Protection Act (III of 1922), is included in the term "building" as defined in the Act and the owner of the shed is entitled to the protection of the Act.

In order to restrict the scope of an Act by the terms of its preamble the Court must be satisfied that there was an intention on the part of the Legislature that its scope should be so restricted.

The text of the Madras City Tenants' Protection Act (III of 1922) cannot be read subject to its preamble so as to impose on the Courts the difficult, if not impossible, duty of deciding the presence of such an attitude of mind as is referred to in the preamble. It would not be in any degree usual to make such an attitude of mind a test of the possession of legal rights.

APPEALS against the judgments of the Court of the City Civil Judge, Madras, in Original Suit Nos. 428 and 429 of 1926.

* City Civil Court Appeals Nos. 30 and 31 of 1927.

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K. S. Krishnaswami Ayyangar for appellants in both.

S. Balasingam Satya Nadar for respondents in both.

JUDGMENT.

CURGENVEN
J.

CURGENVEN J.—The plaintiffs are common to the two suits out of which these appeals arise, separate defendants being sued in ejectment. The defendants pleaded the provisions of the Madras City Tenants' Protection Act, and the learned City Civil Judge has accepted this plea and dismissed the suits. The plaintiffs therefore appeal.

In each case a rental agreement was executed in 1921 for a term of five years, the lessee undertaking at the expiry of that time to deliver vacant possession to the plaintiffs. The evidence shows that the sites were used as firewood depots, and the case of each defendant is that there was a building on the suit land long before the date of the rental agreements. Whether or not therefore the undertaking to deliver up the land as received by the tenant be held to amount to such a stipulation as is provided for by section 12 of the Act as to the erection of buildings, that provision, it is contended, cannot apply to the facts of the present cases. The evidence that there were buildings on the land before the execution of the leases is in our view quite incontestable, but it is unnecessary to discuss it because the plaintiffs' witnesses themselves speak to it. We agree with the lower Court in being unable to accept their story that the buildings were removed immediately before the agreements were executed and re-erected afterwards. The only reason suggested is that the Act was then in prospect, but the evidence itself is interested, uncorroborated, and seems clearly designed to escape the provisions of the Act. So far as appears, the

firewood business continued uninterruptedly and there is no reason therefore to suppose that the sheds used in connexion with it were taken down and put up again. Section 12 cannot therefore, in our view, have any application. Nor, in view of the very wide definition of "building" which the Act contains, are we able to say that the sheds are not comprised in that term.

The question has been raised whether in cases of this class, where the building is of so inexpensive a description, recourse may be had to the terms of the preamble to the Act in order to deprive the defendants of its protection. The preamble opens as follows:—

"Whereas it is necessary to give protection to tenants who in many parts of the City of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land."

It is argued that it is only tenants who can establish that they constructed their buildings in the hope alluded to, whom the Legislature intended to protect by this special enactment. Now it is well settled that the terms of a preamble may be resorted to in two classes of cases. The first class is where the text of the statute is susceptible of different constructions, and it has not been suggested that any such difficulty arises here. Apart from such discrepancy as is to be found between the preamble and the text, the Act itself is perfectly clear and straightforward. The second class of cases is thus described by Craies, Statute Law, 3rd Edition, page 183:

"If very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply."

That is to say that in some cases it may be permissible to control the scope of the enactment by the terms of the preamble. The text-writer goes on to cite

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two English cases in which such a course was adopted. The first was that of *L'Apostre v. Le Plaistrier* cited in *Copeman v. Gallant*(1) where, the preamble showing that the statute related to the goods of bankrupts, a reference in the body of the Act to any goods or chattels was construed as restricted to the bankrupts' property. So in *Brett v. Brett*(2) where the preamble only professed to deal with wills and codicils devising real estate, the expression "any will or codicil", whenever used in the Act, was held to mean only a will or codicil which devised real estate. On the same principle where the title of the Act showed that it related only to elementary schools, references to schools in the body of the Act were held in *Reg v. Cockerton*(3) to mean elementary schools. It may be said that cases such as these also depend upon the existence of an ambiguity, although it is not the meaning of the Act itself which is doubtful but of the Act when read with the title or preamble, and where the enactment is sufficiently explicit of itself it may not be permissible to look into the preamble in order to obtain a gloss upon it. There can be no doubt indeed that many instances could be found of the text of an Act going beyond its preamble. This was recognized in *Nga Hoong v. The Queen*(4). In *Ganesh Krishnaji v. Krishnaji*(5) it was held that the Deccan Agriculturists' Relief Act, although so styled and although the preamble showed that the Act was intended only for the relief of agriculturists, yet made provision in section 3 for certain suits not relating to agriculturists. Similarly, in *Queen-Empress v. Indarjit*(6) the Workmen's Breach of Contract Act (XIII of 1859) was held to have a wider

(1) (1716) 1 P.Wms. 314; 24 E.R. 404. (2) (1826) 3 Add. 210; 162 E.R. 456.
(3) [1901] 1 K.B. 726. (4) (1857) 7 M.I.A. 72.
(5) (1889) I.L.R. 14 Bom. 387. (6) (1889) I.L.R. 11 All. 262.

scope than the language of its preamble would show. It is, I think, indisputable that before restricting the scope of an Act by the terms of its preamble, the Court must be satisfied that there was an intention on the part of the Legislature that its scope should be so restricted and, in fact, that the Legislature would have agreed, had the point been so put, that the passage relied upon in the preamble should form part of the text of the Act. It is not open to the Court to speculate regarding the intentions of the Legislature or to frame its decisions in conformity with what it would itself have done had it been legislating. Now in the present instance, if the preamble had declared it necessary to protect a certain clearly defined class of tenants, it might be reasonable to hold that, although the text is silent, there was an intention so to restrict it; though even then the meaning of the Act would not be so clear as if the restriction had appeared in the body of it. But the expression "tenants who in many parts of the City of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land" is as far as possible from defining a class, and I think it very doubtful whether any Legislature can have intended to impose on the Courts the difficult, if not impossible, duty of deciding on the presence of such an attitude of mind. Nor would it be in any degree usual to make such an attitude of mind a test of the possession of legal rights. It seems to me more probable that the Act was passed in its wide terms because they were the only workable terms, and in the hope that it would approximately remedy the existing evils and hard cases would be few. While, therefore, it can hardly be doubted that the Act must sometimes work hardship upon landlords, I do not

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think it is permissible to give them relief by recourse to this method of construction.

I must accordingly hold that the defendants could claim the benefit of the Act and that the plaintiffs failed to comply with its terms as regards notice. The appeals are accordingly dismissed with costs.

BHASHYAM
AYYANGAR J.

BHASHYAM AYYANGAR J.—I wish to add a few words on the Madras City Tenants' Protection Act (III of 1922), which has come in for construction in these cases. It is an exclusively retrospective enactment as it applies only to tenancies created before its commencement. Its preamble shows that the Legislature set about it "to give protection to tenants who in many parts of the City of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land." But it is found that the actual provisions of the Act are far too wide and unqualified. Before proceeding to consider them the following definitions of building, land, and tenant given in the interpretation clause, that is, section 2, have to be stated :

"Building" includes a house, out-house, stable, latrine, shed, hut and any other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever.

"Land" does not include buildings.

"Tenant" means tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy.

Now going to the body of the Act its important sections are only sections 3, 9, and 12. The other sections are either immaterial for our present purpose or are merely subsidiary. The effect of sections 3, 9, and 12 may be summarized thus: except in cases where a tenant of land has first bound himself by stipulations in writing registered as to the erection of buildings

and then erected the building (section 12), every tenant of land who has erected a building on it and whom the landlord seeks to eject from the land shall have the right to recover compensation equal to the value of the building (section 3), or at his option, the right to acquire the land from its owner for the lowest market value it bore within the next preceding seven years (section 9). It is noteworthy that these provisions stand absolutely unqualified. The area of the land, the period or the avowed purpose of the lease, the size or character of the building put up by the tenant, none of these or similar considerations are made to count for anything. Even if the tenant had erected the building without or against the consent of the landlord, the Act would appear to permit the former to acquire the land through its instrumentality. The landlord might have himself paid much more for the land than its minimum market value during the next preceding seven years, still he could recover no more than that minimum from the tenant for parting with his property. I found it hard to believe that the provision in section 9 which is capable of working so much injustice and hardship on the landlord and which so partakes of the nature of expropriation could have been intended to apply to all tenancies of land created before the Act. I was accordingly inclined during the hearing to the view that its application should be confined to the class of cases contemplated in the preamble, that is, to cases where the tenant put up his building under circumstances from which it may reasonably be inferred that he did so in the hope or expectation that he would not be evicted from the land so long as he paid a fair rent for it. But on subsequent consultation with my learned brother as to how far the preamble of an Act can be held to confine the scope of its express provisions,

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and having regard to the vagueness of the preamble in question, I am not sure that the view entertained by me is free from doubt. On the footing that the text of this Act cannot be read subject to its preamble, the view taken by my learned brother in the judgment just pronounced is, if I may say so with respect, unexceptionable. I accordingly agree with the order made by him though still not without some hesitation.

B.C.S.

APPELLATE CIVIL.

Before Mr. Justice Jackson.

1931,
March 31.

CHINNA VEL NAICK (SECOND DEFENDANT), APPELLANT,

v.

VENKATARAMA NAICK AND ANOTHER
(PLAINTIFFS 1 AND 3), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 182 (5)—Step in aid of execution—Application in accordance with law to take—Limitation if saves—Actual execution prayed for in application not in accordance with law.

An application in accordance with law to take a step in aid will save limitation, although the actual execution prayed for in that application may not be in accordance with law.

APPEAL against the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 12th February 1930, and made in Appeal Suit No. 69 of 1929 (Appeal No. 190 of 1929, District Court, Ramnad) preferred against the order of the Court of the District Munsif of Manamadura, dated 28th January 1929, and made in Execution Petition No. 801 of 1928 in Original Suit

* Appeal against Appellate Order No. 60 of 1930.

No. 911 of 1912 on the file of the Court of the District
Munsif of Sattur.

K. Rajah Ayyar for appellant.

V. K. John and S. Nataraja Nadar for respondent.

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JUDGMENT.

The sole point for determination in this second appeal is whether Execution Petition No. 522 of 1927 is an application in accordance with law to the proper Court for execution or to take some step in aid of execution. The facts leading up to this essential point are stated by the District Munsif in his fourth paragraph.

The application is to bring on to the record the heir of the second plaintiff, and the legal representatives of the first defendant, and then to realize the decree on behalf of the first plaintiff. Apparently it was alleged in the body of the application that the first had obtained an oral transfer of the right of the second plaintiff, and since decrees cannot be orally transferred the execution petition was finally dismissed as invalid. It is therefore argued by the appellant that there was no application in accordance with law. But it must be noted that apart from the transfer the first plaintiff had his own right under the decree and was entitled to apply to the proper Court to have the necessary legal representatives brought on to record. So far the application is in accordance with law, and the bringing on of these legal representatives was a step in aid of execution. It is argued however that this bringing on would only be a step in aid of execution in so far as it is a step in aid of the application for execution which was invalid, as though the article ran, an application in accordance with law for execution or to take some step in aid of the aforesaid application for execution in accordance with law. The article does not run in that way, and in

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construing the statute of limitation it is a recognized practice not to read into it more than it contains. I should hold therefore that the lower appellate Court has rightly decided the matter.

It remains to see whether this view is shaken by the relevant case law.

The appellant relies upon *Abdul Kharim Saheb v. Lakshmanaswami*(1), where it is laid down that an execution petition cannot be a step in aid of itself. As far as that goes it seems to be rather against the appellant's argument that the step in aid of bringing on legal representatives was exclusively a step in aid of this very petition. It was a step which aided the execution as a whole.

Ramanathan Chettyar v. Ragavendra Row(2) lays down what no one disputes that an oral assignment is invalid. The only way the respondent seeks to justify Execution Petition No. 522 is that it contains the prayer to bring on legal representatives.

Kailasa Pandaram v. Ramanuja Naidu(3) is another case of an admittedly invalid application, not because of oral transfer but because of transfer of a minor's interest without the Court's consent.

The respondent relies upon *Adhar Chandra Dass v. Lal Mohun Das*(4). There the decree-holder was seeking to execute an attached decree, and, as in the present case, also sought to bring on legal representatives. The Court held that the execution of an attached decree was not necessarily unlawful (anticipating Order XXI, rule 53) and also held (page 780), in regard to that part of the application which asked for the substitution of the heirs of the judgment-debtor in place of the judgment-debtor, that without bringing them before the Court the

(1) A.I.R. 1928 Mad. 440.
(3) (1917) 39 I.C. 950.

(2) (1912) 16 I.C. 807.
(4) (1897) I.L.R. 24 Calo. 728.

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judgment-creditor could not have proceeded with his execution proceedings. "His application for that purpose appears to me to be a step in aid of execution in accordance with law." Mr. Rajah Ayyar argues that MACLEAN C.J. would never have written in these terms unless he had first found that the application to execute an attached decree was valid. I do not think so. The learned Chief Justice is evidently considering the application as of a double nature in two parts. He is prepared to hold that the part praying for execution of an attached decree is lawful; but, even if it were not, and the application were disallowed, still the part of it which seeks to bring on legal representatives is none the less a step in aid of execution. This is brought out in the headnote. BANERJEE J. puts the matter more clearly. Granting, he says on page 782, that the application was not according to law, the application was not merely an application for execution, but contained a further prayer for the substitution of the legal representatives of the deceased judgment-debtor in his place . . . an incidental step which was a necessary step for the execution of the decree. That is clearly against the appellant's present contention. Moreover, if the only application that can save the bar of limitation is an effective application for execution, there is no apparent reason for the alternative "or to take some step in aid of execution" being inserted in the article. The article seems to be framed precisely in order to admit a case like the one under consideration where the decree-holder has put in an application in accordance with law to the proper Court to bring on legal representatives as a step in aid to execution. It is idle for the appellant to contend that the Court must disregard the application to take a step, and must look only to the application for execution, when the statute in terms

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requires the Court to consider this alternative application to take some step in aid.

Put concisely, the appellant's view is: the application for execution must first be considered, and if that is contrary to law, nothing more need be looked at.

While the view of the respondent is: consider the application to take a step in aid, and if that is according to law, the further prayer for execution does not matter.

Agreeing with the latter view, I dismiss the appeal with costs.

A.S.V.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Waller, Mr. Justice Reilly and
Mr. Justice Anantakrishna Ayyar.

IN RE AN ADVOCATE*.

1931,
March 10.

Indian Bar Councils Act (XXXVIII of 1926), sec. 12 (3)—Case referred to High Court under—High Court—Bench of three Judges of—Jurisdiction of, to hear such a case—Letters Patent, cl. 12—Appellate Side Rules—Rule 8—Advocate—Allegation of professional misconduct against—High Court, if entitled to consider the reports and findings both of the majority and the minority of the Tribunal of the Bar Council.

In proceedings instituted against an Advocate for alleged professional misconduct, the High Court is entitled to consider the reports and findings both of the majority and the minority of the Tribunal of the Bar Council.

A Bench of three Judges of the High Court has jurisdiction to hear a case referred to the High Court by the Bar Council under section 12 (3) of the Indian Bar Councils Act (XXXVIII of 1926).

Per REILLY J.—When the essential charge against the Advocate or legal practitioner concerned is that he has committed a grave criminal offence either in connection with his professional work or entirely outside it, the proper course, just alike to him and to the public, is that he should first be tried by a criminal Court like any other man, gaining no advantage and suffering no disadvantage from his professional position. If the criminal trial ends in a conviction, then it will be for the High Court to consider under the procedure prescribed by the appropriate Act what disciplinary action should be taken. Even if the practitioner is acquitted in the criminal Court, it may be necessary in some cases to take disciplinary action against him either because he has been acquitted on a technical point or because the conduct proved against him, though not criminally punishable, merits such action. But the question of criminal guilt will be tried where it should be, in a criminal

* *In re* an Advocate.

AN
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Court. When the criminal offence alleged is trivial or only incidental to serious misconduct of another nature or it is possible or appropriate that the practitioner should be tried for the criminal offence only on the complaint of a private person, then the disciplinary proceedings need not be delayed because no criminal prosecution has been undertaken, though, if a criminal prosecution is in progress or imminent, it may often be desirable even in such cases that the disciplinary proceedings should be postponed until the prosecution has come to an end.

CASE referred to the High Court by the Bar Council under section 12 (3) of the Indian Bar Councils Act.

Notice was issued to V, an Advocate, calling on him to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court, in that he, in or about the beginning of 1925, set up a false case of payment of two sums of money, viz., Rs. 235 and Rs. 1,200, in substantial discharge of two promissory notes executed by him in February and August 1921, in favour of R.K., another Advocate of the High Court, and in support of the case got two receipts fabricated in his favour for the sums aforesaid—as if they were executed and signed by the said R.K., when in fact they were not so executed or signed—and further got two certificates of posting fabricated containing copies of letters alleged to have been posted by him to the said R.K. and purporting to bear dates, 14th June 1924 and 26th November 1924—when as a matter of fact he did not send any such letters—and he was therefore guilty of professional misconduct.

The matter had been referred by the CHIEF JUSTICE to a Committee or Tribunal consisting of three members of the Bar Council. The Tribunal held an inquiry and submitted to the High Court two reports. The report of the majority of the Tribunal was to the effect that there was very great doubt as to the truth of the charges against the Advocate in regard to the genuineness

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of the receipts, Exhibits K and K-1, and the certificates of posting Exhibits L and L-1, and their finding was that the charges against the Advocate were not proved. The finding of the minority of the Tribunal of the Bar Council was that the alleged payments of Rs. 235 and Rs. 1,200 were not made by the Advocate, that the receipts, Exhibits K and K-1, were not true, and that the certificates of posting had been altered and copies inserted on the reverse as if letters referring to the alleged payments had been despatched.

On this reference the Advocate, apart from the merits, contended, *inter alia* :—

(a) A Bench of three Judges of the High Court cannot inquire into the matter but the matter must be posted before all the Judges of the High Court.

(b) The Bench should ignore the minority report and look into the majority report alone, since there can be only one report from the Tribunal to the High Court and that can only be the majority report.

T. V. Muthukrishna Ayyar for the Advocate-General.

K. S. Krishnaswami Ayyangar for the Bar Council.

The Advocate appeared in person.

JUDGMENT.

WALLER J.—The facts have been set out at length in the finding of the Tribunal and it is not necessary for me to recapitulate them. Briefly, the questions for decision are whether—

(1) the two payments relied on by the respondent were made on the dates alleged,

(2) the receipts produced by him in support of them were given to him by the complainant on those dates,

(3) his letters of June and November 1924 and the connected certificates of posting are genuine.

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That the burden of proof is on the complainant is clear. That he is a witness, whose evidence needs corroboration, is equally clear.

[His Lordship discussed the evidence and concluded as follows :—]

I considered with care all that the respondent has said in his defence and every piece of evidence in his favour and against him. In the result, I think that only one conclusion is possible—that the payments were not made, that the receipts are forgeries, and that Exhibits L and L-1 and the letters entered on them are forgeries also. For misconduct of such gravity there can be only one penalty and that penalty must be inflicted. Respondent is removed from practice and his name is struck off the roll of Advocates. It is true, as he has pointed out, that there has been very great delay in dealing with his case, but I see no reason to suppose that it has resulted in any evidence in his favour having disappeared. He will pay the costs of the proceedings before the Tribunal and before this Court.

On the other points taken by the respondent, I concur in the opinion expressed by my brother ANANTAKRISHNA AYYAR. On the question raised by my brother REILLY, as to the inadvisability of substituting a disciplinary enquiry for a prosecution in a case of grave criminal misconduct, I see no necessity to express any opinion.

In the case before us, the only person who could order a criminal prosecution was BEASLEY J. As he declined to do so, *cadit quaestio*.

REILLY J.

REILLY J.—In this case a Committee of the Bar Council or Tribunal appointed by the Chief Justice under section 11 (2) of the Bar Councils Act has framed a charge of misconduct against the respondent, an Advocate of this Court, viz., that he “set up a false case of payment of two sums of Rs. 235 and Rs. 1,200 in

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substantial discharge of two promissory notes executed by him in favour of Mr. R.K., another Advocate of the Court, whom I shall call the complainant, and “in support of the case got two receipts fabricated” in his favour “for the sums referred to above as if they were signed and executed by the said R.K., when in fact they were not so executed or signed” and “further got two certificates of posting fabricated containing copies of letters alleged to have been posted . . . to the said R.K. and purporting to bear dates, 14th June and 26th November 1924 when as a matter of fact he did not send any such letters.” The promissory notes, to which this comprehensive and not very conveniently framed charge relates, are Exhibit A, dated 10th February 1920, for Rs. 200 with interest at 9 per cent per annum and Exhibit B, dated 29th August 1921, for Rs. 1,000 with interest at 12 per cent per annum. It is admitted that the respondent executed these two promissory notes in favour of the complainant and received full consideration as stated in them. On these notes the complainant sued the respondent in Suit No. 3990 of 1925 in the Madras Court of Small Causes. At the same time he filed Suit No. 3889 of 1925 against the respondent for Rs. 495-4-0, the amount of other alleged loans to the respondent, for which he had taken no promissory note. Those two suits were filed on 18th March 1925. A few days later, on 30th March 1925, the complainant filed Suit No. 4630 of 1925 in the same Court against the respondent for Rs. 990, the balance due on Exhibit XXII, a promissory note, dated 25th September 1921, for Rs. 1,000 without interest, which the respondent admits he executed in the complainant's favour for the consideration named. The respondent contended that the claim in this last suit was barred by limitation. In Suit No. 3990 of 1925 in respect of

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Exhibit A he pleaded a payment of Rs. 235 on 22nd December 1923, for which he produced a typed receipt, Exhibit K, purporting to have been signed by the complainant, and in respect of Exhibit B he pleaded a payment of Rs. 1,200 on 9th September 1924, for which he produced Exhibit K-1, another typed receipt, also purporting to have been signed by the complainant. In support of the first of these receipts, Exhibit K, he produced Exhibit L, a certificate of posting, dated 14th June 1924, for three letters, including one addressed to the complainant, of which what purported to be a copy appeared on the back of Exhibit L, referring to the fact that he had "almost discharged the first of these pro-notes", i.e. Exhibit A. And in support of both receipts he produced another certificate of posting, Exhibit L-1, dated 26th November 1924, for three letters, including one addressed to the complainant, the copy of which, Exhibit Y, on the back of Exhibit L-1, protested against the complainant's worrying him for "the one remaining loan of Rs. 1,000" and went on "Have I not almost discharged the first two pro-notes . . . you must not forget that it is not three months since I paid Rs. 1,200 for the second pro-note." The complainant denied the alleged payments, denied that he had signed either of the receipts, Exhibits K and K-1, and denied that he had received either of the letters mentioned in Exhibits L and L-1. Suits Nos. 3989 and 3990 of 1925 were heard by the Chief Judge of the Small Cause Court; but after the evidence had been closed the respondent applied to this Court for the transfer of those suits and also of Suit No. 4630 of 1925 from the Court of Small Causes to the Original Side of this Court. He made certain allegations of unfairness against the Chief Judge of the Court of Small Causes and also represented that the suits

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involved very serious questions between two Advocates of this Court and that their results would involve a finding of perjury against the complainant or of perjury and forgery against the respondent. In the event all three suits were transferred to the Original Side of this Court, where they became respectively Civil Suits Nos. 8, 9 and 10 of 1926. They were taken up for trial together by BEASLEY J. on 4th May 1926. The complainant and one other witness were examined on his side. The complainant was cross-examined at great length on 4th and 6th May. When his re-examination was finished the hearing was adjourned to the next day. On the next morning, before anything further was done in the suits, the respondent withdrew his defence in all three of them and confessed judgment in all, agreeing to pay a lump sum of Rs. 1,000 as costs in the three suits. On that BEASLEY J. made a decree for the amount claimed in the three suits with the costs mentioned and stated in his judgment that he would make a report to this Court in its disciplinary jurisdiction in respect of the respondent's conduct. Later on BEASLEY J. took the view that the matter was one for criminal prosecution and proceeded to hold an inquiry before making a complaint to a Magistrate under section 476, Code of Criminal Procedure. But at that inquiry it was strongly urged for the respondent that, if the matter was dealt with as one for disciplinary action, the respondent would be able to give evidence in his own behalf, which he could not do if he were prosecuted criminally; and mainly for that reason, as I understand the course of events, BEASLEY J. decided not to prefer a complaint to a Magistrate against the respondent but to report the case to the Chief Justice for disciplinary action. Eventually the matter was referred to a Committee or Tribunal of three members of the Bar Council

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on 16th March 1929. That Tribunal after holding an inquiry has submitted two reports to this Court. The report of two members of the Tribunal is that there is very great doubt as to the truth of the charges against the respondent in regard to the genuineness of the receipts, Exhibits K and K-1, and in regard to the certificates of posting, and their finding is that the charges against the respondent are not proved. The finding of the other member of the Tribunal is that the alleged payments of Rs. 235 and Rs. 1,200 were not made by the respondent, that the receipts, Exhibits K and K-1, are not true and "that the certificates have been altered and copies inserted on the reverse as if letters referring to the alleged payments had been despatched."

At the beginning of our hearing the respondent contended that the Tribunal had no power under the Act or the rules made under it to submit more than one report and that the report and finding of the majority of the Tribunal alone had any validity and alone could be considered by us. Although we did not at the time come to any finding in regard to that contention, it was intimated to the respondent that on this occasion we should not consider the report of the third member of the Tribunal against him. We now agree that, as stated in the judgment of my brother ANANTAKRISHNA AYYAR, we are entitled to consider the reports and findings both of the majority and the minority of the Tribunal; but in this case we have not considered the minority report. I may add that I agree also with the opinion of my brother ANANTAKRISHNA AYYAR in the judgment to be delivered by him on the objections raised by the respondent to the validity of the present proceedings against him.

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It will be observed that the charges against the respondent are in effect charges of very serious criminal offences. They amount at least to charges that he has abetted the forgery of two receipts acknowledging the payment of money and has abetted forgery in respect of the two certificates of posting and in respect of all those documents that he has dishonestly used them as genuine knowing them to have been forged. If he is guilty of abetting the forgery of the two receipts, Exhibits K and K-1, or of using them with knowledge that they had been forged, for either of those groups of offences alone he is liable under the Indian Penal Code to transportation for life or to imprisonment for 20 years. And for those offences, which were not connected with any professional work nor committed when he was acting in any professional capacity, we are in effect trying him in these proceedings. With great respect I do not think it would be right for me to refrain from making it clear that this procedure appears to me to be both incorrect and objectionable. Misconduct which is the subject of inquiry under the Bar Councils Act may often involve the commission of criminal offences. The criminal offence involved may sometimes be of a petty nature, such as trespass or assault, or may be only incidental to the misconduct which is the serious matter alleged against the Advocate concerned. In such cases it may often be quite unnecessary to insist that the criminal charge should be disposed of before the Advocate's conduct is investigated under the Bar Councils Act. Again the criminal offence alleged against the Advocate may be such that he can be prosecuted for it only on the complaint of a private person, which has not been made, or may be one in respect of which it is obviously appropriate that the complaint should be made by a private person and no such complaint has been made. In either

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of those cases there may be nothing improper or inappropriate in launching an inquiry into misconduct under the Bar Councils Act, although the criminal charge involved has not been disposed of. But when, as in the present case, the Advocate is accused of a grave criminal offence, for which no private complaint is required, to deal with him under the Bar Councils Act for the misconduct involved in the commission of that offence before he has been tried for the offence appears to me altogether improper. If he is guilty of the criminal offence, he should be punished for it as if he was an ordinary member of the public. If he is tried and convicted of it, then on the basis of that conviction he can be dealt with appropriately under the Bar Councils Act. But, if before he is subjected to any criminal prosecution, the offence alleged against him is made the subject of proceedings for misconduct under the Bar Councils Act, that may have very serious consequences. To begin with the Advocate will be tried in effect for the criminal offence by a procedure unknown to the criminal law on the evidence of witnesses who have never appeared before the Judges who have to decide the case. It appears to me clearly improper that, unless we are compelled to do so, we should make such a grave departure from the ordinary criminal procedure prescribed by law. In many cases such a course might be gravely prejudicial to the Advocate concerned. It is true that the Judges, though they can blast an Advocate's character by finding him guilty of the criminal offence in such a case, can impose no penalty such as is provided by the Penal Code; but that is not a sufficient reason for depriving him of the protection which the criminal law gives to an ordinary accused person. And on the contrary the finding and procedure in such an inquiry as this may well obstruct the course of justice

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and shield the Advocate from the penalty to which he is liable under the ordinary law of the land. It may well happen that an inquiry under the Bar Councils Act may result in an acquittal in a case where the ordinary course of investigation and prosecution would have ended in a conviction; and that acquittal would almost certainly save the Advocate from further prosecution on the same charge. But a much more serious aspect of the matter is that, if a Bench of this Court as the result of an inquiry under the Bar Councils Act found an Advocate guilty of the criminal offence alleged against him, it is extremely likely that he would escape the due punishment provided for his offence by the Penal Code. If he had been found guilty by a Bench of this Court, he could urge with great effect that by that he would be so seriously handicapped in any trial for the same offence before an ordinary criminal Court that it would be unjust to subject him to it. And, if he had elected to give evidence in the inquiry under the Bar Councils Act and to subject himself to cross-examination, he could, and no doubt would, claim additional shelter from any subsequent criminal prosecution on the same charge. In this country no accused person can be subjected to cross-examination, and the fact that he had been so subjected and material had been so elicited for use against him would enable him to represent himself as a most gravely aggrieved person in any subsequent prosecution, even if there were no great substance in the grievance. In the present case BEASLEY J. was induced to choose this inquiry into the respondent's conduct instead of a criminal prosecution in order that the respondent should have a chance of giving evidence and offering himself for cross-examination. It does not appear to me at all improbable that under the guise of anxiety to offer himself as a witness the

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respondent was manœuvring to shelter himself from subsequent prosecution. But, whether that was his intention when he made his representation to BEASLEY J. or not, I have no doubt that that objection would be taken to any subsequent prosecution. BEASLEY J. has stated that he was influenced in the course he took by his opinion that it is desirable that accused persons should have an opportunity of giving evidence in their own behalf. For myself I may say that a long experience of criminal trials in Courts of every grade in this Presidency leaves me in doubt whether it would be advantageous in this country to allow accused persons the right to give evidence in their own behalf. But without discussing that question I may perhaps point out with the greatest respect that the law of this land neither gives an accused person that privilege nor subjects him to the danger of cross-examination, which must go with it. That being so, with the greatest respect it does not appear to me proper to deflect the ordinary procedure on account of any such consideration. In my opinion, if an Advocate is accused of criminal offences such as those alleged against the respondent and the Judge to whose notice they come regards it as expedient in the interests of justice that an inquiry should be made into them, as I understand BEASLEY J. regarded it, the ordinary criminal procedure, which would apply to any other man, should be followed: so far as the criminal offences are concerned the Advocate should be allowed to gain no advantage nor be subjected to any disadvantage from proceedings to which a private person against whom such offences were alleged would not be liable: least of all should he be shielded from the ordinary penal consequences of what he may have done: he should be tried like any other person according to the ordinary law of the land: when

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that has been done, it will be time enough to deal with his professional position if necessary. I feel so strongly that we ought not to be trying the respondent for these criminal offences alleged against him that, even after all the delay there has been in this case, I should not have consented to take part in these proceedings at this stage but should have proposed that they be adjourned until the respondent had been tried by a criminal Court, if that had still been possible. But, as it is alleged that the criminal offences with which he is accused were committed in respect of documents produced in Court in proceedings to which he was a party, section 195, Code of Criminal Procedure, precludes any criminal Court from taking cognizance of those offences except on a complaint from the Court of Small Causes or from this Court, and BEASLEY J. decided that no such complaint should be made. It happens therefore that the respondent is protected from any criminal prosecution in the matter. In the peculiar circumstances of this case he can be dealt with only in proceedings under the Bar Councils Act, and for that reason I join in these proceedings, though with great reluctance.

I may mention that in England it has long been the established rule that disciplinary action may be taken against attorneys and solicitors for conduct of a criminal character which shows them unfit to exercise their professional functions, even if they have not been tried on the criminal charge involved. In *Stephens v. Hill*(1) that rule was applied to an indictable offence. But in that case, where the charge against the attorney was of misconduct in a cause in which he was professionally engaged, Lord ABINGER said that,

"if the attorney has been guilty of something indictable in itself but not arising out of the cause (in which he is engaged

(1) (1842) 10 M. & W. 28; 158 E.R. 368.

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professionally) the Court would not inquire into that with a view to striking him off the roll but would leave the party aggrieved to his remedy by a criminal prosecution. * * * Where indeed the attorney is indicted for some matter not connected with his profession of an attorney, that also is a ground for striking him off the roll, although in that case it cannot be done until after conviction by a jury."

In *In re Hill*(1), where an attorney admitted an act of misappropriation committed, not when he was acting as attorney, but as clerk to other attorneys, COCKBURN, C.J. said that

"if there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until the conviction had taken place."

In *Chandi Charan Mitter, A Pleader, In re*(2) the rule in England is I think correctly indicated, namely that, if an attorney is charged with a criminal offence not done in connexion with his professional work, then, if the act is indictable and is fairly denied, the Court will not proceed against him for misconduct until he has been convicted by a jury. That rule, if we followed it—and I can see no reason why we should not do so—would be sufficient to prevent disciplinary action being taken in a case such as this until the Advocate had been convicted by a criminal Court. But in this country I think we should go farther, and, when the charge against an Advocate is of a grave criminal offence, for the prosecution for which no private complaint is necessary nor essentially appropriate, the charge should first be tried by a criminal Court, even if the offence is alleged to have been committed in connexion with the Advocate's professional work. The reason given by Lord ABINGER in *Stephens v. Hill*(3) for not waiting for the criminal conviction before taking disciplinary action is that the

(1) (1868) L.R. 3 Q.B. 543.

(2) (1920) I.L.R. 47 Cal. 1115.

(3) (1842) 10 M. & W. 28; 158 E.R. 368.

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party aggrieved might delay, or fail to undertake, prosecution. That reason does not apply in this country in a case where the Court can make a complaint under section 476 of the Code of Criminal Procedure, nor in a cognizable case in which information is given to the Police, nor in any other serious case in which a Magistrate authorizes investigation by the Police. In all those cases, if a complaint is made by the Court or the Police are set in motion, a criminal prosecution is likely to come to an end not less speedily, and in general more speedily, than an inquiry by a Tribunal of the Bar Council followed by proceedings before a Bench of this Court. Apart therefore from the special reasons which I have mentioned, which may lead in this country to proceedings under the Bar Councils Act seriously handicapping an Advocate in subsequent criminal prosecution on the same charge and so in effect precluding him from being subjected to prosecution, the reason of delay in prosecution or failure to prosecute, which may have justified disciplinary action in England on a criminal charge, on which the practitioner had not yet been tried by a criminal Court, is of practically no force in this country even when the criminal offence is alleged to have been committed in connexion with the practitioner's professional work. In my opinion, when the essential charge against the Advocate or legal practitioner concerned is that he has committed a grave criminal offence either in connexion with his professional work or entirely outside it, the only course just alike to him and to the public is that he should first be tried by a criminal Court like any other man, gaining no advantage and suffering no disadvantage from his professional position. That we should weight the scales for him or against him in that matter would be worse than deplorable, and I see no adequate reason why we should adopt

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any course likely to have that effect. If the criminal trial ends in a conviction, then it will be for this Court to consider under the procedure prescribed by the appropriate Act what disciplinary action should be taken. Even if the practitioner is acquitted in the criminal Court, it may be necessary in some cases to take disciplinary action against him either because he has been acquitted on a technical point or because the conduct proved against him, though not criminally punishable, merits such action. But the question of criminal guilt will be tried where it should be, in a criminal Court. When the criminal offence alleged is trivial or only incidental to serious misconduct of another nature or it is possible or appropriate that the practitioner should be tried for the criminal offence only on the complaint of a private person, then the disciplinary proceedings need not be delayed because no criminal prosecution has been undertaken, though, if a criminal prosecution is in progress or imminent, it may often be desirable even in such cases that the disciplinary proceedings should be postponed until the prosecution has come to an end. I am glad to find that my view that, when the essence of the charge against the practitioner is that he has committed a grave criminal offence, even though its commission was in connexion with his professional work, he should be tried by a criminal Court before disciplinary action is taken against him has been adopted by three Benches of the Calcutta High Court, namely in *Chandi Charan Mitter, A Pleader, In re*(1), *Rajendra Kumar Dutta and Abdul Khaleque, In the matter of*(2), and *Satis Chandra Singha, In the matter of* (3), though, if I may say so with respect, the reason given in the first of those cases for requiring a criminal prosecution to be

(1) (1920) I.L.R. 47 Calc. 1115.

(2) (1925) 80 C.W.N. 186.

(3) (1927) 81 C.W.N. 554.

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undertaken does not appear to me to be the only one. In the present case, as I have mentioned, it is not alleged that the criminal offences with which the respondent is charged were committed in any connexion with his professional work.

On the facts of this case I agree with the finding of my brother WALLER. We have not received in the case so much assistance as we might have expected from the majority of the Tribunal; and the respondent himself has conducted his defence before us in the most unfortunate way. His arguments occupied us for more than four days, and nothing but the fact that he was an accused person conducting his own defence could have justified us in allowing him to take so long. During almost the whole of that time he devoted himself to technical objections to these proceedings, which he had himself invited and had begged might be substituted for a criminal prosecution, to a superfluous attack upon the trustworthiness of the complainant, whom Mr. Muthukrishna Ayyar for the Advocate-General had already told us he did not suggest to be a witness whose evidence could be accepted without corroboration, and to continual harping on facts admitted or unimportant. Only at long intervals could he be brought to face the facts against him, and in every instance he shied away from them after a few minutes and returned to what was useless, irrelevant or admitted. The majority of the Tribunal in their report appear to me to have overlooked or ignored important evidence against the respondent. They say that the case against him has to rest on the word of the complainant, which is clearly a mistake. They think that there is nothing else against the respondent but suspicion and that that suspicion "is met very largely by the evidence of Srinivasa Ayyangar", a nephew of the respondent, corroborated by a person whom they call "a respectable witness", though

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they never saw him, he was not examined even on commission, they do not know whether he would admit the signature attributed to him and that signature in the circumstances would indicate no more than that Srinivasa Ayyangar told him something. They are much impressed by the fact that the complainant has given a false explanation of the purpose for which he gave the respondent the Rs. 1,000 which was the consideration for the third promissory note, Exhibit XXII, carrying no interest, and by the complainant's absurd story that he advanced Rs. 400 in five separate amounts to the respondent for the cost of stamps for a purchase of land, which had never been settled and in respect of which they have found that he made false entries in cheque counterfoils and in his diary. It is clear that the complainant has given untruthful evidence in certain particulars, and Mr. Muthukrishna Ayyar does not suggest that his explanation of the purpose for which he advanced Rs. 1,000 to the respondent without interest under Exhibit XXII or his claim for money advanced for stamps, which represents much the greater part of his claim in Civil Suit No. 8 of 1926, can be accepted. Nor does Mr. Muthukrishna Ayyar suggest that the complainant's accounts are trustworthy or that his denial that he received the payments of Rs. 235 towards Exhibit A and Rs. 1,200 towards Exhibit B from the respondent is of any value without corroboration. But there is much else against the respondent in respect of those payments besides the complainant's denial.

[His Lordship dealt with the report of the majority of the Tribunal of the Bar Council and concluded as follows :—]

I regret that I have found it necessary to criticise the report of the majority of the Tribunal at such length. It is our duty to take that report into careful consideration and, if we differ from it, to state our reasons. The

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hearing before the Tribunal was spread over seven and a half months; the evidence was recorded at intervals on seventeen occasions; and the arguments were heard on six occasions spread over five and a half weeks. No doubt the members of the Tribunal find it difficult to hear such a case continuously. But it appears to me probable that many of the defects to be found in the report of the majority are due to this method of hearing. In my opinion, however, they were engaged on a task which was not properly theirs. The Bar Council has no machinery to investigate, nor have its members the time, to hear a long criminal case. If this case had been investigated and prosecuted in the ordinary course, it would have been over years ago, its hearing would have occupied far less time, and the facts would have been more completely presented. Both the members of the Tribunal and Mr. Muthukrishna Ayyar, whom they appointed to conduct the case, were at a serious disadvantage in handling it.

I agree that the respondent must be found guilty on all parts of the charge framed against him and that he must be removed from practice and ordered to pay the costs of these proceedings and of the proceedings before the Tribunal.

ANANTAKRISHNA AYYAR J.—In this case the Tribunal of the Bar Council appointed by the Chief Justice consisted of three members; and, after hearing the allegations against the Advocate and considering the evidence, two members of the Tribunal were of one opinion and the third of a different opinion. The question was raised before us whether the High Court is entitled to consider the findings recorded by the dissentient member, or whether the High Court's consideration should be confined to examining the correctness or otherwise of the findings arrived at by the majority. Our attention was drawn to rules 3, 4 and 9 of the rules framed by

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the High Court, and to the relevant sections of the Bar Councils Act. When a statutory tribunal is invested with jurisdiction over a particular matter, the general rule is that the opinion of the majority should be taken to be the opinion of the body with reference to matters properly within its jurisdiction. It was argued that the High Court should consider only the opinion of the majority of the Bar Council Tribunal, and should ignore the findings and reasonings of the minority.

In cases where a statutory body is charged with the duty of giving advice to a final executive authority, the policy would seem to be to require the advice to be put in a definite form, and not to be accompanied with the dissenting opinion, if any, of the minority. For example, rule 45 (3) of the Madras Legislative Council Electoral Rules, provides :—

“ The report shall be in writing and shall be signed by all the Commissioners. The Commissioners are forthwith to forward their report to the Governor, who, on receipt thereof, shall issue orders in accordance with the report, and the orders of the Governor shall be final.”

Under rule 46,

“ if either in their report or upon any other matter there is a difference of opinion among the Commissioners, the opinion of the majority shall prevail, and their report shall be expressed in the terms of the views of the majority.”

When, however, the report or findings have to be submitted by one judicial tribunal to another judicial tribunal, which latter has got jurisdiction and the duty to examine the correctness or otherwise of the report or findings submitted by the former, it would be advisable to have the opinions of all the members of the Tribunal which inquired into the matter in the first instance, so that the final judicial authority may have the benefit of the opinions, reasonings, and findings of all the members of the Tribunal on the relevant questions, when the

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decision of the case in the last resort rests with the higher judicial tribunal. In pursuance of such policy and to make matters clear, similar provisions have been made by the Legislature—for example, in section 265 of the Code of Criminal Procedure,

“ when a criminal case is tried by a Bench of Magistrates, if the Bench differ in opinion, any dissentient member may write a separate judgment.”

We find that some of the High Courts have framed rules under the Bar Councils Act on this point. For example, rules 13 and 14 framed by the High Court of Calcutta are as follows :—

“ Rule 13.—The finding of the majority of the Tribunal shall be the finding of the Tribunal in case of difference of opinion, provided that a dissentient member of the Tribunal may record his dissent by a note in writing.

Rule 14.—The finding of the Tribunal shall be in writing and the same shall be forwarded with such a note of dissent, if any, to the High Court in the manner provided by section 12 (2).”

Referring to the rules framed by the Rangoon High Court, rule 10 runs as follows :—

“ In the case of an inquiry by the Tribunal the finding shall be signed by each member thereof, and the members may, if not unanimous in opinion, record separate findings.”

Rule 7 framed by the Allahabad High Court states that,

“ the Tribunal shall then proceed to consider and record its findings, provided that each member of the Tribunal shall, if he so desires, be entitled to record a separate finding.”

As far as we have been able to ascertain, the Bombay High Court has not framed any specific rule on the point now before us. Rule 3 provides :

“ The Tribunal shall then consider its finding and remit it with a copy of its reasons through the Bar Council to the High Court.”

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Rule 6 is to the following effect:—

“In all matters not provided for by these rules, the Tribunal will follow the principles of natural justice.”

It may be that as a matter of practice members of the Tribunal of the Bar Council may or may not think it advisable to record dissentient findings; but that is a matter entirely for the Tribunal of the Bar Council. So far as the High Court is concerned, with which alone rests the final decision on the merits of the case, *prima facie* the reasoning and the opinion judicially formed by the minority of the Bar Council Tribunal would also be useful in arriving at the final result.

Under section 11 of the Act, the tribunal may consist of an even number of members (four); and, if in such cases the members are equally divided in opinion, there would be difficulty in saying which of the findings should be taken to be the findings of the Bar Council Tribunal for the purpose of the Act.

To make matters clear, it seems to us desirable that specific rules should be framed on the point.

Pending further consideration of the point, it was intimated to Counsel on the first day of hearing that the findings submitted by the minority (which happens in this particular case to be against the Advocate) would not be taken into consideration. After considering the point, we are of opinion that the High Court is also entitled to take into consideration the findings submitted by the minority, though we may state that in the present case we have come to the conclusion on the merits of the case ourselves independently of the opinion of the minority of the Bar Council Tribunal.

Again, it was argued that under section 10 of the Letters Patent, the full Court of fourteen Judges should deal with this matter, and that a Bench of three Judges has no jurisdiction to hear this case. We are unable to agree

with this contention. Section 10 of the Letters Patent empowers the High Court to remove or suspend from practice, on reasonable cause, any Advocate of the High Court. A rule has been framed that

“every inquiry under clause 10 of the Letters Patent shall ordinarily be heard and determined by a Bench of three Judges.”

See rule 8 at page 7 of the Appellate Side Rules.

On BEASLEY J.'s report to the then Chief Justice, the Chief Justice referred the matter to three Judges to whom was assigned the duty of dealing with such cases, and in accordance with their opinion the late Chief Justice directed the matter to be referred to the Bar Council for inquiry, and appointed three members of the Bar Council to form the Tribunal for enquiring into the matter. After the findings of the Bar Council were received, the present Chief Justice appointed the present Bench of three Judges for hearing this case. It seems to us that in the circumstances this Bench is entitled to hear this matter. We may also state that, when a similar objection was raised before the High Court in Mr. Anandalwan's case, the Bench consisting of three learned Judges, disposed of the objection as follows:—

“Objection was taken to the competency of this inquiry, the first objection being that this Bench of three Judges is inadequate, and that the matter should be dealt with by the Full High Court under section 10 of the Letters Patent. This entirely ignores the rules framed under that clause which delegate the duty to a Bench of three Judges, and this has been the invariable practice in this Court.”

In the appeal to the Privy Council, rule 8 under which “every inquiry under section 10 of the Letters Patent shall ordinarily be heard and determined by a Bench of three Judges” was referred to by the Privy Council, and the Privy Council observed that “several objections to the procedure were taken by the appellant

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in the Courts below, these were not maintained before their Lordships"; see *Anandalwan v. The Judges of the High Court of Judicature at Madras*(1).

We accordingly overruled the objection.

It was also argued that though BEASLEY J. (as he then was) in his order, dated 7th May 1926 resolved, "to make a report to the High Court in its disciplinary jurisdiction, and asked that an enquiry may be made to be directed after an explanation has been sought for from the Advocate in question into the truth of these allegations, because I think that such a charge as this cannot be left where it is—," yet no explanation was called for from the Advocate, and that consequently the whole proceedings should be declared illegal. In this connexion the following passage from the report of the Bar Council Tribunal may be quoted:—"This reference arises out of Civil Suits Nos. 8, 9, and 10 of 1926 disposed of by the Honourable Mr. Justice BEASLEY, as he then was, on 7th May 1926. The papers, after some delay, with the judgment in the case, were forwarded by His Lordship Mr. Justice BEASLEY to the Honourable the Chief Justice for such action as he might think proper to take, on 15th March 1927. The delay in taking such action by His Lordship was due to the fact that he at first took the view that the conduct of the Advocate complained of was not in the capacity of an Advocate but as a litigant; and His Lordship decided that it was a matter to be dealt with purely criminally. Later on, however, His Lordship changed his mind on a representation made on behalf of the Advocate that it could be dealt with by the High Court on its disciplinary side also."

The Advocate and his legal advisers had plenty of opportunity all along in this matter to put in any

(1) (1930) 58 M.L.J. 685 (P.C.).

explanation—if thought fit—and it was at the special request of the Advocate that the matter was dealt with by the High Court in its disciplinary jurisdiction instead of the matter being dealt with by the criminal Court. The Advocate appeared before the Tribunal of the Bar Council and filed a written statement on 1st November 1929. The allegations contained in that written statement were duly inquired into by the Tribunal. In the circumstances, we do not think that there is any force in this contention either.

Another interesting question of great importance has been discussed in the judgment of REILLY J. (the question itself was not fully argued in Court in this case)—about the propriety of a criminal prosecution preceding an inquiry under the Bar Councils Act in cases where the facts would suggest the commission of a very serious criminal offence punishable under the Indian Penal Code. I do not propose in the circumstances to discuss that question at present, because BEASLEY J., who tried the civil suits, though at first inclined to send the matter to the criminal Court, resolved finally not to do so in the present case, being influenced by the request made on behalf of the Advocate that the inquiry should be under the Bar Councils Act. Having regard to the provisions of section 195 of the Code of Criminal Procedure, and having regard to the special circumstances of this case, it seems to me that it is not desirable or proper to drop or adjourn the present proceedings, and that we should in the rather peculiar circumstances dispose of the matter before us on the merits.

[His Lordship discussed the evidence and held that the charges against the Advocate had been proved and concluded as follows:—]

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When these serious charges are held to be proved, I think we are bound to remove the respondent from practice and to direct the removal of his name from the list of Advocates. I also agree in the order as to costs proposed by my learned brother WALLER J.

By COURT.—The order of the Court is that the respondent be removed from practice and that his name be struck off the roll of Advocates and that he do pay the costs of the proceedings before the Tribunal and here. It is contended by him that his case should have been disposed of before the Bar Councils Act came into force, and that, as there was no specific provision for the payment of costs before that Act came into force, we should not direct him to pay the costs. We are unable to agree to this proposition. The inquiry did take place under the Act and we are not prepared to concede that there was no jurisdiction to direct the payment of costs before it was passed. We fix a fee of Rs. 750 for Mr. Muthukrishna Ayyar's appearance before the Tribunal and here.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

PUTLAGUNTA RAMAKOTAYYA (PLAINTIFF), APPELLANT,

1931,
April 1.

v.

PUTLAGUNTA SUNDARARAMAYYA AND THREE OTHERS
(DEFENDANTS 1 AND 2 AND NIL), RESPONDENTS.*

Indian Limitation Act (IX of 1908), art. 96—Mistake—Suit to set aside partition on the ground of—Applicability of article to.

Article 96 of the Indian Limitation Act applies to a case where a Hindu sues to set aside a partition and to get the disparity between his and the other co-parcener's share redressed by a fresh adjustment of the ancestral property on the ground of mistake or misapprehension of the correct position of affairs at the time of partition.

APPEAL against the decree of the Court of the Subordinate Judge of Masulipatam in Original Suit No. 1 of 1923.

V. Govindarajachari for appellant.

T. V. Muthukrishna Ayyar (with him *A. Venkatachalam* and *N. Muthuswami*) for first respondent.

T. V. Muthukrishna Ayyar for third respondent.

N. Ramanatha Ayyar for fourth respondent.

JUDGMENT.

The plaintiff appeals against the dismissal of his suit on the ground of limitation. The suit was filed to re-open a partition which was made between his father Nagayya and his uncle Venkataratnam, father of the defendants, in 1901. That partition comprised not only the property that belonged to the family of these two brothers but also certain property which had belonged

* Appeal No. 827 of 1925.

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to their maternal grandfather, Chinna Naganna, and was at the time in the possession of his widow, Akkamma. The plaintiff's father, Nagayya, received a larger share in that property than Venkataratnam and a correspondingly smaller share in the ancestral property. Unfortunately Akkamma survived her grandsons and the property of Chinna Naganna instead of descending to them passed away to certain agnatic reversioners. These persons sued the plaintiff and obtained a decree and eventually possession of the maternal grandfather's property in his hands on 14th December 1916. The plaintiff accordingly brought this suit in order to get the disparity between his and the defendants' shares redressed by a fresh adjustment of the ancestral property.

The first question that arises upon the issue of limitation is whether the plaintiff can claim the benefit of section 8 of the Limitation Act, namely, whether his plaint was filed within three years of the attainment of his majority.

[Their Lordships discussed the evidence and found that the suit was not filed by the plaintiff within three years of the attainment of his majority, and proceeded as follows:—]

We have then to enquire what is the appropriate article of the Limitation Act to which this suit should be held to be subject. The learned Subordinate Judge has applied article 96; and, after hearing arguments with regard to the applicability of that article and some others, we can find no reason to differ from his conclusion, supported as it is by a decision of the Bombay High Court, *Martand Mahadev v. Dhondo Moreshwar*(1). The terms of the article are perfectly general, the

(1) (1920) I.L.R. 45 Bom. 582.

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description of the suit to which it relates being one for relief on the ground of mistake, and the time from which the period runs being, when the mistake becomes known to the plaintiff. The plaint itself in this case is based upon the ground that a mistake was made, and we think it is clearly appropriate that time should run from the moment when the circumstances with regard to his title to the property first came to the attention of the plaintiff. Mr. Govindarajachari has endeavoured to urge certain objections to the applicability of this article. He suggests, in the first place, that a suit for re-partition, as he would call it, is based upon principles of Hindu Law and, as far as we understand him, that accordingly some other article would be more appropriate for that reason. There can be no doubt that the claim is based upon equitable principles, whether or not those principles derive from Hindu Law or from any other source. We may refer to *Maruti v. Rama*(1), where a suit of a similar character came under consideration; and the learned Judges quote Sir Thomas Strange with regard to its maintainability:

"Whenever from any cause not understood at the time the division proves to have been unequal or in any respect defective, it may be set to rights notwithstanding the maxim 'Once is partition of the inheritance made'";

and they go on to say that

"they (the parties) had divided under such a misapprehension of the true state of the case that the Hindu Law, like common equity, would correct the error . . ."

The nature of such a suit has been very clearly defined by WALSH J. in *Ganeshi Lal v. Babu Lal*(2) where he observes that

"the right is based simply upon this principle, that where parties arrive at a partition either by agreement, or by a decree . . . there is an implied and mutual right of

(1) (1895) I.L.R. 21 Bom. 333.

(2) (1918) I.L.R. 40 All. 374.

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indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties."

We cannot see any reason why an article in the terms of article 96 should not apply to a suit of this nature.

It has then been suggested that because it involves a claim to immovable property the lower Court should more appropriately have applied one of those articles which specifically relate to immovable property. We cannot think that article 127, which governs a suit brought by a person excluded from joint family property, can have any application; because only upon the footing that the original partition was void can it be said that the property remained joint family property. It has been held in the Full Bench Case, *Yerukola v. Yerukola*(1), that a mere division in status will render that article inapplicable. Lastly there is the residuary article 144, relating to suits for possession of immovable property not otherwise specially provided for. This should not, we think, be applied unless no more specific article, such as article 96, is available. Nor does it seem appropriate to apply the article 144 to a suit which does not claim any specific immovable property but only compensation in the shape of a share in the original property divided. We cannot see, further, how the cause of action can be traced to the commencement of adverse possession on the part of the defendants. The cause of action clearly arose out of the consequence of the mistake that was committed, and which alone gave the plaintiff his right to sue. We think accordingly that there are no grounds for differing from the lower Court that the article applicable is article 96. That

(1) (1922) I.L.R. 45 Mad. 648 (F.B.).

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article gives the plaintiff three years within which to bring his suit and the latest possible date from which time would run would be that of his dispossession in pursuance of the decree against him, namely, 14th December 1916. The suit was accordingly out of time and was rightly dismissed.

We dismiss the appeal with costs.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

THOPPAI VENKATARAMA AYYAR (PETITIONER),
APPELLANT,

1931,
February 12.

v.

A. GOVINDARAJULU AYYAR (RESPONDENT),
RESPONDENT.*

Code of Civil Procedure (Act V of 1908), sec. 144—Costs paid under decree afterwards reversed on appeal—Refund of, by way of restitution—Party entitled to—Interest on such costs—Right of party to.

Under section 144 of the Code of Civil Procedure a party who is entitled by way of restitution to a refund of costs paid by him under a decree afterwards reversed on appeal is ordinarily entitled to interest on such costs.

APPEAL against the order of the District Court of Madura, dated 15th July 1926, and made in Execution Application No. 55 of 1926 in Original Suit No. 1 of 1922.

K. Rajah Ayyar (P. N. Appuswami Ayyar with him) for appellant.

T. Krishnaswami Ayyangar (S. K. Narasimhachari with him) for respondent.

* Appeal against Order No. 433 of 1926.

JUDGMENT.

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The question is whether the appellant is entitled to interest on costs paid by him to the respondent under a decree afterwards reversed on appeal, which have to be refunded to him by way of restitution. In *Rodger v. The Comptoir D'Escompte de Paris*(1) their Lordships of the Privy Council did not allow interest on costs to be refunded and remarked that it had never been the habit in ordering the refunding of costs paid under a decree to order that refunding with interest. In *Forester v. The Secretary of State for India in Council*(2) they remarked that interest on costs to be restored was "less favoured" than interest on other amounts to be restored. But in *Kedar Nath Pakrasee v. Doya Moyee Debia*(3) a Bench of the Calcutta High Court and in *Ram Sahai v. The Bank of Bengal*(4) a Bench of the Allahabad High Court allowed interest on costs so refunded. And since those decisions section 144 of the present Code of Civil Procedure has been enacted to enable restitution to be made so as to place the parties in the position which they would have occupied but for the decree reversed and provides for interest being ordered for that purpose without any restriction to interest on amounts other than costs. In *Gokul Prasad v. Ram Devi*(5) a Bench of the Allahabad High Court awarded interest on costs to be refunded in order to give effect to the provisions of the section. In the present case the learned District Judge has given no reason for not allowing interest on the costs in question. In our opinion he could have allowed interest and should have done so.

(1) (1871) L.R. 3 P.C. 465.

(2) (1877) I.L.R. 3 Cal. 161 (P.O.).

(3) (1873) 20 W.R. (C.R.) 49.

(4) (1886) I.L.R. 8 All. 262.

(5) (1921) 63 I.C. 513.

This appeal is allowed, and interest on the costs to be refunded is awarded at 6 per cent. But, as the appellant has claimed a higher rate and has pressed this appeal for a small amount, there will be no order as to costs here.

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APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Stone.

C. VAIDYANATHA RAO (FIRST RESPONDENT),
APPELLANT,

1931,
January 19.

v.

KANDAPPA CHETTI AND THREE OTHERS (PETITIONERS—
CLAIMANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92—Promise of grace—Proof of—Past and future breaches of contract—Waiver of—Distinction between—Indian Contract Act (IX of 1872), sec. 63—Remission of payment resulting in partial discharge of contract—Validity of.

Section 92 of the Indian Evidence Act (I of 1872) is not a bar to the reception in evidence of an alleged oral arrangement, even though it is in variance with the terms of a written agreement, when it is put forward not as imposing any legal obligation on a party to accept a lower amount than the one specified in the written agreement but as a promise of grace to support other independent evidence that a less amount was accepted in satisfaction of a larger amount due.

There is nothing in law to prevent proof of actual waiver of of past breaches whether or not this is in pursuance of a promise to waive. A promise of grace to waive future breaches may be proved but is of no value unless performance has been actually waived. A binding agreement to waive future performance cannot be proved.

* Appeal No. 200 of 1929.

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Section 63 of the Indian Contract Act (IX of 1872) is not restricted to cases where by remission of payment the whole contract is discharged and extinguished but also applies to any and every occasion in which any sum becomes due and payable under the contract.

APPEAL against the decree of the District Court of North Arcot at Vellore in Original Petition No. 55 of 1928.

K. S. Krishnaswami Ayyangar with T. D. Srinivasa Chari for appellant.—Under section 63 of the Indian Contract Act accord and satisfaction need not be simultaneous; see *Kattika Bapanamma v. Kattika Kristnamma*(1) and *Collector of Etah v. Kishori Lal*(2). Before the section comes into operation, there must be both accord and satisfaction. Either the promisor or the promisee or both are entitled to resile until there is satisfaction and, if there is satisfaction in part, they can resile only to the extent that there is no satisfaction; see *Mallappa v. Matum Nagu Chetty*(3), *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti*(4), *Goseti Subba Row v. Varigonda Narasimham*(5), and *Balasundara Naiker v. Ranganatha Aiyar*(6). *Jaganath v. Shankar*(7) which is contrary to the view expressed in the above cases has been dissented from by the Calcutta and Allahabad High Courts. In *Yegnanarayana Aiyar v. Suppan Chetty*(8) WALLER J. follows the above-mentioned Bombay case. *Lakshmana Setti v. Chenchuramayya*(9) also requires reconsideration. Oral evidence proving discharge of a promise which is in writing can be let in. There is no statute in India which says that the discharge should be evidenced by writing. What is really proved is that the accord has been worked out by satisfaction to that extent.

P. Viswanatha Ayyar for respondents.—The language of section 63 of the Indian Contract Act shows that it refers to a case of complete discharge of contract. It has no application to a case where a contract is partially remitted and is remaining in force as regards the rest. This construction also gets support from the fact that section 63 finds a place in the chapter on "Discharge of contracts" under sub-heading "contracts that need

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| (1) (1906) I.L.R. 30 Mad. 281. | (2) (1930) I.L.R. 53 All. 157 (F.B.). |
| (3) (1918) I.L.R. 42 Mad. 41 (F.B.). | (4) (1902) I.L.R. 26 Mad. 195. |
| (5) (1903) I.L.R. 27 Mad. 368. | (6) (1929) I.L.R. 53 Mad. 127. |
| (7) (1919) I.L.R. 44 Bom. 55. | (8) (1923) 52 M.L.J. 224. |
| (9) (1917) 34 M.L.J. 79. | |

not be performed". See also the illustration to section 63. The contract of mortgage under consideration is one and indivisible. Any oral agreement to reduce the amount to be paid will be a variation of the contract. Sections 62 and 63 of the Indian Contract Act are mutually exclusive. Section 63 is controlled by sections 91 and 92 of the Indian Evidence Act, and section 92(4) of the Evidence Act is a bar to the admissibility of such an agreement; see *Mallappa v. Matum Nagu Chetty*(1), *Jaganath v. Shankar*(2), and *Yegnanarayana Aiyar v. Suppan Chetty*(3). *Balasundara Naiker v. Ranganatha Aiyar*(4) lays down that payment and discharge should be simultaneous. The case of *Kailash Chandra Nath v. Sheikh Chhenu*(5) has been distinguished in *Lakshmana Setti v. Chenchuramayya*(6). See also *Namagiri Lakshmi Ammal v. Srinivasa Aiyangar*(7) and *Mayandi Chetti v. Oliver*(8).

T. D. Srinivasachari in reply.—Oral agreement is not put forward as a binding contract. It is relied on to probabalize the later discharge of a portion of the original contract.

JUDGMENT.

This appeal arises out of an award in a land acquisition case. The immediate point before the lower Court was what proportion of the amount awarded should go to certain mortgagees of the appellant in discharge of their mortgage for Rs. 10,000, dated 11th July 1912. The mortgage bore interest at 7½ per cent per annum, but on default of payment of principal or interest, the rate of interest was to be increased to 9 per cent. It is admitted that there was default. In dealing with the point, the lower Court has shut out evidence of an agreement alleged by the appellant whereby his mortgagees agreed "to waive the default in the payment of interest and to waive their right in future also to claim enhanced rate of interest at 9 per cent per annum and to receive payment of interest

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| (1) (1918) I.L.R. 42 Mad. 41 (F.B.). | (2) (1919) I.L.R. 44 Bom. 55. |
| (3) (1926) 52 M.L.J. 224. | (4) (1929) I.L.R. 53 Mad. 127. |
| (5) (1914) I.L.R. 42 Calo. 546. | (6) (1917) 34 M.L.J. 79. |
| (7) (1914) 27 I.C. 269. | (8) (1898) I.L.R. 22 Mad. 261. |

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throughout only at $7\frac{1}{2}$ per cent per annum". It was further alleged that, in pursuance of this agreement, certain renderings of account, Exhibits I and II in Civil Miscellaneous Petition No. 5514 of 1929, had been submitted by the mortgagees to the mortgagor calculating interest at the $7\frac{1}{2}$ per cent rate only. The District Judge held that proof of such an agreement was inadmissible under section 92 of the Indian Evidence Act, rejected such proof, and refused to admit Exhibits I and II or any other evidence on the point. It is against this refusal that the appellant now comes up here.

We think the District Judge has not sufficiently considered the legal aspect of the problem and, in particular, that he has overlooked the provisions of section 63 of the Indian Contract Act. The application of section 92 of the Evidence Act is only called for in so far as the alleged agreement is put forward in variation of the original contract of mortgage. So far as the alleged arrangement is advanced as imposing any legal obligation on the mortgagee to accept a lower rate of interest than that specified in the contract, it is tantamount to a binding agreement that the penalty clause is inoperative and therefore is a variation of the contract, and proof of it is inadmissible; but, in so far as it is put forward merely as a promise of grace imposing no legal obligation, section 92 cannot be any bar and evidence of it is relevant, so far as may be, to probabalize the alleged acceptance of a lesser rate of interest. Since no legal obligation to accept the less amount can be proved, the only value as evidence of such an arrangement would be to support other independent evidence that such less amount was actually accepted, not on account or in part payment, but in satisfaction of a larger amount due; and the crucial evidence

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in the case would not be evidence of the arrangement, but evidence of such actual acceptance in satisfaction. To state the proposition of law in another form, if the evidence of such acceptance cannot be understood or will not prove the acceptance without evidence that the mortgagee was under a legal obligation so to accept, the evidence is inadmissible; but if it can be understood and proved without proof that the mortgagee was under such legal obligation, there is nothing in section 92 to prevent the admission of such evidence. By way of example we may cite illustration (e) to section 63 of the Contract Act that evidence of a composition arrangement made with creditors, by which they agree to receive less than the sums due to them, can be admitted to explain receipt of a less sum in full discharge of a debt due.

Section 63 of the Indian Contract Act is clearly in point. It is obviously intended to apply not to cases where the whole contract has been supplanted by a new one because then it will be superfluous, but to cases where the old contract subsists, but there is a voluntary remission of performance of some promise in it, for example, a remission of part of the debt at the time when it becomes payable. Section 63 will not be extended to cover a case of a binding promise to dispense with or remit performance in the future unless that waiver is made the subject of a fresh contract, because then section 92 of the Indian Evidence Act will stand in the way.

Several reported cases bearing on the subject have been brought to our notice. We shall consider only those which to our minds throw light on the problem. A Full Bench case in the Allahabad High Court, reported in *Collector of Etah v. Kishori Lal*(1), is in point, and

(1) (1930) I.L.B. 53 All. 157 (F.B.).

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supports the above conclusion. It relies *inter alia* on various decisions of this Court, including the Full Bench case, *Mallappa v. Matum Nagu Chetti*(1). The only reasonable ground on which this case can be distinguished from the present is that, there the remission was accepted in discharge of the whole contract, while here the contention is that remission was from time to time accepted in payment of parts of the contract, leaving the contract still alive. This is a point to which we shall come later. The respondents challenge the interpretation put by the Allahabad Court on *Mallappa v. Matum Nagu Chetti*(1), but we cannot see that there is any misinterpretation of that decision. The head-note is worded in very general terms but the whole tenor of the judgment shows that the Full Bench was considering the admissibility of an oral agreement which remitted the legal obligation under the contract, a case obviously within the mischief of section 92 of the Indian Evidence Act. This is particularly clear from the language used by SESHAGIRI AYYAR J. This Full Bench case follows *Goseti Subba Row v. Varigonda Narasimham*(2). The learned District Judge here relies on these decisions which no doubt support his view of what he thought was the only problem in the case, namely, whether an oral agreement varying the legal obligation under the contract could be proved. He also relied on *Yegnanarayana Aiyar v. Suppan Chetty*(3), a judgment of a single judge, which goes further and holds that the actual discharge of a mortgage by payment of a less amount than is due in pursuance of an oral agreement to that effect cannot be proved. The learned Judge there relied mainly on *Jagannath v. Shankar*(4). The *ratio decidendi* of the latter decision seems to be that

(1) (1918) I.L.R. 42 Mad. 41 (F.B.).
(3) (1926) 52 M.L.J. 224.

(2) (1903) I.L.R. 27 Mad. 368.
(4) (1919) I.L.R. 44 Bom. 55.

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proof of actual acceptance of a less amount in full discharge cannot be given because underlying such acceptance there must have been an agreement to accept, which, the Bench held, would be inadmissible under section 92. With respect, we would point out that this annuls the operation of section 63 of the Contract Act and ignores the contingency that the less amount is accepted not because some oral agreement has imposed on the creditor a legal obligation so to accept but as a matter of grace. The decision in *Jagannath v. Shankar*(1) has been dissented from in various other cases, twice by the Calcutta High Court, and by a Bench of this Court in *Balasundara Naiker v. Ranganatha Aiyar*(2), which case, if we may say so with respect, gives a very luminous exposition of the legal position, pointing out that the remission of debt under section 63 of the Contract Act is not in pursuance of an agreement at all. The same view is taken by another bench of this Court in *Ramanathan Chettiar v. Sethuram Madige Rao Sahib*(3). Similar views had already been expressed in earlier cases of this Court; *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti*(4), *Kattika Bapanamma v. Kattika Kristnamma*(5), and *Neelamani Patnaik Mussadi v. Sukaduvu Beharu*(6) and these are in consonance with the Privy Council view in *Ohunna Mal-Ram Nath v. Mool Chand-Ram Bhagat*(7). We may add, with reference to *Yegnanarayana Aiyar v. Suppan Chetty*(8), that we looked into the printed papers and it would appear from them that the alleged discharge was said to have been in pursuance of an undertaking underlying the mortgage contract

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

(3) (1927) 27 L.W. 47.

(5) (1906) I.L.R. 30 Mad. 231.

(7) (1928) I.L.R. 9 Lah. 511 (P.C.).

(2) (1929) I.L.R. 53 Mad. 127.

(4) (1902) I.L.R. 26 Mad. 195.

(6) (1920) I.L.R. 43 Mad. 808.

(8) (1926) 52 M.L.J. 224.

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which was that the rate of interest should be Rs. 1-4-0 and not Rs. 3-12-0 as stated in the contract. Such an agreement would of course clearly be inadmissible under section 92.

To sum up this point : there is nothing to prevent proof of actual waiver of past breaches whether or not this is in pursuance of a promise to waive or not. A promise of grace to waive future breaches may be proved but, not being binding, is of no value unless performance has been actually waived. A binding agreement to waive future performance cannot be proved.

Two points then arise : first, whether, in the case of a remission of payment, section 63 is restricted to cases where by the remission the whole contract is discharged and extinguished, and second, whether the case now put forward by the mortgagor was pleaded in the lower Court, and ought to be allowed to be pleaded here. As to the first point, it is contended that the mortgage debt is indivisible and cannot be discharged in part, and that, therefore, there cannot be a remission of part of the amount due under the contract unless thereby the contract as a whole is discharged. But section 63, on the face of it, contains no such restriction, and its applicability would seem to arise on any and every occasion on which any sum becomes due and payable under the contract. Any sum become payable can *prima facie* be the subject of remission and there seems no reasonable ground for holding that in law a mortgagee can as of grace remit under section 63 only when the whole contract is thereby extinguished. We are not shown any reported authority for such a proposition. On the contrary, the case of *Karampalli Unni Kurup v. Thekku Vittil Muthorakutti*(1) is one where the acceptance of a

less amount than the lease amount for the first year of lease was held binding, although the lease was still current. So in *Kattika Bapanamma v. Kattika Kristamma*(1) the acceptance of possession of land in discharge of a debt for maintenance arrears was held provable, although the whole obligation to pay maintenance was not thereby discharged. We think there is no substance in this contention of the respondent.

As to the second point, the word used in the pleadings to describe the alleged agreement is "waiver" and the waiver is related not only to the past but the future. Waiver of a ground of forfeiture or of breach of a term or condition in a contract arises when one party with knowledge of the fact giving rise to the forfeiture or the breach does or says something which expressly or by implication shows an intention to treat the thing which might be forfeited as subsisting or the breach as forgiven. It assumes a ground of forfeiture or a breach. The intention once expressed, the waiver is complete. It is apparent therefore that "waiver" is not entirely apt to describe a remission which falls within section 63 of the Contract Act. Further, even if we can speak of a waiver that will operate as to future breaches, it is clear that such a "waiver" would amount to a variation of the contract. In the present case the alleged remission assumes that the old liability to pay 9 per cent continues. The creditor receives the $7\frac{1}{2}$ per cent in satisfaction and thus remits $1\frac{1}{2}$ per cent. There is thus no question of a breach forgiven. In the eye of the law the contract liability is deemed to be performed, not because one party has precluded himself from relying on a breach (waiver) but because one party has received in satisfaction of a liability something less than

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(1) (1902) I.L.R. 26 Mad. 195.

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the contract liability. The fundamental question is not "Has the contract liability been altered?", but when $7\frac{1}{2}$ per cent was paid and received, "was it received in part-payment or in satisfaction?"—This raises not a question of waiver but of remission. At the same time though the pleadings are not very aptly worded we are satisfied that the point of substance was raised and certainly from the argument before us it was apparent that the respondent has not been taken by surprise.

It is argued that the present position was not taken up in the Court below. Of that we are not satisfied. The lower Court in its order, paragraph 14, admits that, while the appellant conceded that the subsequent oral arrangement cannot be proved to modify the written registered contract, he did urge that payments made in pursuance of such oral agreement could be proved constituting a discharge. The lower Court held that no actual discharge was alleged. This does not appear to us to be correct, unless the learned Judge means a discharge which extinguished the whole contract. Paragraph 6 of the written statement of the appellant to our minds implies a contention that the mortgagee had at least accepted and appropriated up to 15th December 1923 payments of interest at $7\frac{1}{2}$ per cent up to an aggregate sum of Rs. 4,549-1-0, that is, that the interest debt nominally at 9 per cent contract rate had been discharged up to that date by payment at $7\frac{1}{2}$ per cent accepted by the mortgagee, and in proof of that Exhibit I in the civil miscellaneous petition was offered, and similarly it was contended that in December 1927 the mortgagee had, by account rendered, Exhibit II in the civil miscellaneous petition, accepted and appropriated payments of interest at $7\frac{1}{2}$ per cent up to 14th April 1924. The lower Court refused to admit both these documents, holding that no

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such evidence was admissible. Undoubtedly in his written statement the appellant did endeavour to establish the untenable proposition that the alleged agreement was binding as such on the mortgagee and that therefore he must be held to have accepted the $7\frac{1}{2}$ per cent rate for all interest payments up to 24th August 1926, although even then in paragraph 11 he did not claim that the agreement prevented the mortgagee claiming interest at 9 per cent subsequent to 24th August 1926; so that it cannot be maintained that the written statement alleged an agreement binding on the mortgagee to forego the default penalty *in toto*. There is no evidence at present brought to our notice as available beyond Exhibits I and II, which only carry the possibility of proof of actual acceptance of the $7\frac{1}{2}$ per cent rate up to 14th April 1924. Nevertheless, so far at least as acceptance up to that date is concerned, available evidence should not have been excluded nor can any other evidence that may be available to prove other later acceptances at the same rate be shut out.

For the reasons given above, therefore, we must set aside the decree of the lower Court and remand the case for fresh disposal in the light of the above remarks. The appellant will get his costs here, and costs in the Court below will abide the result.

Court-fee on the appeal memorandum will be refunded.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

1931,
January 6.

SRIMATH JAGATHGURU SRINGERI SRI SATCHITHA-
NANDA CHANDRASEKHARA BHARATHI SWAMIGAL
BY AGENT T. C. NATARAJA MUDALIAR
(PLAINTIFF), APPELLANT,

v.

C. P. DURAISAMI NAIDU AND FOUR OTHERS
(DEFENDANT AND HIS LEGAL REPRESENTATIVES), RESPONDENTS.*

*Madras Estates Land Act (I of 1908), sec. 3 (15), (11) and
(1)—Agriculture—Land held for purpose of—Meaning of—
Casuarina trees—Growing of—Land held for purpose of,
not held for purpose of agriculture—Person holding land
for that purpose not a ryot.*

Growing casuarina trees, that is trees for fuel, is not an agricultural purpose so as to make the person who holds the land for that purpose a ryot within the meaning of the Madras Estates Land Act.

Per REILLY J.—Agriculture cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on.

APPEAL against the order of the 4th March 1926 and made by the District Court of Chittoor in Appeal Suit No. 324 of 1923 preferred against the decree of the Court of the District Munsif of Sholinghur in Original Suit No. 1061 of 1922.

S. Srinivasa Ayyar for appellant.

T. Kumaraswamiah for respondents.

JUDGMENT.

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REILLY J.—In this case the plaintiff has sued to recover from the defendant about six acres of land in the

* Appeal against Order No. 380 of 1926.

village of Chinnamapet with damages. The plaintiff granted a lease of the whole village of Chinnamapet to the defendant as an izaradar for eight years in 1911. After the expiry of that term the defendant surrendered the whole village to the plaintiff with the exception of the six acres with which we are now concerned. On these six acres during the period of his lease the defendant had himself planted casuarina trees, and he claimed the right to remain in possession of that area as an occupancy ryot. The District Munsif of Sholinghur, who heard the suit, found that the defendant was not a ryot but a trespasser and made a decree for the plaintiff for the recovery of possession with Rs. 20 as damages and subsequent mesne profits to be fixed later. Against that decree both the plaintiff and the defendant appealed to the District Judge, the plaintiff claiming that the damages awarded to him were insufficient and the defendant objecting to the whole decree. It has been found by the District Judge that the village of Chinnamapet is an "estate" under the Madras Estates Land Act, and that finding has not been disputed before us. It is also not now disputed that the land upon which the defendant planted his casuarina trees is ryoti land. The District Judge found that the Civil Court had no jurisdiction in this case and returned the plaint for presentation to a Revenue Court. Against that order the plaintiff now appeals.

The only contention which has been urged before us on his behalf is that the defendant, although he has been occupying ryoti land in an "estate" under the Madras Estates Land Act, is not a ryot because he has not held the land for the purpose of agriculture, and, that being so, the jurisdiction of the Civil Court is not excluded. It is not suggested that the defendant holds his land for any other purpose than for his casuarina

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plantation, and, as was decided recently by my learned brother and WALLACE J. in *Venugopala Rice mill v. Rajah of Pittapuram*(1), even if a man holds ryoti land in an "estate" under the Madras Estates Land Act, he is not a ryot unless he holds it for agricultural purposes. The question we have to decide in this appeal is whether growing casuarina trees, that is trees for fuel, is an agricultural purpose so as to make the person who holds the land for that purpose a ryot within the meaning of the Madras Estates Land Act. It has been pointed out to us for the defendant that, after he had surrendered the rest of the village to the plaintiff, the plaintiff accepted rent from him for the land on which these casuarina trees stand for one fasli and gave him a receipt, Exhibit I, which refers to "payment of cist made by the ryot" and that the plaintiff also sent him a notice, Exhibit B, on the following day saying that he might retain the land up to the end of the following fasli and should then surrender it, incidentally mentioning that the defendant was "cultivating it and had planted casuarina trees thereon". I do not think we can decide this question, whether the growing of casuarina trees as fuel is an agricultural purpose, on the language used by the plaintiff either in Exhibit I or in Exhibit B. It is a legal question which affects the jurisdiction of the Civil Courts, and that can certainly not be determined by the language which the plaintiff happens to have used in those documents.

I agree with the remark of SHEPHERD J. in *Murugesu Chetti v. Chinnathambi Goundan*(2) that a man who plants or maintains trees for firewood is not in ordinary parlance an agriculturist. If we take the strict meaning of "agriculture" according to its derivation, it means

(1) (1929) I.L.R. 53 Mad. 367.

(2) (1901) I.L.R. 24 Mad. 421.

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the cultivation of a field, the cultivation of an open space, as opposed to horticulture, the cultivation of a comparatively small enclosed space. The cultivation either of the field in agriculture or of the garden in horticulture cannot be confined, I think, to any particular product. With great respect, I do not agree with the opinion of BHASHYAM AYYANGAR J. in *Murugesu Chetti v. Chinnathambi Goundan*(1) that agriculture implies production of things useful as food for man or beast or other products fit for human consumption by way of luxury. That appears to me to be too narrow an interpretation. Still less do I agree with the opinion expressed by SADASIVA AYYAR J. in *Raja of Venkata-giri v. Ayyappareddi*(2) that agriculture is confined to the production of grain crops. I can see no reason why the cultivation in open spaces of such useful products as cotton, jute, flax and hemp should not be agriculture. Indeed I think agriculture cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on. In some cases it has been suggested that agriculture is confined to tillage. I think it can easily be shown that agriculture was carried on in this world before ploughs were invented. In the present day in many places cultivation is done with spades and not with ploughs. But the planting of timber or firewood trees, which are to stand on the land for a considerable number of years, forming plantations or woods or forests, appears to me to be opposed to the idea of agriculture, the cultivation of an open space. It is true that for the purpose of growing trees in a plantation it may be necessary first to prepare the land. Later on it may be necessary to protect and water the

(1) (1901) I.L.R. 24 Mad. 421.

(2) (1913) I.L.R. 38 Mad. 738.

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young plants. Still later it may be necessary to thin out the plantation. But, when the land is covered with trees which have to stand on it for a number of years, sometimes as long as a century, during most of which period the land itself is untouched, to describe that as agriculture appears to me inappropriate. To my mind it is something very different from the cultivation of a field or of an open space. It may be noticed that in *Kesho Prasad Singh v. Sheo Pragash Ojha*(1) their Lordships of the Privy Council approve of the opinion expressed by two learned Judges of the Allahabad High Court that land let for a grove was not let for an agricultural purpose. It happened that the case then under consideration was one arising under the Agra Tenancy Act. But in that Act there is no definition of "agriculture". Therefore both the learned Judges of the Allahabad High Court and their Lordships of the Privy Council were, we may take it, considering what is the meaning of the word "agriculture" in its general sense. I may mention also that in *Commissioner of Income-tax, Madras v. Manavedan Tirumalpad*(2) a Full Bench of this Court remarked that income from cutting timber was not agricultural income.

But for our present purpose I do not think any discussion or investigation of the meaning of "agriculture" in general conversation or as ordinarily used by educated men is sufficient. We are more interested in ascertaining in what sense the word is used in the Act with which we are particularly concerned, in this case the Madras Estates Land Act. It happens that there is no direct decision on the question whether the growing of timber and fuel trees is agriculture as "agriculture" is used in that Act. There are two

decisions of this Court in regard to the meaning of "agriculture" and "agricultural purposes" as used in the Transfer of Property Act to which I may refer. In *Panadui Pathan v. Ramasami Chetti*(1) SPENCER and RAMESAM JJ. held that a lease of land for growing casuarina trees for fuel was a lease for agricultural purposes within the meaning of section 117 of the Transfer of Property Act. If that could be applied to the present case, it would decide the matter in favour of the defendant. SPENCER J. went so far in that case as to say that agriculture includes horticulture, arboriculture and silviculture. If I may say so with great respect that appears to me to be using the word "agriculture" in a very loose way. It ignores the first two syllables of that word. It appears to me to be the result rather of stretching than of defining the word. RAMESAM J. also agreed that the growing of timber trees would be included in agriculture. But again with the very greatest respect perhaps I may point out that his view of the matter appears to have been affected by the definition of "agriculture" in three modern English Acts. To use the definition of a word in one Act and to apply it as the definition of that word in another Act, especially when the second Act is in force in another country and under other conditions, appears to me to be a very dangerous course. That is a road which, I think it is well known, leads to many pitfalls. On the other hand to compare and contrast the definitions of the same word in a number of Acts is often of the greatest use in determining what is the meaning to be attached to the word in one of those Acts. However, so far as the Transfer of Property Act is concerned, it must be remembered that in *Devaraja Naicken v. Ammani*

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(1) (1924) I.L.R. 48 All. 831 (P.O.). (2) (1930) I.L.R. 54 Mad. 21 (F.B.).

(1) (1922) I.L.R. 45 Mad. 710.

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Ammal(1) another Bench of this Court, SESHAGIRI AYYAR and KUMARASWAMI SASTRI JJ., held that a lease for planting casuarina trees is not a lease for agricultural purposes within the meaning of that Act. That shows that even in regard to the Transfer of Property Act the question is not a very easy one to decide. But what we are concerned here with is, not the Transfer of Property Act, but the Madras Estates Land Act; and, as I think it cannot be denied that in different Acts "agriculture" is used with varying contents and as ordinary educated people use "agriculture" in different senses, the only safe course for us is to try by examining the Madras Estates Land Act itself to ascertain in what sense that word has been used in that Act.

There appear to me to be several indications in the Madras Estates Land Act that the growing of timber and fuel trees was not regarded by the Legislature when making that Act as an agricultural purpose. We have first the definition of the word "agriculture" in that Act—"agriculture" with its grammatical variations and cognate expressions shall include horticulture". Now, as I have mentioned, according to its derivation agriculture does not include horticulture; but the framers of this Act have said that for the purpose of the Act agriculture shall include horticulture. They have chosen to extend the meaning of the word in that direction. But what is even of more interest to us is to notice that they have not chosen to extend the meaning of the word in any other direction. When we find that the essential, literal meaning of a word is deliberately extended by the framers of an Act for the purpose of that Act in one direction but not in any other, surely that is

(1) (1915) 3 L.W. 319.

a clear indication that they wished to exclude any possibility of the word being extended by interpretation in any other direction. As I have mentioned SPENCER J. thought that the word "agriculture" might include among other things horticulture; but no one, so far as I am aware, has ever suggested that horticulture can include silviculture and arboriculture in the sense of growing a large plantation or wood of timber or fuel trees. That definition of agriculture in the Act appears to me to be a very strong indication that the growing of timber or fuel trees is not an agricultural purpose within the meaning of the Madras Estates Land Act.

Then, if we look at the definition of "improvement" in the Act, we find that improvement means with reference to a ryot's holding "any work which materially adds to the value of the holding, which is suitable to the holding and consistent with the character thereof". We must remember that the holdings referred to are agricultural holdings and their character is agricultural. That definition goes on to say that "improvement" shall include (subject to the words I have quoted) certain specified things, and among them is the planting of fruit trees and fruit gardens. But under section 14 of the Act that kind of improvement may not be made by one class of ryots, non-occupancy ryots, without the permission of the landholder. How could the planting of fruit trees have been provided for specially as an improvement and have been made subject to that restriction if the planting of trees generally was an agricultural purpose, which might be carried out by an ordinary agriculturist?

Then we have section 12 of the Act. In that it is provided among other things 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 . . . in the case of trees which after the

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passing of this Act may be planted by the ryot or which may naturally grow upon the holding, . . . to use, enjoy and cut them down, notwithstanding any contract or custom to the contrary".

If the growing of trees was an ordinary agricultural purpose, why should it be necessary to provide that the ryot shall have the right to use, enjoy and cut down trees planted by him on his own holding? That too is an indication, I think, that the growing of trees is not regarded as an agricultural purpose in this Act. But I must mention in connexion with that argument that some weight should be attached to the contention urged by Mr. Kumaraswamiah for the defendant that section 12 was introduced into the Act for historical reasons, because there had been certain disputes between landholders and their tenants about the right of the tenants to make use of trees on their holdings. That may detract a little from the use which we should otherwise make of the words in the section I have mentioned; and the last words of the section show that special protection of tenants in this respect was thought necessary.

Then later in the Act we have the provision in section 77 and the following sections that, if a ryot does not pay the rent due on his holding in time, the landholder among his remedies has the right to distrain the growing crops of the ryot. That is a very useful weapon for the landholder and one of which he makes frequent use. But, if a ryot in the ordinary course of agriculture can plant timber trees which will not be worth anything for a considerable number of years, so far as such a ryot is concerned, the landholder's power of distress will often be illusory. That is perhaps another minor indication that the framers of the Act did not regard the growing of timber and fuel trees in large plantations as an ordinary agricultural purpose of a ryot.

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Then again there is the provision in section 151 of the Act that a landholder may institute a suit before the Collector to eject an occupancy ryot from his holding on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. I take it that "agricultural purposes" in that section means agricultural purposes generally. It cannot be doubted that, if a ryot grew on his holding a large plantation of timber trees and cut them down when they matured, the stumps and roots in the land would render it entirely unsuitable for ordinary agricultural purposes until they had been removed, which could often be done only at very great expense. It is no answer, I think, to that argument to say that, if the growing of trees is an agricultural purpose, the land may still be suitable for growing more trees in the spaces between the trees already cut down. I think the meaning of the section is that the landholder can eject a ryot who makes his holding unfit for agricultural purposes generally, not unfit for all agricultural purposes except one, even if the growing of timber were an agricultural purpose. Such a heavy penalty could hardly have been provided if the growing of timber trees was an agricultural purpose at all. With this provision section 11 of the Act may be compared.

These are five indications I find in the Act that "agriculture" was not meant by the framers of the Act to include the growing of plantations of timber or fuel trees. Mr. Kumaraswamiah has drawn our attention to section 26 of the Act. There we find mention of a ryot accepting a putta with a rent lower than the lawful rate previously payable on the land on condition that he plants trees. Mr. Kumaraswamiah has urged that the use of the word "ryot" and the use of the word

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"rent" in that section indicate that the ryot, who by definition must be a person holding land for the purpose of agriculture, may plant trees and pay rent for them under the Act as an agricultural purpose. Possibly the use of these two words "ryot" and "rent" in that section may lend a little colour to the defendant's contention in this case. But I think, if we examine the section, we shall see that very little can be made of that. The section, so far as the planting of trees is concerned, is aimed at providing that a ryot, who holds, or would ordinarily hold, land for agricultural purposes, may hold the land at a lower rate if he carries out the very useful purpose of planting some trees upon it and that, so long as he carries out that purpose and fulfils that condition, his rent shall not be enhanced. I do not think we can use the provision intended to secure reduction of rent to a ryot who plants trees on his holding as showing that the planting of trees is an ordinary agricultural operation. Indeed, if the planting of trees was an ordinary agricultural operation of a ryot, why should he be allowed a favourable rent when he did it? If the section is examined as a whole, I do not think it throws any doubt upon the view that the framers of the Act did not include in agriculture the planting of timber or fuel trees.

In my opinion therefore the defendant, though he holds ryoti land in an "estate" under the Madras Estates Land Act, is not a ryot, because he holds it for some purpose other than agriculture within the meaning of "agriculture" as used in the Act. That being so, in my opinion the learned District Judge was mistaken in supposing that the jurisdiction of the Civil Court was excluded in this case, and his order returning the plaint should be set aside.

As I have said, the plaintiff appealed against the award of damages, maintaining that he was entitled to something more. But Mr. Srinivasa Ayyar has informed us that, after the weary course this lengthy litigation has run, he does not wish to proceed with that appeal any farther. So far as the defendant is concerned, although the learned District Judge found in his favour that the suit should have been brought in a Revenue Court, he dealt with the other aspects of the case, and it is unnecessary to send the defendant's appeal back to the District Court for further hearing.

In my opinion the present appeal should be allowed with costs and the decree of the District Munsif restored. In the District Court each party should bear his own costs.

ANANTAKRISHNA AYYAR J.—I agree. The plaintiff filed the original suit to recover possession of 6 acres of land which he described in paragraph 6 of the plaint as poramboke land of the village of Chinnamapet. He also claimed damages from the defendant. The village of Chinnamapet belongs to the plaintiff. In 1911 the plaintiff had granted, in favour of the defendant, an ijara to be in force for a term of eight years—Exhibit A. Under that document, the defendant was practically to represent the plaintiff in respect of the plaintiff's rights in that village during the eight years, and this defendant was authorized under that document to grant pattas to ryots and to do all other things that would have to be done by the plaintiff but for the ijara. After the expiry of the period, the defendant surrendered possession to the plaintiff of all that he got under the ijara, but as regards the suit lands the defendant had planted casuarina trees thereon and consequently he did not surrender the same to the plaintiff. The present suit was accordingly brought to recover possession of the

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suit lands with damages. The defendant's plea was that the village was an estate within the meaning of the Madras Estates Land Act, that the suit lands constituted ryoti lands, that the defendant was a ryot, and that therefore the Civil Court had no jurisdiction to entertain the suit; and he urged that the plaintiff should have sought whatever remedies he was entitled to in the Revenue Court. The District Munsif of Sholinghur framed Issue I in the following terms: "Is the defendant a trespasser as stated by plaintiff, or is he a ryot as alleged by him?" The third issue was raised as to "whether the District Munsif's Court had jurisdiction to try the suit". The learned District Munsif came to the conclusion that the land was used by the defendant for rearing casuarina trees, and that the land which must be taken to have been let out for such a purpose could not be said to be let for "agricultural purposes" within the meaning of the Madras Estates Land Act. He accordingly held that the Civil Court had jurisdiction to entertain the suit and that the defendant was not entitled any longer to remain in possession of the land. He decreed the plaintiff's suit for possession of land, and awarded Rs. 20 for damages, and also mesne profits after date of suit. Both parties preferred appeals to the District Court—the plaintiff claiming a larger amount as for damages, and the defendant objecting to the decree in ejectment passed by the trial Court. The learned District Judge, after remand, found, as I understand his judgment, that the defendant should be taken to have been holding this land for rearing casuarina trees. The question was therefore raised before the learned District Judge whether the letting of land for such a purpose would be letting lands for "agricultural purposes" within the meaning of the Madras Estates Land Act. He came to

the conclusion that it was, and accordingly reversed the decision of the trial Court and directed the return of the plaint for presentation to the proper Court—holding that only Revenue Courts have jurisdiction in the matter. The plaintiff has preferred the present civil miscellaneous appeal against the order passed by the learned District Judge.

For the purpose of disposing of this appeal it is necessary only to consider the question whether, assuming the land to be ryoti land, the defendant holds the land for "purposes of agriculture". As was held in *Venugopala Rice-Mill v. Rajah of Pittapuram*(1), if, by agreement between the parties, a ryoti land is no longer held for agricultural purposes but is held for non-agricultural purposes, then the jurisdiction of the Civil Court to decide the rights of the parties thereto would not be ousted by the Madras Estates Land Act. Therefore the argument in second appeal really centered on the question whether letting land for "rearing casuarina trees" is letting it for "agricultural purposes". This leads naturally to the discussion as to what exactly is the meaning to be attached to the expression "agricultural purposes"—occurring in the Act. Our attention was drawn to various definitions of the term "agriculture" which learned Judges have given on various occasions. In *Murugesu Chetti v. Chinnathambi Goundan*(2) SHEPHARD and BHASHYAM AYYANGAR JJ. had to decide the question whether the lease of land for the cultivation of betel is an agricultural lease. The question arose in connexion with section 17 of the Registration Act and section 117 of the Transfer of Property Act. The learned Judges held that it was; but, in discussing the question, BHASHYAM AYYANGAR J. at page 425

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(1) (1929) I.L.R. 53 Mad. 367.

(2) (1901) I.L.R. 24 Mad. 421.

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defined "agriculture", as distinguished from horticulture, as including

"not only all field cultivation by tillage but also all garden cultivation for the purpose chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury, if not as an article of diet."

The learned Judge thus practically limited the application of the word "agriculture" to the procuring of vegetables and fruits which are useful as food for man or beast and other products fit for human consumption by way of luxury if not as an article of diet. SHEPHARD J., who agreed that the lease of land for the cultivation of betel is an agricultural lease, was evidently not prepared to accept the definition of the word "agriculture" given by BHASHYAM AYYANGAR J. The learned Judge says that neither the man who planted fruit trees or bushes in an enclosed space, nor still less one who planted and maintained trees for firewood or other such purpose, could be called an "agriculturist". The term "agriculture", however, is capable of being applied to tillage of the soil in the widest sense. The learned Judge considered the context in which the expression "agricultural purpose" occurred in the Transfer of Property Act, and came to the conclusion that a lease of land for cultivating betel was an agricultural lease. The learned Judge also took occasion to say that the view expressed by him in an earlier case, *Kunhayen Haji v. Mayan*(1), that a lease of coffee garden was not an agricultural lease, was not one to which he was inclined to adhere, after hearing further arguments upon the question. In *King-Emperor v. Alexander Allan*(2) DAVIES and MOORE JJ. referred to various

(1) (1893) I.L.R. 17 Mad. 98.

(2) (1901) I.L.R. 25 Mad. 627.

dictionaries as to the definition of the word "agriculture". They referred to the Oxford Dictionary by Dr. Murray, and held, in connexion with a case arising under the Madras District Municipalities Act, that lands let for pasture for cattle were lands let for agricultural purposes, in the absence of a definition of the word "agriculture" in that Act. SADASIYA AYYAR J. had occasion to consider the definition of "agriculture" in two cases, *Raja of Venkatagiri v. Ayyappareddi*(1) and *Seshayya v. Rajah of Pittapur*(2). In *Raja of Venkatagiri v. Ayyappareddi*(1) the question that had to be considered was whether land leased for pasture for cattle was land let for agricultural purposes within the meaning of the Madras Estates Land Act. In deciding the question in the negative the learned Judge observed at page 741 as follows:—

"The ordinary meaning of 'agriculture' is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc."

He reiterated the same definition in the later case of *Seshayya v. Rajah of Pittapur*(2). In *Maharajah of Venkatagiri v. Rami Reddi*(3), WALLIS C.J. and PHILLIPS J. had to consider the same question as regards lands let for pasture. These learned Judges agreed with the decision in the prior case of *Raja of Venkatagiri v. Ayyappareddi*(1), and observed that lands held for purposes of pasture only could not be said to be held for purposes of agriculture within the meaning of the Madras Estates Land Act. Now, as regards the actual decision in those cases, I do not think that any doubt could be entertained. The Madras Estates Land Act itself contains indications with reference to pasture lands for the decision of such

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(1) (1913) I.L.R. 38 Mad. 738.

(2) (1916) 3 L.W. 485.

(3) (1916) 81 M.L.J. 211.

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a question. In section 3, clause 11, when defining "rent" as "whatever is lawfully payable in money or in kind, etc., for the use of land for the purpose of "agriculture", the Legislature thought it proper to include within that term and for the purpose of the Act "sums payable by a ryot as such on account of pasturage fees and fishery rent." The learned Judges who had to deal with this question naturally laid emphasis on this clause 11 of section 3, and, if one may say so respectfully, properly came to the conclusion that, so far as the Madras Estates Land Act is concerned, land let for pasture could not be said to be land let for "agriculture" as otherwise there was no necessity for including in sub-clause (b) of section 3 (11) sums payable on account of pasture as "rent". There are other indications also in the Act which would go to support the above decisions, which it is not necessary for me to mention here. Speaking with all respect, it seems to me that the definition of the word "agriculture" in *Murugesu Chetti v. Chinnathambi Goundan*(1) by BHASHYAM AYYANGAR J., and by SADASIVA AYYAR J. in *Raja of Venkatagiri v. Ayyappa-reddi*(2) and *Seshayya v. Rajah of Pittapur*(3) could not be accepted for all purposes without qualification. If we look into the recognized dictionaries as to the meaning of the word "agriculture", all that we find is that "agriculture" means "field cultivation", and "cultivation" is said to be "tillage or breaking up the soil." There is nothing in the definition of "agriculture" given in the dictionaries which I have been able to consult which restricts its application to cases of production of those things only which are fit for human consumption for man or beast as described by BHASHYAM

(1) (1901) I.L.R. 24 Mad. 431. (2) (1913) I.L.R. 38 Mad. 738.
(3) (1916) 3 L.W. 485.

AYYANGAR J. Nor do I find anything which restricts its meaning to the raising of "grain crops" as mentioned by SADASIVA AYYAR J. When this question came later on for discussion before this Court in *Panadai Pathan v. Ramsami Chetti*(1), SPENCER and RAMESAM JJ. found themselves unable to agree with the definitions given by BHASHYAM AYYANGAR and SADASIVA AYYAR JJ. I am not now, however, concerned with the definition given by the learned Judges in the case in *Panadai Pathan v. Ramasami Chetti* (1). In this connexion, reference may be made to a discussion of this question of "agriculture" and "husbandry" generally in *Duncan Keir v. Thomas Gillespie*(2). However, general definitions given in dictionaries would be of use only when there is nothing to the contrary in the context of any particular provision of law which the Courts have to construe. Pronouncements by Courts on other provisions of other Acts, however useful, would not be decisive as authority when we have to construe the provisions of quite a different Act. In several of the English Statutes, viz., Agricultural Holdings Act, Agricultural Rates Act, and other similar Acts, the Legislature has chosen to enlarge the meaning of the term "agriculture", as it thought fit, for the purpose of those Acts. It is, therefore, I think, not of real use to go to those definitions when we have to construe an Indian Act quite different. Our attention was drawn to a case in *Kaju Mal v. Salig Ram*(3) where the Privy Council held that lands let out for cultivation of tea are lands let for agriculture. Similarly, there are cases which show that lands let for producing indigo are also lands let for cultivation purposes. The Privy Council in *Kesho Prasad Singh v. Sheo Pragash Ojha* (4) held with

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(1) (1922) I.L.R. 45 Mad. 710. (2) (1919) 7 T.C. 473.
(3) (1923) I.L.R. 5 Lah. 50 (P.C.). (4) (1924) I.L.R. 43 All. 831 (P.C.).

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reference to the Agra Tenancy Act, in which I understand there is no special definition of the word "agriculture," that rearing a grove was not one connected with agriculture; see also *Hedayet Ali v. Kamalanand Singh*(1).

As already remarked, one has really to fall back on the provisions of and the indications contained in the particular Act which one has to construe in disposing of cases like the one before us. I find that the definition of the word "agriculture" in section 3 (1) of the Madras Estates Land Act specifically makes it include "horticulture." This, I think, is a matter of very great importance and help in deciding the point before us. If the Legislature wanted the Courts to understand by the word "agriculture" what is generally supposed to come under its significance in its widest sense, then its express statement that "agriculture" in its grammatical sense shall "include horticulture" is meaningless, if we accept the view of the learned Advocate for the respondent. If "agriculture", according to this contention, includes "horticulture", and, possibly, also others, one cannot give effect to the inclusion of these words specifically in section 3 (1) of the Act. There is the legal maxim *expressio unius est exclusio alterius*—that is, the specific inclusion of one necessarily implies the exclusion of others; so that, in the absence of any other indication afforded by the Act, this one circumstance is, I think, of so great significance that the contention of the learned Advocate for the respondent on this point could not, in the circumstances, be upheld. But are there any further indications in the Act? Now the definition of the word "improvement" in section 3, clause 4, sub-clause (f) refers to the planting of "fruit

trees and fruit gardens". If agriculture includes the planting of fruit trees and fruit gardens, the definition of "improvement" mentioned above is meaningless. If one is, however, at liberty (I have my doubts whether one is) to look into other Acts passed by the Madras Legislature, one may refer to section 4 of the Malabar Compensation for Tenants' Improvements Act I of 1900—where the word "improvement" is made to include other things also—namely, "timber trees and other useful trees"; and in the recently enacted Madras Malabar Tenancy Act, XIV of 1930, the definition of the word "improvement" given in the Compensation Act I of 1900 is taken to be the definition for the purpose of the new Act also. Again, while the planting of fruit trees and fruit gardens is included in the term "improvement", we have not got anything to indicate that the planting of trees as such (irrespective of fruit bearing) should be considered to be an "improvement". Section 12 of the Act, as I read it, is strongly against the argument of the learned Advocate for the respondent. It speaks of trees planted by the ryot after the passing of the Act and enacts that the ryot is entitled to the same. If a ryot entitled to use the land for agricultural purposes would be entitled to plant trees as coming within the operation of agriculture as contended for by the learned Advocate for the respondent, then a specific provision to this effect in section 12, is, I think, not likely to have been made, there being no necessity for the same in that view. I am not able to agree with the explanation offered by the learned Advocate for the respondent, namely, that it was *ex abundanti cautela* that such a provision was made. From what I am able to see, the first portion of section 12 would be enough to achieve the object, and therefore, I think, that the indication afforded by

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(1) (1912) 17 C.L.J. 411.

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section 12 is also against the view contended for by the learned Advocate for the respondent. Again, in section 6, clause 4, I find the expression "agricultural crops". I do not find the expression "agricultural grain crops". Therefore, to restrict the meaning of agriculture to the raising of "grain" crops, as was evidently sought to be done by SADASIYA AYYAR J., is, I think (speaking with all respect), against the indication afforded by the Act, so far as I can gather from the reference to agricultural crops in section 6, clause 4. It cannot be said that the idea of a "forest" was not present to the mind of the draftsman of the Act, for I find the word "forest" used in section 6 of the Act. If the Legislature meant that the term "agriculture" should also include "forestry", or "rearing of trees", it seems to me that it would have expressly said so, when it expressly included "horticulture" within the purview of the word "agriculture" for the purposes of this Act. I do not propose to attempt a positive definition of the word "agriculture". It is enough for the disposal of this case to say that letting lands for rearing casuarina trees does not come within the scope of "agriculture", as the term is used in the Madras Estates Land Act. As I said, it is not safe to draw any sort of conclusive inference from the meaning of the word "agriculture" used in one Act, when we have to construe another Act; but, so far as they go, the observations in *Commissioner of Income-tax, Madras v. Manavedan Tirumalpad*(1)—a case that arose under the Income-tax Act—seem to support the contention of the appellant in the present case.

The question there was whether, under the Income-tax Act, amounts received from the sale of timber trees

were income liable to income-tax assessment. The Court observed at page 267 as follows:

"Of course we are unable to distinguish between income derived from the sale of paddy which is grown on land and the income derived from the sale of timber cut in a forest; but the profits earned from the sale of paddy would be assessable to income-tax but for the special exemption given to that income in the Income-tax Act by reason of its being agricultural income. There is no such exemption in the case of income derived from the sale of timber."

Therefore, when there was no definition of the word "agriculture", the Court held that planting trees on land could not be said to be operation by way of agriculture. In the case before us, we have got this extra indication, as I said, viz., the Legislature has specifically said in so many words that "agriculture includes horticulture". That being so, it seems to me that it would not, in this Act, include other operations which in the widest sense of the term might otherwise be taken to come under the same. The question whether the raising of casuarina trees is using lands for agricultural purposes came up for decision before this Court, though not in connexion with the Madras Estates Land Act. In *Devaraja Naicken v. Ammani Ammal*(1) SESHAGIRI AYYAR and KUMARASWAMI SASTRI JJ. had to consider that question in connexion with the Transfer of Property Act and the Registration Act. The learned Judges held that a lease for planting casuarina trees is not one for an agricultural purpose. The learned Judges expressed concurrence with the opinion of SHEPARD J. in the case of *Murugesu Chetti v. Chinna-thambi Goundan*(2) and they also remarked:—

"Mr. Ramachandra Ayyar has rightly conceded that in the face of that ruling he cannot successfully contend that the lease is one for agricultural purposes."

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(1) (1930) I.L.R. 54 Mad. 21 (F.B.).

(1) (1915) 3 L.W. 819.

(2) (1901) I.L.R. 24 Mad. 421.

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This case is to some extent an authority in favour of the view I have expressed. But in *Panadai Pathan v. Ramasami Chetti*(1) SPENCER and RAMESAM JJ. had to consider practically the same question, and, as I said, that case also was not one that arose under the Madras Estates Land Act, but under the Transfer of Property Act and the Registration Act. The learned Judges were of opinion that the decision in *Devaraja Naicken v. Ammani Ammal*(2) was based upon admission of Counsel, and they were accordingly not prepared to accept the same as binding. The case before us is not under the general law, or under an Act which does not describe the term "agriculture". That being so, I do not think that the decision in *Panadai Pathan v. Ramasami Chetti*(1) concludes this case. I have already remarked that the learned Judges in the case of *Panadai Pathan v. Ramasami Chetti*(1) referred to the definition of the term agriculture given in some English statutes. All learned Judges are agreed that the word has to be construed with reference to the context, and, for reasons I have already given, it seems to me that the indications given not only by the definition (rather description) of the word "agriculture" but by the other provisions of the Madras Estates Land Act, to which my learned brother has elaborately referred, lead us to the conclusion that the contention of the learned Advocate for the respondent should not be upheld by us. There is a decision in *Vellayappa Chetti v. Subramaniam Chettiar*(3) where DEVADOSS and WALLACE JJ. had to consider the question whether cocoanut trees would be "improvements" within the meaning of the Madras Estates Land Act. The learned Judges held that they were not improvements, though they held so with great hesitation. That exact

(1) (1922) I.L.R. 45 Mad. 710.
(2) (1915) 3 L.W. 319. (3) (1926) 51 M.L.J. 880.

question is not before us. The question before us is with reference to casuarina trees. I gather that it takes about 8 or 10 years for casuarina trees to mature, that the fruits of these trees and the trees are not fit for consumption either by man or beast, that they are used for firewood purposes, and that, after they are cut, the stumps remaining on the ground would seriously impede cultivation unless great expense is incurred in removing the same. There is also the idea of periodically raising crops, and preparing the land, though it need not necessarily be at the end of every year, and of care and supervision involved in operations relating to agriculture; and, from what I am able to gather, the planting of casuarina trees in no way conforms to these ideas.

For the foregoing reasons, I am of opinion that this appeal should be allowed and that the District Munsif's decree should be restored. I also agree in the order as to costs proposed by my learned brother.

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APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao.

1931,
March 26. THE RAJAH OF VIZIANAGARAM (COUNTER-PETITIONER),
APPELLANT,

v.

PADALA APPALASWAMI AND FIFTY-ONE OTHERS
(PETITIONERS AND LEGAL REPRESENTATIVES OF PETITIONERS
Nos. 2, 47, 26, 35 AND 46), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 135, 137, 142 and art. 21 of Part B of schedule to Act—District Collector's order under sec. 137 directing landholder to carry out repairs—Appeal by landholder from—Competency to entertain—Board of Revenue and not District Court has—Art. 21 of Part B of schedule to Act—Application contemplated by and appeal allowed by.

Where, on an application filed by ryots under section 135 of the Madras Estates Land Act, an order is made by the District Collector under section 137 of the Act directing the landholder to carry out certain repairs to the irrigation work in question, an appeal by the landholder against the District Collector's order to the District Court is incompetent. The appeal lies under section 142 of the Act to the Board of Revenue.

Article 21 of Part B of the schedule to the Act contemplates an application made by the landholder under section 137 of the Act and the appeal allowed by that article is against the order made on such application.

APPEAL against the decree of the District Court of Vizagapatam in Appeal Suit No. 252 of 1926, dated the 23rd day of July 1927, preferred against the proceedings of the Collector of Vizagapatam, dated 1st July 1926 in D. Dis. No. 2478 of 1925-A 2.

S. Venkatesa Ayyangar for appellant.
Y. Suryanarayana for respondents.

* Second Appeal No. 272 of 1928.

JUDGMENT.

The learned District Judge has, upholding a preliminary objection, dismissed the appeal of the landholder (the Rajah of Vizianagaram) as being incompetent. The question is, whether his order is correct or not. The proceedings started before the Collector by certain ryots filing an application under section 135 of the Madras Estates Land Act stating that the tank of their village was out of repair and that the landholder failed to restore it to efficiency and praying for the issue of an order under section 137 for the repair of that tank. The Collector, holding that the landholder had grossly neglected his duty, made an order under section 137, directing him to carry out certain repairs to the tank and take certain other steps within six months of the date of that order. It was against this order that the landholder filed an appeal to the District Court, which, as I have said, was rejected on the ground that it does not lie. Under section 142, from any order issued by a District Collector under Chapter VII (chapter dealing with repair of irrigation works) other than an order under section 138, an appeal lies, unless otherwise provided for in part B of the Schedule to the Act, to the Board of Revenue, whose decision shall be final. The effect of this section is, that the appellate authority is the Board of Revenue and not the District Court, unless there is a provision to the contrary in Part B of the Schedule. Before turning to the Schedule, I must refer to section 189 of the Madras Estates Land Act. The material portions of that section read thus:—

Clause 1.—A Collector or other Revenue Officer specially authorized under this Act shall hear and determine as a Revenue Court all suits and applications of the nature specified in Parts A and B of the Schedule.

Clause 2.—Decrees and orders passed under sub-section (1) shall be subject to appeal as provided in the sixth column of Parts A and B of the Schedule.

I shall now quote article 21 (that is the article applicable) of Part B of the Schedule to the Act :—

Serial number.	Section of Act	Description of application.	Period of limitation.	Time from which period begins to run.	Court, if any, to which appeal lies.
21	137	By a landholder against an order under section 137 for the repair of an irrigation work.	None ..	None ..	District Court.

Now, was the application, on which the Collector made his order, of the kind referred to in the article quoted above? Assuredly not. As I have said, the application was one made by the ryots under section 135. What this article contemplates is an application under article 137 and that made by a landholder. It is only an appeal against an order on such an application that lies to the District Court; otherwise, the appeal lies under section 142 to the Board of Revenue. It follows from this that the appeal filed by the landholder to the District Court was rightly rejected as being incompetent. The appellant's Counsel suggests that, when the ryots applied under section 135, the counter-petition filed by the landholder may be regarded as the latter's application under section 137 and, viewed in that light, his appeal to the District Court was in order. I cannot accede to this contention, for it implies that, while a landholder has a right of appeal to the District Court from an order made on the ryot's application, the ryot himself has no such right. The construction suggested cannot, in my opinion, be the correct one. Moreover, the wording of article 21, as it stood before it was amended by Act IV of 1909, shows that the view

suggested cannot prevail. I reproduce below the original article :—

Serial number.	Section of Act.	Description of application.	Period of limitation.	Time from which period begins to run.	Court, if any, to which appeal lies.
21	135	For an order under section 137 for the repair of an irrigation work	None ...	None ...	District Court.

That shows that an appeal lay to the District Court from an order under section 137 for the repair of an irrigation work on an application made under section 135. That article gave a wide power of appeal to the District Court. The intention of the amendment obviously was to curtail that right. It follows that the learned Counsel's argument, as I have pointed out, cannot be accepted. There is no decided case on the point, but I find that my view receives support from Mr. Ramadas's note on section 137 in his work on the Madras Estates Land Act. The following passage from that book contains a terse statement of the law :

"Appeal.—A landholder who feels aggrieved by an order under this section for the repair of an irrigation work may apply to the District Collector to set it aside. This is evidently by way of a review of the order made under section 137. If he is dissatisfied with the order made on such an application he may appeal to the District Court. This implies that he cannot appeal against the original order under section 137. But section 142 seems to give him an appeal to the Board of Revenue against the original order of the District Collector. If the landholder commits default in carrying out the Collector's order, the ryots may apply to the Collector to authorize them to execute the repair; and, if the Collector refuses to authorize them to execute the repair, they may appeal to the District Court."

The second appeal is dismissed with costs.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

1981,
March 4.

SRI ISWARANANDA BHARATHI SWAMI OF EDNIR
MUTT (PLAINTIFF), APPELLANT,

v.

THE BOARD OF COMMISSIONERS FOR HINDU
RELIGIOUS ENDOWMENTS, MADRAS, BY ITS
SECRETARY (DEFENDANT), RESPONDENT.*

*Madras Hindu Religious Endowments Act (II of 1927), ss.
9 (7), 84 (2)—Math—Finding by the Religious Endowments
Board that a particular building is a—Suit for a declara-
tion that it is not a—If maintainable.*

The Hindu Religious Endowments Board, after giving notice to B and holding an inquiry, passed an order that a particular building was a math within the Madras Hindu Religious Endowments Act. B filed a suit for a declaration that it was not an institution under the said Act.

Held, that when by an act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury and when the mode of redressing the injury is also pointed out by the statute, as has been done in this case by section 84 (2) of the Act, viz., by an application to the District Court, the suit for the said purpose is not maintainable.

APPEAL against the decree of the District Court of South Kanara, dated 27th January 1930, in Original Suit No. 4 of 1929.

B. Sitarama Rao for appellant.

P. Venkataramana Rao for respondent.

The JUDGMENT of the Court was delivered by

CORNISH J.

CORNISH J.—The plaintiff sued for a declaration that the building in which he resides and in which the worship of the deity, Sri Gopalakrishna Devaru, is

* Appeal No. 168 of 1930.

performed, though it is popularly called the Ednir Math, is not an institution to which the Madras Hindu Religious Endowments Act (II of 1927) applies.

The plaintiff was filed on 17th April 1928. The defendant, the Religious Endowments Board, had by its order dated 27th April 1927, after giving notice to the plaintiff and holding an inquiry, decided that the institution was a math within the Madras Hindu Religious Endowments Act. This order of the Board, as appears from paragraph 6 of the plaintiff, is the cause of action on which the plaintiff founds his suit. The learned District Judge has held that the suit is barred by section 84 (2) of the Act and has dismissed it, and we think that he was right.

A "math" as defined by the Act, section 9 (7), means,

"an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples, and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution."

Section 84 as it stood at the date of the Board's order (it has since been amended) provided:

"(i) If any dispute arises as to whether a math . . . is one to which this Act applies . . . such dispute shall be decided by the Board.

(ii) A trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final."

There is no doubt that a dispute had arisen between the plaintiff on the one side who maintained that the institution was his private property, and the Board on the other which claimed that the institution was a math within the definition of the Act. The Board was,

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therefore, competent to decide the dispute under section 84 (1) of the Act; see *Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar*(1). The argument was directed to showing that the Court's jurisdiction to entertain this suit is not ousted by section 84 (2). A number of cases have been cited in support of the proposition that an enactment providing that the decision of a special tribunal upon a particular matter shall be final does not import a total exclusion of the Court's jurisdiction over the matter. Thus, a determination or order which is in excess of the jurisdiction conferred upon the tribunal would be liable to be set aside by suit or by the Court in the exercise of its powers of revision, as the case might be; see *Secretary of State for India in Council v. Fahamidannissa Begum*(2), *Matangini Debi v. Girish Chunder Chongdar*(3), *Nataraja Mudaliar v. Municipal Council of Mayavaram*(4) and *Parthasaradhi Naidu v. Koteswara Rao*(5). And the jurisdiction of the Court will not be ousted unless it is expressly or impliedly excluded by the enactment creating the special tribunal; see *Stevens v. Chown*(6), *Bhaishankar v. The Municipal Corporation of Bombay*(7), and *Valli Ammal v. The Corporation of Madras*(8). But the well established principle is that, when by an act of the Legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted, and, in the case of injury, the party cannot proceed by suit; see *Ramachandra v. The Secretary of State*(9), *Saibesh Chandra Sarkar v. Sir*

Bejoy Chand Mahatap Bahadur(1), *Bhaishankar v. The Municipal Corporation of Bombay*(2), and *Nataraja Mudaliar v. Municipal Council of Mayavaram*(3). The mode of redress open to the plaintiff in respect of the interference with his rights by the Board's order is definitely provided by section 84 (2) of the Act, viz., an application to the District Court. In our opinion, therefore, it is not open to him to seek redress by means of this suit. His appeal is accordingly dismissed with costs.

G.R.

APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice,
and Mr. Justice Sundaram Chetti.*

IN RE EDDULA VENKATASUBBA REDDI AND FIVE
OTHERS (ACCUSED NOS. 1 TO 3 AND 5 TO 7), PRISONERS.*

1931,
January 20.

Indian Evidence Act (I of 1872), ss. 8, 32 (1)—Statement by deceased constituting motive to commit crime—Admissibility—Under what circumstances.

Where a statement by a deceased person is said to constitute a motive for another to commit a crime, it cannot be proved by one who heard the deceased make the statement.

Such a statement will be admissible under section 32 (1) of the Indian Evidence Act (I of 1872) if it be a statement as to the cause of death or as to any of the circumstances of the transaction which resulted in death or under explanation 1 to section 8 of the Act if it is shown to have accompanied or explained any act of the deceased.

There is nothing in section 8 to indicate that a relevant fact can be proved by hearsay evidence.

(1) (1928) 55 M.L.J. 605, 611. (2) (1889) I.L.R. 17 Calo. 590 (P.C.).
(3) (1908) I.L.R. 30 Calo. 619. (4) (1911) I.L.R. 36 Mad. 120, 122.
(5) (1923) I.L.R. 47 Mad. 369. (6) [1901] 1 Ch. 894, 904.
(7) (1907) I.L.R. 31 Bom. 604, 609. (8) (1912) I.L.R. 38 Mad. 41.
(9) (1888) I.L.R. 12 Mad. 105.

(1) (1921) 26 C.W.N. 506. (2) (1907) I.L.R. 31 Bom. 604, 609.
(3) (1911) I.L.R. 36 Mad. 120, 122.

* Referred Trial No. 111 of 1930 and Criminal Appeal No. 473 of 1930.

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TRIAL referred by the Court of Session of the Cuddapah Division for confirmation of the sentences of death and appeal against the sentence of the Court of Session of the Cuddapah Division in Case No. 22 of its Calendar for 1930.

Nugent Grant and *V. L. Ethiraj* for first accused, *A. S. Sivakaminathan* for second accused, *N. Soma-sundaram* for third accused, *D. R. Venkatesa Ayyar* for fifth accused, *G. K. Damodara Rao* for sixth accused, and *L. Jayaram* for seventh accused, in Referred Trial No. 111 of 1930.

V. L. Ethiraj and *A. S. Sivakaminathan* for appellant in Criminal Appeal No. 473 of 1930.

K. N. Ganpati and *B. P. Devarajulu Nayudu* for Public Prosecutor (*L. H. Bewes*) for the Crown in both cases.

JUDGMENT.

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SUNDARAM CHETTI J.—Accused 1 to 7 have been convicted by the Sessions Judge of Cuddapah for the murder of Eddula Sivamma at Chinnadandlur village on 20th February 1930, and all of them except the fourth accused were sentenced to death, and the fourth accused to transportation for life. Accused 5 to 7 are alleged to be the hired assassins who committed the murder; whereas accused 1 to 4 are said to have abetted it.

The facts of the prosecution case are briefly as follows. Sivamma was a widow, aged about 60, in affluent circumstances, without any issue. She was a charitable lady, and many and various were her religious and charitable dispositions. Accused 1 had an elder brother, who was brought up by Sivamma, but he died some years ago, leaving his widow Subbamma (P.W. 7), who is now aged about 23. Accused 1 has two younger brothers, Venkatasiva Reddi aged about 18 (C.W. 2)

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and a minor aged 12. Sivamma was protecting Subbamma (P.W. 7) in her own house, and treating accused 1 and his younger brothers with affection, they being her paternal uncle's great-grandsons. They were living in another house, which is two or three doors off Sivamma's house. Her last will is Exhibit L, which she executed in 1924, whereby she left the bulk of her estate to accused 1 and his two younger brothers, after making some bequests for charity, and some provision for Subbamma. Pedda Venkatasubba Reddi (C.W. 3), the paternal uncle of accused 1, was keeping the accounts of Sivamma for several years, till a few months before her death, and she was lending out considerable sums of money on promissory notes and owned also landed property. Accused 2 is the husband of accused 1's sister, residing at Kothapeta, two and half miles from Chinnadandlur, while accused 4 who lives in a distant village Pothireddipalle is accused 1's wife's brother. Accused 3 who is a native of Kothapeta has recently settled at Chinnadandlur, to look after his minor nephews. Both accused 2 and accused 4 owed money to Sivamma on promissory notes, whereas accused 3 owed a sum of Rs. 600 on a promissory note to accused 2.

It is beyond doubt that Sivamma was most brutally murdered in the early part of the night of 20th February 1930, between 7 and 8 p.m., when she was sitting on the outer pial of her house chewing betel after her dinner. According to the prosecution case, it was accused 1 who plotted the murder of Sivamma in a diabolical manner. It is alleged that, about three months before the occurrence, when Subbamma was left alone in Sivamma's house, during the latter's absence for a week from the village, accused 1 approached Subbamma and made improper overtures to her, that, when she reported this matter to Sivamma on her return, she became enraged

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and after severely scolding accused 1 told him not to enter her house, and that she was also saying that she would alter her will and settle at Gundlakunta. This threatened disinheritance is said to have supplied accused 1 a motive for bringing about the death of Sivamma with the aid of hired assassins.

There has been an elaborate trial in this case, and the learned Sessions Judge has written an exhaustive judgment, adverting to the evidence in great detail. As observed by him more than once in his judgment, the case for the prosecution principally depends on the evidence of the approver alone.

P.W. 1 is the approver. He is doubtless a man of disreputable character, addicted to drinking and gambling. About a month before the murder of Sivamma, he came out of the jail, after serving nine months' term of imprisonment for robbing a woman.

[His Lordship dealt with the evidence of the approver, and continued:]

This story of the approver, which connects accused 1 with this murder as the prime abettor, is altogether uncorroborated by any evidence, and is left severely alone. Except for the motive, there is absolutely no proof as to what part, if any, accused 1 did play in connexion with this murder, beyond the uncorroborated statement of the approver.

The testimony of an accomplice is doubtless tainted evidence. It is well settled by judicial decisions that, though a conviction based on the uncorroborated testimony of an approver is not illegal, it is however unsafe to convict in the absence of independent corroborative evidence as regards material particulars. Such corroborative evidence may be either direct or circumstantial. This question has been well discussed in the

case of "*Rex v. Baskerville*(1). Lord READING C.J. has laid down the principles of law at page 667 as follows:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. . . . It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

Applying the aforesaid test, the corroborative evidence as regards the approver's story to connect accused 1 with this crime as an abettor by the narration of the part played by him just before the murder must be stated to be nil.

[His Lordship discussed the alleged motive of the first accused for plotting the murder and proceeded:]

In order to prove the motive for accused 1 to plot this murder, the prosecution relies on the evidence of P.Ws. 7, 14, and 15. They speak to certain statements made by Sivamma, in her outburst, having been enraged against accused 1 by reason of his molestation of Subbamma. As for the molestation, there is only the evidence of Subbamma. P.W. 14 says that Sivamma told him, that, as Subbamma had complained to her that accused 1 molested her, she forbade him to come to her house. She further said that, after Venkatasiva Reddi's marriage, she would cancel her will and go and live at

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Gundlakunta. P.W. 15 also speaks to the outburst of Sivamma, and says that she told him that, after marrying Venkatasiva Reddi, she would cancel her will and collect all the bonds standing in accused 1's name. It is argued by the learned Counsel for the appellants that these statements of the deceased are inadmissible in evidence, unless they can be brought under section 8, explanation 1, or section 32 (1) of the Evidence Act. According to the prosecution, the disclosure of Sivamma's intention to cancel the will (Exhibit L) and disinherit him was the reason for accused 1 to plot the murder of Sivamma. Section 8 says that any fact is relevant which shows or constitutes a motive for any fact in issue. In this case the fact in issue is whether accused 1 caused the murder of Sivamma. The motive for this can be proved as a relevant fact. But a fact, though relevant, must only be proved by admissible evidence. What P.Ws. 14 and 15 heard Sivamma say would be hearsay evidence, and as such inadmissible, unless it can be brought under any recognized exception. I at first thought that, if what Sivamma stated about her intention to cancel the will constituted a motive for accused 1 to devise her murder, that statement could be proved only by those who heard it from her. There is, however, this difficulty, viz., that, though that statement shows a motive for accused 1's act, it does not lose the character of being a statement made by a deceased person. Such a statement will be admissible under section 32 (1) if it satisfies the requisites mentioned therein. It cannot be deemed to be a statement as to the cause of her death, or as to any of the circumstances of the transaction which resulted in her death, and it would therefore be hearsay and not admissible; vide *Queen-Empress v. Surendra Nath*

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Sarkar(1). Unless such a statement is shown to have accompanied or explained any act of Sivamma, it would not come under explanation (1) to section 8. It must also be noted that P.W. 15 says that accused 1 was not present when Sivamma said so. It is not shown that Sivamma stated like that in the presence or to the knowledge of accused 1. No doubt, the result will be that, where a statement made by a deceased person is said to constitute a motive for another to commit a crime, it cannot be proved by one who heard the deceased say so. It is contended, that a motive is provable as a relevant fact, but it cannot be proved by hearsay evidence. With some hesitation, I am constrained to accede to the contention that the evidence of these witnesses as to what Sivamma stated to them is inadmissible. That being so, it should be taken that there is only slender proof in support of the alleged motive, which consists in the evidence of P.W. 7.

[His Lordship discussed the remaining evidence and held that, apart from the evidence of the approver, evidence of a direct character against the accused was scanty, and that, as the circumstantial evidence was capable of two constructions, one in favour of the accused and another against, they would be entitled to the benefit of the doubt, and proceeded:]

In a case of this kind, which shows that the murder in question must be the outcome of a cleverly conceived and carefully worked out plot, the task of the police in procuring adequate evidence to prove in a Court of Law the guilt of the accused, even if they were able to trace them as the real culprits, is no easy one. The learned Sessions Judge appears to be keenly alive to the fact that the culprits have successfully covered

(1)[(1901) I.L.R. 28 Calc. 397.]

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up all their traces, so as to make the task of detection a herculean one. Some of his observations in weighing the evidence seem to have been coloured by this impression. In order to convict persons charged with murder, there should be unimpeachable evidence of reliable witnesses bringing home the guilt to the accused beyond reasonable doubt. Such evidence is wanting in the present case, and it need not be reiterated that it is not safe to convict on the sole testimony of an approver without sufficient corroboration in material particulars either by direct or circumstantial evidence. We have bestowed our anxious consideration over this case. The learned Sessions Judge has doubtless evinced a commendable anxiety to get at the truth. But, if we find that the proof adduced at best leads to strong suspicion but falls short of the requisite standard, we are constrained to give the benefit of the doubt to the accused. In this case, if the accused escape, it is certainly not because their innocence is established, but only as the recipients of the benefit of doubt.

In the result, the conviction and sentence of all the accused are set aside. They are acquitted and will be set at liberty.

BEASLEY C.J. BEASLEY C.J.—I entirely agree with the judgment of my learned brother and do not propose to add anything with regard to the facts of this case, but I think it is necessary to say something with regard to the admissibility of some important matters tendered in evidence in the Sessions Court and held to be admissible by the learned Sessions Judge in spite of the objection taken to admissibility by the defence. That evidence relates to the motive for the murder relied upon by the prosecution. It is contended that the first accused caused Sivamma to be murdered because she intended to alter her will which was in his favour. This, it is alleged,

was because he had made indecent overtures to Subbamma during the absence of Sivamma from her village and that, in consequence of a complaint made by Subbamma to her on her return about those overtures, Sivamma was very much incensed and expressed her intention of cutting the first accused out of her will.

P.W. 15 states as follows:—"When I asked her about the inferior jewels she was getting made, she began to abuse saying 'our caste is a wretched Mala Madiga caste. There is not a caste like this anywhere else. They are eating my properties. They are ungrateful to me. Should I burn more property over them? I am quite sure they will murder me in six months or a year'. She was on the pial and abusing like this very loud. She said that after marrying Venkata Sivadu, she would cancel her will and retransfer or collect all the bonds standing in accused 1's name and go and settle at Gundlakunta or Kokattam. She said she would give her property to such persons as she liked. She said all this out loud. Accused 1 was not present at the time. All Sivamma's anger was because accused 1 had caught hold of Subbamma." Subbamma (P.W. 7) in her evidence states:—"In her second will Sivamma left property to me and to accused 1 and his two brothers. Sivamma was not on speaking terms with accused 1 for about three months prior to the murder and he did not come to our house. One day he came and molested me when Sivamma had gone to Nallaballe. Sivamma went there for eight days and I was left alone in the house. He came during the day time when I was alone. I told him he should come only when Sivamma was at home. He then went away. I complained weeping to Sivamma when she returned home two or three days later. She sent for accused 1 and scolded him and asked him not to come to her house again. Since then we and accused 1

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were not on speaking terms". Then: "Sivamma also told me after this incident with accused 1 that she would alter her will and that she would go and settle at Gundlakunta as accused 1 was a bad character." P.W. 14 also gives similar evidence.

Clearly the statement of Sivamma was not one made as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death and this is conceded by the learned Public Prosecutor. Sivamma's statement therefore is not admissible as one coming within the provisions of section 32 of the Indian Evidence Act. But it is contended that her statement is admissible under section 8 of the Indian Evidence Act because it shows a motive for the murder. Section 8 makes any fact relevant which shows or constitutes a motive for any fact in issue and the conduct of any party is relevant as proving such motive. It is contended by the prosecution that Sivamma's intention to alter her will is conduct showing such motive, and clearly her intention to alter her will is a relevant fact, but the question is how such an intention is proved. The learned Public Prosecutor of Cuddapah, who has most ably argued the case, contends that because her intention is relevant it can be proved by hearsay evidence. With this contention I cannot agree. If the intention of a person can be proved by direct evidence, then such evidence is clearly admissible to prove the relevant fact of motive, but I can find nothing in the Evidence Act which renders hearsay evidence of such intention admissible; and it seems to me that the learned Sessions Judge has failed to draw a distinction between the relevancy of evidence and its admissibility. I can find nothing in section 8 of the Indian Evidence Act which supports the contention of the prosecution that a relevant fact can be proved by hearsay evidence. Hearsay

evidence can never be admitted unless the Indian Evidence Act permits it. Section 32 does, subject to the conditions therein stated, admit hearsay evidence. If the learned Public Prosecutor's contention is correct, then it means that evidence otherwise inadmissible, namely, hearsay evidence, can be admitted in order to prove any relevant fact. This, it seems to me, is an utterly impossible contention. It cannot be argued that Sivamma's expressed intention amounted to conduct, because explanation (1) expressly rules out any such contention. That explanation says:

"The word 'conduct' in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this act."

What Sivamma said was not in explanation of any act of hers nor did it accompany any act of hers. It is a bare statement unaccompanied by any act and not any explanation of any act. If Sivamma had attempted to tear up her will, that would have been evidence of conduct admissible under section 8 of the Indian Evidence Act; if she had made any statement in doing so, that also would have been admissible under section 8; and if she had explained why she was doing so, that also would have been admissible under the same section. But that is not this case at all and I am unable to see how the statement made by her can possibly be admitted. She has not been called and it is merely the evidence of what other persons heard her say in the absence of the first accused. Therefore, in my view, the learned Sessions Judge was wrong in admitting such evidence.

I think it necessary to add that it is quite clear that the police were faced in this case with a very difficult task. I am satisfied that the motive for this murder

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was not robbery and that no one except one who would benefit financially by Sivamma's death was likely to bring about her death. Judging the case from the probabilities and strong suspicion, the conclusion may well be that it was the first accused who brought about her death, but in criminal cases neither suspicion nor probabilities can decide cases in the absence of legal evidence. In this case, in the course of the argument of the learned Counsel for the accused, the learned Sessions Judge was accused of being obsessed with the belief of the guilt of the accused and to have exhibited unnecessary and unwarranted zeal in convicting them. His task was a very difficult one indeed and I am far from saying that there were not good grounds for the obsession attributed to him. Unfortunately, as my learned brother has pointed out in his judgment, there is not the necessary evidence to turn strong suspicion and probability into a reasonable certainty and the prosecution case fails on that account, and I agree that this appeal must be allowed and the conviction and sentence set aside and the accused set at liberty.

B.C.S.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam, Mr. Justice Jackson, Mr. Justice Anantakrishna Ayyar and Mr. Justice Sundaram Chetti.

IN RE ARUMUGHA SOLAGAN (ACCUSED), PETITIONER.*

1931,
January 26.

*Code of Criminal Procedure (Act V of 1898), sec. 7, cl. 1—
Object of—Relation between sessions division and district—
“District”—Meaning of—Notifications constituting Sessions Division of West Tanjore and Sessions Division of East Tanjore—Whether intra vires.*

Held by the Full Bench (JACKSON J. dissenting):—The object of section 7, clause 1 of the Code of Criminal Procedure (Act V of 1898), is not to enable the Local Government to constitute sessions divisions out of districts but to lay down a rule governing the relation between sessions divisions and districts; that is, a sessions division shall not consist of half a district or even one and a half districts, but shall consist of one district or a plurality of whole districts.

The word “district” as used in section 7 and in other sections of the Code is a district for the purposes of criminal administration.

Hence the Notifications Nos. 175 and 177 of the Local Government, dated 22nd June 1921, constituting a Sessions Division of West Tanjore and a Sessions Division of East Tanjore, are *intra vires*.

Per JACKSON J.—The word “district” in the section must be understood in its generally accepted sense, as the revenue division in charge (in this Presidency) of a Collector.

Under section 7 a sessions division shall either be a district, as for instance in Madura, where the jurisdiction of the Sessions Judge and of the District Magistrate is conterminous, or shall consist of districts as in Coimbatore and the Nilgiris, where there is one Sessions Judge with two District Magistrates. But (except in Malabar, which was validated by sub-clause 3 of

* Criminal Miscellaneous Petition No. 36 of 1931.

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section 7) there may not be a sessions division consisting of part of a district as in Tanjore.

Hence, the notifications aforesaid of the Local Government are *ultra vires*.

PETITION under section 107 of the Government of India Act praying that the High Court may be pleased to decide whether the constitution of a Sessions Court for East Tanjore at Negapatam is *ultra vires* of the powers of the Local Government and that this question be decided before hearing on the merits Referred Trial No. 147 of 1930, referred by the Court of Session, East Tanjore, at Negapatam, for confirmation of the sentence of death passed upon the petitioner herein in Case No. 21 of the Calendar for 1930 on its file.

K. S. Jayarama Ayyar (G. Gopalaswami with him):—The question for consideration is whether in the revenue district of Tanjore there can be two sessions divisions, one of East Tanjore and the other of West Tanjore. Section 7 of the Code of Criminal Procedure has to be construed and the meaning of "district" occurring therein determined. Section 10 would seem to contemplate that a sessions jurisdiction may be contemporaneous with the jurisdiction of a District Magistrate or a number of District Magistrates, i.e., a sessions jurisdiction cannot be only over a part of the District Magistrate's jurisdiction.

Zillah Courts were first established in 1883. Both the popular as well as the technical meaning of "district" is revenue district. Under section 17, clause 5, the subordination of Magistrates to the Sessions Judge is recognized. Very serious anomalies will occur if there are two sessions divisions in one revenue district.

[RAMESAM J.—The moment a Sessions Court is established, a "district" is formed for the purposes of the Code; "and" in clause 2 implies a number of things to be done.]

"And" cannot mean "or". An alteration of the sessions jurisdiction involves an alteration of the district.

Under section 3 of the Madras Civil Courts Act "district" means "zillah". See also Oxford New English Dictionary, Vol. III, page 535, and Maclean's Manual of Administration, Vol. I, page 64 "Revenue district". Before the notification of

1860 under Act VII of 1843 there was only one Sessions Court at Kumbakonam.

[RAMESAM J.—The Legislature would seem to have deliberately refrained from defining "district."]

It may be helpful to look at the earlier enactments.

[RAMESAM J.—A process of interpretation condemned by the House of Lords in *Bank of England v. Vagliano Brothers*(1).]

[The relevant sections of the earlier Codes were then referred to.]

Queen-Empress v. Mangal Tekchand(2) and *Valia Ambu Poduval v. Emperor*(3) are two cases where the point came up for consideration. In the former a sessions division is recognized as a "district" under section 7 of the Code. In the latter it is assumed that district means revenue district.

[RAMESAM J.—No Act links a revenue division with a sessions division. It is significant that the General Clauses Act does not define "district".]

Advocate-General (A. Krishnaswami Ayyar) with him *Public Prosecutor* (L. H. Bewes) for the Crown.—If section 7 were a definition section, there would be an automatic creation of a "district" by the constitution of a sessions division. But it is not so.

K. S. Jayarama Ayyar replied.

JUDGMENT.

RAMESAM J.—The question arising before us is whether the Notifications Nos. 175 and 177 of the Local Government, dated the 22nd of June 1921, constituting a Sessions Division of West Tanjore and a Sessions Division of East Tanjore are *intra vires* or *ultra vires* of the Local Government. The doubt arises because of the language of section 7, clause 1 of the Code of Criminal Procedure, the latter part of which says, "every sessions division shall, for the purposes of this Code, be a district or consist of districts." Two alternative meanings have been suggested for this clause.

(1) [1891] A.C. 107.

(2) (1886) I.L.R. 10 Bom. 274, 282.

(3) (1906) I.L.R. 30 Mad. 186.

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According to one, the sentence merely lays down the relation between a sessions division and a district, namely, that either a sessions division shall be equivalent to a district, or it shall be equivalent to a number of whole districts. The other interpretation is that a sessions division should be constituted out of a single district or a number of districts. In the latter interpretation a district is already a thing known; but a sessions division, a new thing, is to be formed out of a district or districts which are known. If sessions divisions were unknown at the time when the Code was passed, but only districts were known, the second interpretation would certainly be a reasonable interpretation. But, as clause 3 of section 7 points out, both sessions divisions and districts were already known. So, the object of clause 1 is not to enable the Local Government to constitute sessions divisions out of districts but to lay down a rule governing the relation between sessions divisions and districts; that is, a sessions division shall not consist of half a district or even one and a half districts, but shall consist of one district or of a plurality of whole districts. Even accepting the second interpretation, it does not follow that the word "district" there is a revenue district. In my opinion, the word "district" as used in section 7 and in other sections of the Code is a district for the purposes of criminal administration. The word "district" has not one well-known sense which might be described as the ordinary sense. We have revenue districts in the Presidency administered by Collectors. We have got civil judicial districts within the jurisdiction of District Judges. We have also got registration districts. It is because the word "district" has got all these senses, that it is not defined in the General Clauses Act of 1868, 1887, or 1897. Nor is it defined in the Code. It

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seems to me that, just as there are other kinds of districts, there is also a district for the purposes of criminal administration. Such districts shall have a District Magistrate according to section 10, and that a sessions division should be the equivalent of one such district or a number of such districts is all that is meant by section 7 (1). Clause 2 of section 7 enables the Local Government to alter the limits or number of divisions and districts. Though generally a district and a division may be identical in area, they need not necessarily be identical, because a sessions division may be equivalent to two or more districts. But, whatever alteration is made in the limits or number of divisions or of districts, it should always conform to the principle in clause 1, viz., that a sessions division should be equivalent to a whole district or should be equivalent to a number of whole districts without having a fraction. I have already observed that clause 3 recognizes sessions divisions and districts as existing when the Code was passed. Now, what were the districts which were existing then and which the Code recognized?

To examine this question, and not for the purpose of interpreting section 7 in the light of the corresponding sections of the earlier Codes, a process condemned by the House of Lords, we may look into the earlier Codes to see the history of sessions divisions and districts.

In the Code of Criminal Procedure of 1861 there were no sessions divisions, but Courts of Session were mentioned. The Magistrate of a district was defined. "District" was also defined as the local jurisdiction of the Magistrate of a district. This definition cannot be considered as a logical definition, because the term defined also occurs in the definition. But, however, we may assume that "district" in the Code of 1861 perhaps meant a revenue district which was probably

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the only district known at that time. Coming to the Code of 1872, we find that the term "sessions divisions" was first introduced. Section 12 in Chapter III refers to sessions divisions. Apparently it corresponds to section 7 in the later Codes. The whole of Chapter III refers only to sessions divisions and makes no reference to districts. There is no section in that Code like section 7 (1) of the later Codes laying down any rule regarding the relation between sessions divisions and districts. The next chapter, that is Chapter IV, refers to districts. In section 22 (b), for the first time, we have got reference to the Magistrate of a district, and section 35 enacts that in every district there shall be a Magistrate called the Magistrate of the district. So far, one may assume in favour of the other argument that at the time when the Code of 1872 was enacted the only district known was a revenue district. But by section 4 of Act XI of 1874 an amendment was introduced into section 39 of that Code by which the Local Government may, with the previous sanction of the Governor-General in Council, declare any local area to be a district. It seems to me that a district so declared by the power conferred under section 39 would have been so declared for the purposes of the Code and not for any other purposes, i.e., it would be a district for criminal administration. A revenue district or a registration district could not be "declared" under the power conferred by section 39 of the Code of Criminal Procedure. Therefore, a district created under section 39 would be a district for the purposes of administering the Code of Criminal Procedure and, in my opinion, from and after that amendment a new kind of district was created in the Presidency, namely, a district for criminal administrative purposes. When the Code of 1882 was passed there were already sessions divisions and also districts

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for the purposes of criminal administration existing, but no rule governing the relation between them. Now comes section 7 of the Code of 1882, which resembles section 7 of the Code of 1898. The first clause of section 7 for the first time lays down a rule that a sessions division should, for the purposes of the Code of Criminal Procedure, be equivalent to one district or should be equivalent to a number of whole districts. Sessions divisions had not to be newly constituted then for they were already existing. The third clause of that section enacts that the sessions divisions and districts existing at the time when the Code was passed shall be recognized as sessions divisions and districts. The second clause was enacted enabling the Local Government to alter the limits and the number of divisions and districts. The Code of 1898 merely continues the Code of 1882. It is thus seen from the scheme of the Codes of 1882 and 1898 that a district has a different conception from that of a division, though a division may be equivalent to a district. It need not necessarily be so, for it may consist of a number of districts. The conception underlying a division is that a Sessions Judge is presiding over a division—*vide* section 9. The conception underlying a district is that there is a District Magistrate for each district—*vide* section 10. So a sessions division is not identical with a district, though territorially one may be (but may not be) equivalent to a district. It seems to me that from 1874 the distinct conception of a district for criminal administrative purposes was introduced. It was made clearer in the Codes of 1882 and 1898 by the use of the words "for the purposes of the Code" in section 7, clause 1. It seems to me that the word "district" has not one ordinary sense. Now, at any rate, it has several ordinary senses. One of them, viz., a revenue district

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is perhaps of a longer duration than the other senses at present existing and there is no reason why the word "district" in section 7 should be taken in a sense alien to the purposes of the Code and not in the sense of a district for criminal administration which is the only proper sense for the purposes of the Code.

Now, according to the above interpretation, let us see what has happened in 1921 when the notification was issued. Before the notification there was one Tanjore Sessions Division. It was also a Tanjore District for criminal administration. The notification creates two sessions divisions. By the operation of section 7, clause 1, each sessions division also becomes a district, the Government not having notified that each sessions division should consist of more than one district. So that, after the notification we have got East Tanjore Sessions Division and also East Tanjore District. We have also West Tanjore Sessions Division and also West Tanjore District. This is in accordance with section 7. This is supported by the reasoning of BIRDWOOD and JARDINE JJ. in *Queen-Empress v. Mangal Tekchand*(1), where they say: "As Perim is a Sessions Division, it is also a District under section 7 of the Code." We have not got a sessions division which consists of half a district but each of the two divisions consists of one district. It is true that section 10 directs that a District Magistrate shall be appointed for every district; but that section does not say that one officer should not be appointed District Magistrate for two districts. There is nothing wrong in having one District Magistrate for both the districts of East Tanjore and West Tanjore. Perhaps, if any mistake was ever committed, it must have been a verbal mistake, that is, the officers who

have been District Magistrates in Tanjore from 1921 up to now should be strictly described as District Magistrates of East Tanjore and as District Magistrates of West Tanjore and not as District Magistrates of Tanjore District, because for criminal administrative purposes there are two districts. It may be they are properly described as Collectors of Tanjore, there being one district for revenue purposes. But for the purposes of the Code of Criminal Procedure there were two districts each having a District Magistrate. It may be that the same officer was the District Magistrate for both. Beyond this possible verbal mistake, namely, that the District Magistrate of East Tanjore District and of West Tanjore District was described as the District Magistrate of Tanjore District, I do not think any mistake has ever been committed by the Local Government. But whatever error might have happened in connexion with section 10, I do not think that the constitution of two sessions divisions each consisting of a full district, viz., East Tanjore District and West Tanjore District, offends any section.

Mr. Jayarama Ayyar, the learned Advocate who appeared for the petitioner, argued that in section 7, clause 2, the power to alter does not include the power of addition and he also argued that the word "and" there, does not mean "or". I do not think there is anything in this contention. In my opinion, in altering the number, a number can be added. Though "and" may not be the same as "or", still it does not prevent a distributive sense; that is, the Local Government have got the power of altering the number and limits of divisions as well as the number and limits of districts. Nor does section 531 throw any light on the matter, except that a sessions division connotes a different idea from that of a district, which of course I do not deny.

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(1) (1886) I.L.R. 10 Bom. 274, 288.

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I therefore find that the notifications are *intra vires* of the Local Government.

BEASLEY C.J.—I agree with the judgment just pronounced by my learned brother RAMESAM J. and have nothing to add.

ANANTAKRISHNA AYYAR J.—I agree with the judgment of my learned brother RAMESAM J.

SUNDARAM CHETTI J.—I agree with the judgment of my learned brother RAMESAM J.

JACKSON J. JACKSON J.—I agree that the question before us turns upon the meaning of “district” in section 7, Code of Criminal Procedure. In the course of the argument alternative interpretations were suggested. Either “district” is merely a compendious term for sessions division, the two for the purposes of the Code being interchangeable and synonymous; or “district” is used in its generally accepted sense of the revenue division in charge (in this Presidency) of a Collector.

As regards the first alternative, the learned Advocate-General frankly conceded that, if district merely means sessions division, it is not compatible with ordinary language to say, as section 7 says, that a sessions division shall be a district, or consist of districts. It would always be a district. There are other indications both in this section and in the rest of the Code that sessions division and district, whatever they may mean, are not regarded as identical terms; but there is no need to go elaborately into the matter because, I think, this first alternative interpretation has found no acceptance.

Then it would seem that the second holds the field.

It is certainly not unnatural to take “district” in its ordinary sense, and if that is done, the word in the various sections of the Code presents no difficulties at all.

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It is hardly necessary to labour the point that there is a generally accepted sense. The Simon Commission reports in paragraph 308 of the preliminary survey:

“Apart from exceptional areas such as the Presidency towns every inch of soil in British India forms part of a district, and at the head of every district there is an officer who is in the eyes of most of its inhabitants the Government.”

Nor is the point quite uncovered by authority. In *Valia Ambu Poduval v. Emperor*(1) two experienced Judges of this Court had to decide, when there are two sessions divisions in the jurisdiction of one First-class Magistrate, to which Sessions Judge appeals from that Magistrate shall go. They began by assuming, possibly *obiter*, but still with no hesitation, that district meant the well-known revenue district of Malabar; and not that there were two districts one of South and one of North Malabar.

I think too that we are agreed that in the Code of 1872 “district” had undoubtedly this sense, and I cannot see that the short amending Act of 1874 enabling the Local Government with the previous sanction of the Governor-General in Council to declare any local area to be a district, indicates that a new meaning had been adopted, because even in the present Code it seems to me that there has been no departure from the accepted sense. Section 11 runs:

“Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall . . . perform . . . the duties . . . imposed by this Code on the District Magistrate.”

In that section, to my mind, district in its generally accepted sense is clearly meant.

I should hold therefore that under section 7 a sessions division shall either be a district, as for instance

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in Madura where the jurisdiction of the Sessions Judge and of the District Magistrate is conterminous, or shall consist of districts as in Coimbatore and the Nilgiris where there is one Sessions Judge with two District Magistrates. But (except in Malabar which was validated by sub-clause 3 of this section 7) there may not be a sessions division consisting of part of a district as in Tanjore. Therefore the notification establishing such sessions divisions in East and West Tanjore appears to me to be *ultra vires*.

I have carefully considered whether it can be said that these divisions so constituted are also districts, in the sense that when the Local Government made two sessions divisions it also made two districts; so that we have an East and a West Tanjore Sessions Division, and also an East and a West Tanjore district. Of course the Local Government can create new districts, and if that had been done in regard to East and West Tanjore there would be no difficulty. The difficulty to my mind precisely arises because it has not done so. The old unified district of Tanjore still continues intact, and there is one District Magistrate, as provided in section 10, in that district. He is not in West Tanjore and in East Tanjore and, if *Valia Ambu Poduval v. Emperor*(1) is good law, appeals from his decisions all go to West Tanjore. How can he then be said to be District Magistrate in East Tanjore? If the Government had made two districts, East and West Tanjore, it would have appointed a District Magistrate in each district as under section 10 it is bound to do. So too in Malabar it would have been bound to appoint a District Magistrate for the district of North, and a District Magistrate for the district of South Malabar. If these are all districts

(1) (1906) I.L.R. 30 Mad. 186.

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under section 10, grave doubts would seem to arise in regard to the jurisdiction of the present District Magistrates of Malabar and Tanjore who have never been appointed District Magistrates of these distinct moieties of their respective districts. In fact, this conception though it may lift one foot from the slough of the sessions jurisdictions only plunges the other into the slough of the magisterial jurisdictions.

BEASLEY C.J.—In the result, the opinion of the majority prevails and the referred trial will come before the Criminal Bench for hearing in due course.

B.C.S.

APPELLATE CIVIL—FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam, Mr. Justice Reilly, Mr. Justice Anantakrishna Ayyar, and Mr. Justice Sundaram Chetti.

VALLATHUSSERI CHAKKALA KUMPIL PANKUNNI
MENON (RESPONDENT-PETITIONER-PLAINTIFF), APPELLANT,

1931,
March 11.

v.

VALLATHUSSERI CHAKKALA KUMPIL RAMAN
MENON (APPELLANT-COUNTER-PETITIONER—DEFENDANT),
RESPONDENT.*

*Code of Civil Procedure (Act V of 1908), sec. 2, sub-cl. 12;
O. XX, r. 12—Decree of Court awarding mesne profits silent
as to interest—Executing Court—If entitled to execute decree
allowing interest.*

Held (by the CHIEF JUSTICE, and RAMESAM, ANANTAKRISHNA AYYAR and SUNDARAM CHETTI JJ.), that, when a decree of Court which awards mesne profits under rule 12, of Order XX of the Code of Civil Procedure (Act V of 1908) is silent as to interest, it is not open to the executing Court to fix the rate of interest and to execute the decree allowing interest.

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Per REILLY J.—If a decree for mesne profits is not only silent in regard to interest, but properly interpreted does not award interest, the executing Court cannot allow interest. But, if the decree, though “silent as to interest” in the sense that the word “interest” does not appear in it, nevertheless by the use of the expression “mesne profits” combined with a reference to a rate of income or in any other way indicates that interest is awarded, the executing Court must give interest, and, no rate of interest being mentioned, should give it at the Court rate of 6 per cent. But this result, when reached, must be reached solely by interpretation of the decree, not by the use of any supposed discretion in the executing Court. And, as the Court making the decree has the right to refuse interest, any indication that it has done so must be allowed full weight by the executing Court.

Rajah of Bobbili v. Ayyagari Sodemma(1) overruled on this point.

APPEAL under clause 15 of the Letters Patent against the judgment of MADHAVAN NAIR J. in Appeal against Appellate Order No. 4 of 1924 preferred against the order of the District Court of South Malabar, dated the 27th August 1923, in Appeal Suit No. 68 of 1923 preferred against the order of the Court of the District Munsif of Ponnani, dated the 9th December 1922, in Execution Petition No. 1420 of 1922 in Original Suit No. 475 of 1917.

The final decree under Order XX, rule 12 (2) of the Code of Civil Procedure (Act V of 1908) in Original Suit No. 475 of 1917 which fixed the amount of mesne profits was silent as to interest on mesne profits, and the decree was sought to be executed with interest on the amount so fixed in Execution Petition No. 1420 of 1922. Objection was taken that the executing Court cannot award interest on the said amount under the circumstances.

(1) (1927) 53 M.L.J. 619.

This letters patent appeal coming on for hearing, the Court (KUMARASWAMI SASTRI and PAKENHAM WALSH JJ.) made the following ORDER OF REFERENCE TO A FULL BENCH:—

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KUMARASWAMI SASTRI J.—The question for decision in this letters patent appeal is whether the Court to which a decree is sent for execution can award interest on mesne profits where the decree sent to it for execution is silent on that point. There is a conflict of authority in this Court as regards this question. MADHAVAN NAIR J., in the judgment which is now appealed against, followed the decision in *Harmanoje Narain Singh v. Ramprosad Singh*(1) and the decision of WALLACE J. in Appeal against Appellate Order No. 74 of 1924 and held that the executing Court could not allow interest where the decree it executes is silent on the point.

For the respondent it is contended that, having regard to the definition, in section 2, sub-clause 12, of mesne profits, interest is part of the mesne profits and that the executing Court can award interest. Reliance is placed on the decision of a Bench of this Court (ODGERS and CURGENVEN JJ.) in *Rajah of Bobbili v. Ayyagari Sodemma*(2). The learned Judges disagreed with the two decisions of MADHAVAN NAIR J. and of WALLACE J. which were referred to before them as also the decision in the Calcutta Law Journal case, *Harmanoje Narain Singh v. Ramprosad Singh*(1), on which the judgment of MADHAVAN NAIR J. is based, and held that it is competent for the executing Court to allow interest. We may point out that, under Order XX, rule 12, the Court which passes a decree for possession of property in cases where there is a claim for possession and mesne profits can either assess mesne profits itself or direct an enquiry as to the rents or mesne profits from the institution of the suit until delivery of possession or other periods mentioned in clause (c). Then sub-section 2 of section 12 provides that when an enquiry is directed under clause (b) or (c) a final decree in respect of rents or mesne profits shall be passed in accordance with the result of such an enquiry. It is no doubt correct to say that, where the Court passing a decree holds that a party is entitled to mesne profits and without saying anything more directs an enquiry, the Court

(1) (1907) 6 O.L.J. 462.

(2) (1927) 53 M.L.J. 619.

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dealing with the question can allow mesne profits having regard to the definition of mesne profits in section 2, sub-section (12), because there the whole enquiry is before the Judge determining the mesne profits and there is no judgment determining the quantum of mesne profits or anything further than that the party is entitled to mesne profits. It is something like working out a declaratory decree determining the rights of the parties in a partnership suit where each party is declared entitled to a certain share and accounts are directed to be taken on that basis. The difficulty comes in where a decree under section 2 (12) has been passed and is sent down for execution to another Court. It has been held in a series of cases that the executing Court cannot go behind the decree it executes and any error or omission in the decree should be rectified only by the Court which passes the decree. In the present case we must take it that, assuming that the Court which passed the decree for mesne profits under Order XX, rule 12 (2) committed an error, having regard to the definition of mesne profits under section 2 (12), in not awarding interest, the remedy would be to apply to the Court which passed the decree under rule 12 and get the decree amended by allowing interest. There is nothing which prevents the party from doing so and if the Judge refuses to do it he can take the matter in appeal. The definition of mesne profits simply says it includes interest. Neither section 2, sub-clause 12, nor rule 12 of Order XX fixes the rate of interest. Ordinarily six per cent is given but there is nothing to prevent the Court from giving more or less than six per cent. If there is a residue of discretion left in fixing the rate, that, we think, should be exercised by the Court which passed the decree, the executing Court's function being solely to execute the decree passed. Having regard to the conflict of opinion we think it desirable that the following question be referred to a Full Bench of this Court for decision:—

“Whether, where a decree of Court which awards mesne profits under rule 12 of Order XX is silent as to interest, it is open to the executing Court to fix the rate of interest and to execute the decree allowing interest.”

ON THIS REFERENCE—

K. P. Raman Menon for appellant.—The definition of “mesne profits” in section 2, clause 12 of the Code of Civil Procedure includes interest. The final decree fixes the amount as and for “mesne profits.” If the interest is not specially

disallowed in the final decree, the executing Court will not be varying the decree by awarding interest on the amount. Any other construction would make the definition of “mesne profits” superfluous in view of Order XX, rule 12 of the Code of Civil Procedure. The case of *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(1) arose under the old Code. The Privy Council awarded interest, not in view of the power of delegation to the executing Court, but in view of the definition of “mesne profits” in that Code. See also *Rajah of Bobbili v. Ayyagari Sodemma*(2), *Girish Chander Lahiri v. Sasi Sekhareswar Roy*(3), *Muhammad Zafaryab Khan v. Abdul Razzaq Khan*(4), and *Lalta Prasad v. Sri Ganeshti*(5).

K. P. Krishna Menon for respondent was not called upon.

OPINION.

ANANTAKRISHNA AYYAR J.—The question referred for the decision of the Full Bench is: “Whether, where a decree of Court which awards mesne profits under rule 12 of Order XX of the Code of Civil Procedure is silent as to interest, it is open to the executing Court to fix the rate of interest and to execute the decree allowing interest.”

In a suit for the recovery of possession of immovable properties and for mesne profits, the Court, if it finds the plaintiff's case to be proved, may pass a decree (a) for the possession of the property; (b) for mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to the mesne profits; and (c) directing an inquiry as to the mesne profits from the institution of the suit until the delivery of possession to the decree-holder, etc.; under rule 12 (2), where an inquiry is directed under clause (b) or clause (c), a final decree in

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(1) (1900) I.L.R. 27 Calc. 951 (P.C.). (2) (1927) 53 M.L.J. 619.
(3) (1905) I.L.R. 33 Calc. 329. (4) (1928) 26 A.L.J. 820.
(5) (1922) I.L.R. 44 All. 579.

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respect of the mesne profits shall be passed in accordance with the result of such inquiry.

When, therefore, the Court holds an inquiry in respect of the amount of mesne profits, it has to pass "a final decree" incorporating the amount fixed by it as the result of the inquiry made regarding the amount of mesne profits. According to the definition of the expression "mesne profits" contained in section 2 (12) of the Code of Civil Procedure—, "Mesne profits of property" means "those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits". The result is that, though the first decree (which would be a final decree so far as the delivery of the property is concerned, but only a preliminary decree in so far as it directed an inquiry as to the mesne profits,—past or future—) be a decree for "mesne profits" merely, yet, having regard to the definition of the term "mesne profits" mentioned above, the Court which inquires into the amount of mesne profits should award to the successful plaintiff not only the profits which the defendant in wrongful possession actually received or might with ordinary diligence have received from the property during the period in question, but also award "interest" on such profits. No separate, or specific direction in the first decree as regards the award of interest is necessary to enable the Court when inquiring into the amount of mesne profits to pass a decree for interest also on the said amounts of profits, under Order XX, rule 12 (2), Code of Civil Procedure. The questions,—whether mesne profits should be awarded or not, and if so, the period for which the same should be awarded,—are questions to be decided by the Court which passes the first decree under Order XX, rule 12 (1).

Code of Civil Procedure. "Mesne profits are in the nature of damages which such Court may mould according to the justice of the case." It may, having regard to the circumstances, decline to award any mesne profits at all; or limit the period for which such profits are to be awarded; or give specific directions as to how the same should be calculated having regard to the special circumstances of the case. Similarly such Court has jurisdiction to direct that no interest at all be awarded to the plaintiff, or to fix the rate of interest in the circumstances. All these are open to the Court which passes the first decree under Order XX, rule 12 (1). But, if that Court simply passes a decree for "mesne profits" for a particular period, then it is no more open to the Court inquiring into the matter under rule 12 (2), either to refuse mesne profits at all, or to limit the period for which profits should be decreed, or to decline to award any interest at all,—though it is open to it to fix the amount of such profits and also to fix the rate of interest. The Court, when passing the final decree fixing the amount of mesne profits under Order XX, rule 12 (2), has therefore to fix the amount of profits and also the rate at which interest on the amount ascertained by it should be awarded to the plaintiff. If for any reason it should decline, or omit, to award interest in the final decree, the party feeling aggrieved thereby should take appropriate proceedings either by way of appeal or otherwise to have interest included and the decree set right by its inclusion. If however he should allow such a decree to become final, then he could not in execution proceedings claim interest on the amount mentioned in the final decree. It is a settled principle of law that, when a decree is unambiguous on its face, the executing Court cannot go behind the decree. A decree, even though it may not

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be according to law is binding and conclusive between the parties until it is set aside either on review, appeal, or revision. The Court executing a decree cannot alter, vary, or add to, the terms of the decree under the guise of executing the decree,—(questions of adjustment of decrees by consent of parties apart). When a decree is ambiguous, it has been held that a reference to the pleadings and judgment is legitimate. If the decree is based upon, or refers to, another document, then reference to the same in such cases would be permissible, in order to understand what the decree really means. Though, therefore, the executing Court is entitled, and is in fact bound, to construe the decree of which execution is sought, it is not entitled to add to the terms of the decree. If on its construction of the decree the executing Court comes to the conclusion that the decree does not award interest on the amount of profits mentioned in the final decree, it is not open to the executing Court to allow execution for interest; it is surely not open to the executing Court to fix the rate of interest itself when the same has not been fixed in the final decree. As already mentioned, it is a question of the construction of the final decree in each case, whether the same either specifically, or by necessary reference to the documents referred to by it, awards, and fixes the rate of interest; but, when the final decree does not award interest in that manner, it is clear that it is not open to the executing Court to fix the rate of interest and then to execute the decree allowing interest.

Great reliance was placed by the learned Advocate for the plaintiff-decree-holder-appellant on the decision of the Privy Council in the case of *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(1). To understand

(1) (1900) I.L.R. 27 Cal. 951 (P.C.).

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that decision correctly, it is necessary to remember that under section 211 of the Code of Civil Procedure (Act XIV of 1882) in force at that time,

“when the suit is for the recovery of possession of immovable property yielding rent or other profits, the Court may provide in the decree for payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree is made . . . with interest thereupon at such rate as the Court thinks fit.”

Under section 212,

“when the amount of mesne profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of mesne profits and dispose of the same on further orders.”

Section 244 of the same Code enacted that

“questions regarding the amount of any mesne profits as to which the decree has directed inquiry shall be determined by order of the Court executing a decree and not by a separate suit.”

Accordingly, the Court, after passing a decree for mesne profits, proceeds by subsequent proceedings to inquire into the amounts of such mesne profits, and in the result fixes the amount due by the one party to the other. Under the definition of the word “decree” in section 2 of the Code of 1882, “an order determining any question mentioned or referred to in section 244, but not specified in section 588” is specifically mentioned as coming within the definition of a “decree”. The explanation attached to section 211 is to the following effect:—

“Mesne profits mean those profits which the person in wrongful possession of such property actually received . . . together with interest on such profits.”

Under section 196 of Act VIII of 1859,

“the Court may provide in the decree for the payment of mesne profits, . . . with interest thereupon at such rate as the Court may think proper.”

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That Act did not contain any definition of "mesne profits". Section 211 of Act X of 1877 enabled the Court to provide in the decree for payment of mesne profits, with interest thereupon at such rate as the Court thinks fit, and, at the same time added an explanation to the effect that "mesne profits of property mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom". By Act XII of 1879, the words "together with interest on such profits", were added to the explanation. Section 211 of Act XIV of 1882 reproduced the explanation as amended by the Act of 1879. Therefore, after 1879 the expression "mesne profits" includes interest on such profits.

The appeal before the Privy Council was against the order of the Court fixing the amount of mesne profits in the proceedings undertaken to inquire into the amount of mesne profits in pursuance of a decree passed for land and mesne profits on 23rd December 1883. The Court of first instance awarded interest on the amount of profits which it held should be awarded to the successful decree-holder; but the High Court declined to grant interest. On appeal their Lordships of the Privy Council held that the successful plaintiff was entitled to interest also on the amount of profits, and therefore they reversed the decision of the High Court and restored the decision of the Subordinate Judge allowing interest on the profits as ascertained, year by year.

The following passages at page 967 of the report throw light on the point:—

"The learned Judges say that the Court has still jurisdiction to give or refuse interest as it chooses. Their Lordships agree because mesne profits are in the nature of damages which the Court may mould according to the justice of the case. But the question is what is the effect of a decree which grants

mesne profits and says nothing about interest, which as their Lordships think, is the proper construction of the decree in this suit. The learned Judges treat that silence as equivalent to a decision that there be no interest. But then it is difficult to see what effect is given to the alteration made in s. 211 in the year 1882. Its obvious effect is to provide that a simple decree for mesne profits shall carry interest on them. No reason has been assigned for holding the true effect to be other than the obvious one. If the Court does not intend to give interest it should say so. The learned Judges give reasons for thinking that interest ought not to be given in this case. But in execution proceedings we are only construing the decree and not considering its merits."

see *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(1).

When therefore a decree granted mesne profits but said nothing about interest, their Lordships held that the Court which inquires into and fixes the amount of profits should award interest on the amount of profits ascertained year by year. As the appeal to the Privy Council was from the decision of the High Court passed in the proceedings taken to ascertain the amount of profits, the Privy Council modified the High Court's decision and allowed interest on the amount of profits ultimately fixed by the Court.

If in any case the plaintiff-decree-holder be not satisfied with the decree of the lower Court fixing the amount of profits but not allowing interest on the profits as ascertained year by year, it was open to him to appeal against that decree and urge in support of his appeal the decision of the Privy Council in *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(1). He however should not allow the lower Court's decree to become final; otherwise, proceedings to ascertain the amount of mesne profits would have

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ended, and the decree would have become final. What remains in such a case would be to take execution only in respect of the amount mentioned in the final decree. Having regard to the principle laid down by the Privy Council in various cases, that the Court executing a decree could not go behind the decree, nor alter, vary, or add to the terms of the decree, I am clear that the appellant's contention—that it is open to the Court which executes a final decree, fixing the amount of mesne profits but silent as regards the award of any interest or the rate thereof, to make up the omission and itself fix a rate of interest and then allow execution for the interest so fixed—is untenable.

Under the present Code of Civil Procedure, the amount of mesne profits is inquired into and fixed, and a final decree regarding the same is passed under Order XX, rule 12 (2). Such a decree is open to appeal in the manner provided by the Code; but unless appealed against, at the stage when the execution of the same is sought, the executing Court could not award interest or fix the rate of interest when the final decree is silent on those matters.

Under the Code of 1882, first a decree for immovable property and also for mesne profits was passed; by subsequent orders, on proceedings taken to inquire into and ascertain the amount of such mesne profits decreed to the plaintiff, the Court fixed the amount; in doing so, the Court could allow interest. Such orders fixing the amount were treated as "decrees" within the definition of the word "decree" in section 2, and were open to appeal. The appellate Court could, if it choose, modify the amounts awarded by the lower Court, and fix such rate of interest as it, in its discretion, thought fit; but, when once the amount had been finally fixed in those proceedings, there is no authority

to support the contention that the executing Court could either alter the figures, or award interest, or fix for the first time, or change the rate of interest.

This is the view that was taken by the Calcutta High Court in *Harmanoje Narain Singh v. Ramprosad Singh*(1) and *Narendra v. Byomkesh*(2); and in this Court by MADHAVAN NAIR J. in the judgment now appealed against; and by WALLACE J. in the case referred to in the Order of Reference to the Full Bench. A Bench of this Court would seem to have taken a contrary view in *Rajah of Bobbili v. Ayyagari Sodem-ma*(3). Of course we are not concerned with the construction put by the learned Judges on the decree which was sought to be executed in that case; for, as I have already mentioned, the question of construction of a decree is for the Court which executes the decree; but there are certain observations in the judgments of the learned Judges which seem to me, with all respect, to be unsustainable. At page 621, it is remarked:—

"There remains the question whether the executing Court was competent to grant interest, no express provision for interest being made in the decree . . ."

At page 623, reference is made to the passage already extracted from page 967 of the Privy Council judgment in *Grish Chunder Lahiri v. Shoshi Shikhar-eswar Roy*(4). The inference is drawn from that passage that

"it is competent to an executing Court to grant interest when no express provision for interest is made in the decree."

A similar reasoning is adopted in the judgment of the other learned Judge at pages 626 and 628 of the report. For reasons already mentioned, the learned Judges do not seem to have attached due weight to the

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(1) (1907) 6 C.L.J. 462.
(3) (1927) 53 M.L.J. 619.

(2) (1919) 30 C.L.J. 205.
(4) (1800) I.L.R. 27 Calo. 951 (P.C.).

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circumstance that the observations relied on were made by the Privy Council in the appeal preferred against the decision of the Court fixing the amount of profits; in which case it follows that the appellate Court has got full powers in the matter of interfering with the amount awarded by the lower Court and also to award such rate of interest as the appellate Court thought fit. If the appeal before the Privy Council arose, not against the decree fixing the amount of profits, but against orders passed in execution proceedings undertaken to realize the amount of profits finally fixed in proper proceedings by the Court, then undoubtedly the observations would be relevant, and conclusive, on the question. I am, therefore, unable to agree with the view taken by the learned Judges that "the executing Court was competent to grant interest when no express provision for interest was made in such a decree".

The decisions of the Allahabad High Court do not seem to be uniform;—the earlier decisions supporting the position taken up in *Harmanojee Narain Singh v. Ramprosad Singh*(1); whereas the later decisions seem to take a contrary view.

A decree should be clear and self-contained as far as possible, and difficulties would in most cases be avoided if the Courts bestow proper attention in passing such decrees.

It is clear that the executing Court would not be warranted in fixing the rate of interest, when the Court which passed the decree fixing the amount did not do so. Whatever other reliefs the decree-holder might have in such circumstances, it seems to me, that it is not open to the executing Court to fix the rate of interest and to execute the decree allowing interest where the decree

(1) (1907) 8 C.L.J. 462.

of the Court which awards mesne profits is silent as to interest.

For the above reasons, I would answer the question referred to us in the negative.

REILLY J.—I agree that, if a decree for mesne profits is not only silent in regard to interest but properly interpreted does not award interest, the executing Court cannot allow interest. I agree that an executing Court can never grant interest on mesne profits unless interest has been explicitly or implicitly awarded by the Court which fixes the mesne profits. The duty of the executing Court in this, as in other cases, is to carry out the decree, not to add to it nor vary it in any way; but it is a duty not always easy to perform. The absence of the word "interest" from the decree is not always decisive. "Mesne profits" by the definition of that expression in section 2 (12), Code of Civil Procedure, means (i) "those profits which the person in wrongful possession . . . actually received or might with ordinary diligence have received", which I will call the "net income", plus (ii) interest on that net income. But it is open to the Court which makes the decree to award the net income without also awarding interest, and, if that is done, the duty of the executing Court is merely to carry out the decree so made. The executing Court however sometimes finds a difficulty because the effect of the decree in this respect is not clear. The Court which makes the decree should always make its meaning clear but sometimes does not do so. The executing Court has then the duty of interpreting the decree. Cases are met in which the decree first awards "mesne profits"—which in itself by the definition in the Code means net income plus interest—and then goes on to specify in kind or in money the rate of the net income. When the decree is framed in that way,

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the proper interpretation of it is in my opinion that the Court making the decree intended to give the net income fixed and also by implication in the use of the expression "mesne profits" intended to give interest, and the interest, not being specified, will be at the Court rate, viz. 6 per cent per annum. In other cases without saying anything explicitly about interest a lump sum is fixed either as total or for each year in such a way as to indicate that is all that is awarded—perhaps because interest has been calculated and included in the lump sum, perhaps because it has been refused. If it is clear that nothing more than the lump sum has been awarded, the executing Court is not interested in the reason but has only to carry out the decree as made. But the exact significance of the decree is again a matter of interpretation. Sometimes the fact that interest is mentioned in respect of some other amount in the same decree but is not mentioned in respect of the amount described in the decree as "profits" or "mesne profits" indicates that interest on the net income has been refused. There again the executing Court has to interpret the decree and so ascertain the intention of the Court which made it. All these are instances of badly drawn decrees, the results of careless work. But unfortunately such decrees are sometimes—indeed too often—made, and executing Courts have to make the best of them. A little time ago my brother ANANTAKRISHNA AYYAR and I had to interpret a decree for mesne profits in Appeal against Order No. 348 of 1928. There the decree awarded "mesne profits" and then fixed a rate of net income in money without mentioning interest explicitly. We interpreted that to mean that the net income mentioned and interest at 6 per cent were awarded as mesne profits. The reason that the decree was not better worded may have been that it was mainly based upon a

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compromise between the parties. But it is not only compromise decrees which are worded obscurely in this respect, and, where there is obscurity, the executing Court has the duty of interpretation. Section 34 (2) is not of much help in such cases, as the failure to mention interest explicitly is not decisive when the expression "mesne profits", which ordinarily includes interest, is used.

I cannot answer the question put to us with a simple "Yes" or "No". My answer is that, even if the decree "is silent as to interest" in the sense that the word "interest" does not appear in it, nevertheless, if by the use of the expression "mesne profits" combined with a reference to a rate of income or in any other way the decree indicates that interest is awarded, the executing Court must give it and, no rate of interest being mentioned, should give it at the Court rate of 6 per cent. But this result, when reached, must be reached solely by interpretation of the decree, not by the use of any supposed discretion in the executing Court. And, as the Court making the decree has the right to refuse interest, any indication that it has done so must be allowed full weight by the executing Court. "Silence" so complete that there is no indication at all that any interest has been awarded would itself be an indication that interest has been refused. In every case in which the intention of the decree is not expressed with unquestionable clearness it is the duty of the executing Court to ascertain that intention by interpretation. But I may add that it is the duty of the Court making the decree to make its intention in the matter so clear that there is no room for interpretation. If I may express an opinion regarding the decree in the suit out of which this reference has arisen, I interpret it as not awarding interest on the future mesne profits

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fixed, an indication of that intention in spite of the use of the expression "mesue profits" being found in the fact that no interest is mentioned in respect of those profits, though interest is explicitly awarded on the past kannipattam.

I agree that in reading the judgment of their Lordships of the Judicial Committee in *Grish Chunder Lahiri v. Shoshi Shikhareswar Roy*(1) we must remember that they were dealing with a case in which mesue profits had to be fixed in execution under the Code of 1882, a duty which can never properly fall on the executing Court under the present Code. I agree also that the application of that judgment in *Rajah of Bobbili v. Ayyagari Sodemma*(2) was incorrect, though the interpretation which the learned Judges in the latter case put upon the decree before them, which had not been drawn with sufficient care, may have been right.

RAMESAM J.—I agree with the judgment of ANANTAKRISHNA AYYAR J. and have nothing to add.

SUNDARAM CHETTI J.—I agree with the judgment of my learned brother ANANTAKRISHNA AYYAR J.

BEASLEY C.J.—I agree also.

G.B.

(1) (1900) I.L.R. 27 Calo. 951 (P.C.).

(2) (1927) 53 M.L.J. 619.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Stone.

MARAPPUREDDIGARI SAYAMMA AND ANOTHER
(DEFENDANTS 1 AND 2), APPELLANTS,

1931,
March 4.

v.

R. VENKATA REDDI AND FOUR OTHERS
(PLAINTIFF AND DEFENDANTS 3 TO 6), RESPONDENTS.*

Indian Evidence Act (I of 1872), sec. 92, proviso (1)—
Principles governing the application of.

Section 92, proviso (1) of the Indian Evidence Act (I of 1872) does not empower a plaintiff suing on an unreformed and unambiguous deed to lead evidence to shew that by a mistake a term has been omitted from the deed, unless the mistake is of such a nature as would found a claim for rectification or cancellation of the deed, and in such a case the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification or cancellation.

One test which equity applies in a suit for rectification is "Is the proof of error clear and conclusive?" One defence equity allows is laches. Equity will not relieve him who tarries on the way. One bias equity always shews in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say the burden of proof lies heavily on the person seeking rectification.

APPEAL against the decree of the Court of the Subordinate Judge of Chittoor in Original Suit No. 54 of 1926.

A. Krishnaswami Ayyar (*Advocate-General*), with him
C. Rangaswami Ayyangar for appellants.

V. Ramadoss for first respondent.

The JUDGMENT of the Court was delivered by

STONE J.—This appeal raises a short point, viz., whether the deed of mortgage, dated 4th January 1917,

* Appeal No. 142 of 1929.

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in favour of one Chinnayya Chettigaru provides for interest on the capital sum of Rs. 6,500 at the rate of Rs. 2 per month on the Rs. 6,500 or at the rate of Rs. 2 per centum per month. The said mortgage was attached by the decree-holder in Execution Petition No. 2 of 1925 and the plaintiff in this present action is the receiver therein.

The plaint makes no claim for rectification of this instrument, and issue 2 expressly raises the question whether the plaintiff is entitled to recover under this deed interest at the rate of Rs. 2 per cent per month without rectification. Issue 1 appears to raise the question whether as a matter of construction this deed reserves to the mortgagee interest at the rate of Rs. 2 per cent per month or at the rate of Rs. 2 per month. Why the plaintiff declined to ask for rectification can only be a matter of speculation. In fact he did not, and proceeded to claim on the footing of an unrectified deed the same sum as would have been due had he claimed rectification and had succeeded in that claim.

It is not suggested that sections 95, 96, 97, or 98 of the Evidence Act apply. It is not therefore a case of construing a document contrary to its apparent meaning. If evidence can be given to vary this document it can only be because of the first proviso to section 92 of the Evidence Act. This proviso permits the proof of a mistake which would entitle the party to a decree or order relating to the document or which would invalidate the document.

Does section 92, proviso 1, apply? We conceive that it only applies if there be such mistake as would entitle the party alleging the mistake to a decree or order rectifying or cancelling the document. Proviso 1 thus, on this point, permits mistake to be proved, but when proved it has the same effect as in English law. What is that effect?

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It is clear that unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification, and would, therefore, if proved, not entitle the party alleging it to a decree, or order rectifying, or cancelling the document; see *United States v. Motor Trucks, Ltd.*(1) and *May v. Platt*(2).

The common law is impatient even of mutual mistake save when the contract has not attached and the mistake shows absence of consensus.

Equity, however, relieves against mutual mistake upon equitable principles. But this is an equitable remedy or defence, and is available to a plaintiff where the equitable remedy of rectification or cancellation is sought, and to a defendant against whom an equitable remedy (e.g., specific performance) is sought. This is a distinction which exists in India as in England. It is borne of the fact that equitable remedies raise equitable defences and have equitable characteristics. Thus it is a defence to a suit claiming an equitable remedy that the plaintiff has been guilty of laches. This defence is unknown in the common law. If, therefore, the remedy sought is equitable, it is open to equitable defences; if not, it is not so open.

It is apparent, therefore, that it is not being merely technical to enquire, is the remedy sought in fact rectification or not? Let it be conceded that in the same action the plaintiff can ask for rectification and consequential relief; is it a mere technicality that he should ask for rectification before he can get relief on the basis of a reformed deed? What is the date from which his remedy commences? Is it the date of the deed and of the mistake, or is it the date of the failure to meet some obligation under the deed and, if the latter, what obligation? Is it the obligation to be found in the

(1) [1924] A.C. 196, 200.

(2) [1900] 1 Ch. 616, 623.

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reformed or the unreformed deed? To these questions we think there can only be one answer. Whether the pleadings and claim are viewed strictly or loosely, a plaintiff who claims more than the unreformed deed gives him is claiming on the footing of a rectified deed; and if the Court allows his claim, it allows it on that basis, that is, in effect, it rectifies the deed. It does not, nor can it, let in a parol variation.

If what is in essence sought is rectification, it is manifest that the same tests and the same defences should be applied as would be applied if the plaintiff did what strictly he should do, viz., claim rectification and consequential relief.

Reliance was placed upon *Mahadeva Aiyer v. Gopala Aiyar*(1), *Rangasami v. Souri*(2), *Chinna Mallayya v. Veeriah*(3) and *Baluswami Aiyar v. Lakshmana Aiyar*(4) as showing that evidence could be given to prove mistake although no rectification be sought. In *Rangasami v. Souri*(2) and *Baluswami Aiyar v. Lakshmana Aiyar*(4) the mistake was alleged by way of defence. *Mahadeva Aiyer v. Gopala Aiyar*(1) purports to follow *Karuppa Goundan alias Thoppala Goundan v. Periathambi Goundan*(5). *Karuppa Goundan alias Thoppala Goundan v. Periathambi Goundan*(5) was a case where the error was by way of misdescription. It is a case similar to *Alexander's Settlement, In re*(6), where PARKER J. (as he then was) treated the use of the word "male" in "tail male" as a misdescription. In *Karuppa Goundan alias Thoppala Goundan v. Periathambi Goundan*(5), the evidence was let in under the provisions of sections 95 and 97 of the Evidence Act. It is thus an entirely different case from this. It is a case where the deed cannot be related precisely to existing facts. *Chinna Mallayya v. Veeriah*(3)

(1) (1910) I.L.R. 34 Mad. 51.

(3) (1915) 3 L.W. 551.

(5) (1907) I.L.R. 30 Mad. 397.

(2) (1915) I.L.R. 39 Mad. 792.

(4) (1921) I.L.R. 44 Mad. 605 (F.B.).

(6) [1910] 2 Ch. 225, 228.

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purports to follow *Mahadeva Aiyer v. Gopala Aiyar*(1), though a reference is there made to the first proviso to section 92. We are of the opinion that that proviso does not empower a plaintiff suing on an unreformed and registered and unambiguous deed to lead evidence to show that by a mistake a term has been omitted from the deed, unless the mistake is such a one as would found a claim for rectification or cancellation, and in such case the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification.

One test which equity applies in a suit for rectification is, "Is the proof of error clear and conclusive?" One defence equity allows is laches. Equity will not relieve him who tarries on the way. One bias equity always shows in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say the burden of proof lies heavily on the person seeking rectification.

Keeping the above principles in mind, how does the matter on the evidence stand? The deed is dated 4th January 1917. The plaint is dated 29th October 1926. During all those years this mistake lay dormant though it relates to interest. The parties who are supposed to have agreed to something other than that expressed in the writing are C on the one side and M.S., M.M. on the other side. C does not give evidence. M.S. gives evidence to the effect that the interest agreed to was Rs. 2 per annum (not per month) on Rs. 6,500. She does not appear to have been asked a single question as to whether the Rs. 2 per month on the Rs. 6,500 was an error. The only answer having any bearing on this point in cross-examination is: "I did not offer to write for Rs. 2 per cent interest because the previous rate was

(1) (1910) I.L.R. 34 Mad. 51.

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Rs. 3-8-0 per cent." That obviously does not touch the point which the plaintiff had to establish, viz., that what had been agreed was Rs. 2 per cent and what was written was a mistake. The question of mistake was never put to the defendant. The terms of the alleged agreement were never put to her. The explanation given for not calling C was that he was ill on and off for four months. "He recovers and then falls ill." No reason is offered why this witness could not have been examined on commission as was another witness to this matter. Two witnesses remain to be considered, P.W. 1 and P.W. 3. P.W. 1 is the person who wrote Exhibit A. He says he left out the words "per cent" by oversight. He states there was a dispute as regards interest when Exhibit A was executed. C suggested one rate, M.S. offered another and this counter-offer was not accepted. That evidence, so far as it goes, is to the effect that the parties were never *ad idem*. This witness then elaborates how this deed came into being. There was, it seems, a draft. P.W. 3 read out the draft, C., M.S., and M.M. amongst others being present. P.W. 1 wrote down the deed from this dictation and having written it read it over, there being present *inter alia* C (a money-lender), M.S. and M.M. It is not suggested that anything was read out other than appears now in the deed. It is not explained, how a term that was not agreed, viz., the term as to interest, could be in the draft or could be read out of the draft without comment being made.

P.W. 3 prepared and read out the draft. Where is this draft? It is not produced. This witness says he asked C's son for this draft on 4th September 1928, i.e., on the day he first gave evidence; eleven years after the deed was prepared; nearly two years after the suit was instituted. This vital document had apparently never before been enquired about. When asked for, it was found to be missing. This witness eleven years

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after the event pretends to remember the exact words he had written in the draft. A better example of the importance of excluding oral evidence to vary a written document can hardly be given than this witness's evidence at page 77. Never before this day on which he gave evidence, it appears, had this witness been asked what the correct rate was; but when asked he says, "I thought within myself that I had dictated according to the draft and the writer might have written wrongly." This, of course, amounts to nothing at all. The writer might have written wrongly or he might have written correctly.

There remain the circumstances that during the whole period sums were received from the mortgagor and credited in each case to capital; that no clear cut demand for the interest alleged, viz., Rs. 2 per cent was ever made in all the eleven years.

It is urged that the terms as they stand are so unusual as to show that the document cannot mean what it says. That is not in our opinion any ground for adding terms to an unambiguous deed. We do not even find the bargain to be either absurd or unlikely. These ladies were merely coming forward to offer a security for another's debt. These are, however, irrelevant considerations. It is obviously no ground for finding mutual mistake that the bargain evidenced is one-sided. At most that would show either unilateral mistake or fraud. Fraud is not suggested and unilateral mistake leads to no relief. The decree of the lower Court is modified in accordance with the above findings. Plaintiff will have from and pay to first and second defendants proportionate costs in both Courts. Time for redemption extended up to the last day before vacation of the lower Court.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

RAMALINGA SETHUPATHI AMBALAM, PLAINTIFF,

v.

ANDIAPPAN AMBALAM, DEFENDANT.*

1931,
March 25.

Court-Fees Act (VII of 1870), sec. 11, as amended by sec. 9 of Madras Act (V of 1922)—Code of Civil Procedure (Act V of 1908), O. XX, r. 12—Decree for possession of immovable property and past and future profits at ascertained rates—Execution of, with reference to possession of immovable property—Decree-holder's right of, irrespective of question of payment by him of court-fee on future profits decreed.

When a decree gives possession of immovable property and past profits and future profits at certain ascertained rates, the decree-holder is entitled to execute the decree with reference to possession of immovable property, irrespective of the question whether court-fee has or has not to be paid on the future mesne profits decreed to him by the same decree.

CASE stated under Order XLVI, rule 1, Schedule I of the Code of Civil Procedure (Act V of 1908) by the District Munsif of Melur in Execution Petition No. 615 of 1930 in Original Suit No. 414 of 1928 on his file.

P. V. Rajamannar for the Government Pleader for the Government.

None appeared for the parties.

JUDGMENT.

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ANANTAKRISHNA AYYAR J.—In Original Suit No. 414 of 1928, on the file of the District Munsif's Court,

Melur, the plaintiff obtained the following decree, on 18th December 1929 :—

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“(1) That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

(2) That the defendant do pay to the plaintiff the sum of Rs. 60 on account of mesne profits which have accrued due prior to the institution of the suit, and do also pay future mesne profits at the rate of Rs. 60 per year from the institution of the suit until the delivery of possession to the decree-holder, or the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or the expiration of three years from the date of the decree whichever event occurs earlier.

(3) That the defendant do pay plaintiff's costs Rs. 45-2-0 and do bear his own Rs. 24-8-0.”

The decree-holder applied in Execution Petition No. 615 of 1930 on 23rd September 1930 for execution of the decree so far as immovable property was concerned and for delivery of possession of the property decreed to him. He also mentioned in the execution petition that he would file a separate execution petition in respect of mesne profits and costs. The plaint had been valued at Rs. 115-10-0 (the same being made up of Rs. 55-10-0, being the value of the relief regarding the land at ten times the annual revenue, and Rs. 60-0-0, being the value in respect of past mesne profits for one year), and he paid court-fee thereon. Objection was raised before the District Munsif that court-fee should be levied on future mesne profits awarded in the decree before execution in Execution Petition No. 615 of 1930 is allowed to proceed. The learned District Munsif referred, under section 113 and Order XLVI of the Code of Civil Procedure, the following points for the opinion of the High Court :—

“(1) In a case where the decree gives the following reliefs to a decree-holder,—namely, possession with certain

*Referred Case No. 5 of 1930.

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amount for past profits and future profits at a certain ascertained rate, is court-fee payable on the future profits before any portion of the decree can be executed?

(2) If court-fee is payable, up to what date is the future profits to be calculated for the purpose of determining the court-fee?"

When questions arise regarding court-fees payable in respect of mesne profits which have accrued on the property, the subject of litigation, prior to the institution of the suit or for the period after the filing of the plaint, the same have to be decided, so far as Madras is concerned, by reference to section 11 of the Court-Fees Act (VII of 1870) as amended by Madras Act V of 1922 and to the provisions of Order XX, rule 12 of the Code of Civil Procedure.

Section 9 of Madras Act V of 1922 substituted the following paragraphs for the second paragraph of section 11 of the principal Act:—

"Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained be paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess shall be dismissed, unless the Court, for sufficient cause, extends the time for payment.

"Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor."

Now, reading the provisions of section 11 of the Court-Fees Act as amended, with Order XX, rule 12 of the Code of Civil Procedure, the procedure that should

be followed in suits for recovery of possession of immovable property and for mesne profits is the following, when the Court finds that the plaintiff is entitled to the same:—

To pass a decree—(a) for the possession of the property; (b) for mesne profits which have accrued on the property during a period prior to the institution of the suit, or directing an inquiry as to such mesne profits—(this may be called "past mesne profits" for convenience); (c) directing an inquiry as to mesne profits from the institution of the suit until

(1) the delivery of possession to the decree-holder,

(2) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or,

(3) the expiration of three years from the date of the decree whichever event first occurs (this may be called "future mesne profits" for convenience).

Analysing the above, we find that in such cases—

(1) There is a decree for possession of the immovable-property. This is a final decree, and, subject to any just objections, is capable of being executed.

(2) Either a final decree for past mesne profits is passed or the Court passes a preliminary decree for past mesne profits directing an inquiry as to the amount thereof.

(3) There is a preliminary decree directing an inquiry as to the amount of the future mesne profits. When an inquiry is directed either in respect of past mesne profits or in respect of future mesne profits, a final decree in respect of the said mesne profits is to be passed in accordance with the result of such inquiry.

Coming to the Court-Fees Act as amended, under the first paragraph newly added (which will be

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paragraph 2 out of the three existing paragraphs of the amended section), if the amount of the past mesne profits ascertained on such inquiry should exceed the amount claimed in the plaint, no final decree relating thereto should be passed till the difference between the court-fee actually paid and the court-fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid; and, if the additional fee be not paid within such time as the Court shall fix, the claim for the excess amount shall be dismissed. Reading therefore this paragraph with Order XX, rule 12 of the Code of Civil Procedure, the result is that the Court should not pass a final decree in respect of past mesne profits regarding which an inquiry has been directed, when the amount of the same exceeds the amount claimed in the plaint, unless the extra court-fee be paid.

As regards future mesne profits, under the second paragraph of the amended section 9 of Madras Act V of 1922 (which will be the third paragraph of section 11 as amended) and under sub-clause 2 of rule 12 of Order XX of the Code of Civil Procedure, a final decree in respect of such future mesne profits is passed in accordance with the result of the inquiry, and, in cases coming under the said paragraph of the Court-Fees Act, the decree is not to be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor.

It will thus be noticed that a final decree for the immovable property is passed. A final decree for past mesne profits is passed either straightaway, or, after a preliminary decree directing an inquiry as to the amount of the same; in the latter class of cases, the provisions of the amended section 11 of the Court-Fees Act would have operation, with the result that no final

decree shall be passed till the extra court-fee is paid. The wordings of paragraph 2 of section 11 do not apply to a case where a final decree for past mesne profits is straightaway passed fixing the amount of such past mesne profits and without a preliminary decree directing an inquiry as to the amount of the same. In such a case, and to such a final decree, the first paragraph of section 11 (which is the first paragraph of the old section also) would apply; that paragraph directs that the decree is not to be executed until the extra court-fee is paid. Why it is provided in the second paragraph that, when an inquiry is directed, no *final decree* shall be passed for the extra amount of past mesne profits, and that the claim for the said excess shall be dismissed under the second paragraph unless the extra court-fee be paid, and why a different rule is adopted in the first paragraph where it is provided that the decree shall not be *executed* until the extra court-fee is paid;—all this is not quite clear. Why it is not provided in the second paragraph of section 11 that a *final decree* might be passed for a higher amount of past mesne profits found due, but that the decree for the excess could not be *executed* unless the extra court-fee is paid, is also not clear. If the latter alternative had been adopted, there would be no inconsistency of any sort between the provisions of section 11 and of rule 12; whereas now, as regards passing a decree for past mesne profits, there seems to be an apparent inconsistency between the two provisions. No doubt, the two provisions could be read together, and the provisions of rule 12 enabling a Court to pass a final decree straightaway may be said to be governed by the first paragraph of section 11 of the Court-Fees Act.

When we go to sub-clause 2 of rule 12, we find that a final decree has to be passed in respect of future mesne profits when an inquiry is directed under clauses

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(b) and (c) of the rule. Here the policy of the Court-Fees Act as disclosed by the last paragraph of section 11 is to prohibit, not the passing of the final decree, but only the execution of the same until the necessary court-fee is paid.

It is a question for consideration whether the same policy should not be adopted also with reference to past mesne profits where a decree directs an inquiry into the same, and whether for the sake of uniformity—if not for other reasons—paragraph 2 of section 11 should not be amended, enabling the Court to pass a final decree in such cases, but prohibiting execution in respect of the extra amount of such mesne profits unless the necessary court-fee be paid.

It should also be noticed that there is no specific provision to cover cases where a final decree for future mesne profits is straightaway passed, without a preliminary decree directing an inquiry as to the amount of the same. The question would accordingly arise whether the first paragraph of section 11 of the Court-Fees Act would cover the case of future mesne profits in respect of which a final decree was passed straightaway, without a preliminary decree directing an inquiry into the same as aforesaid. In this connection, the decisions of this High Court in *Maiden v. Janakiramayya*(1) and *Saminatha v. Muthusawmi*(2) would be relevant, where this Court followed the decision in *Ramakrishna Bhikaji v. Bhimabai*(3) in preference to the decision in *Dwarka Nath Biswas v. Debendra Nath Tagore*(4). The decision of the Full Bench in *Parameswara Pattar, In re* (5) was also mentioned to us. The rule of construction that the words of a taxing statute should not be strained to tax the subject would also be relevant in

such a case. However, for the purpose of disposing of the reference before us, it is not necessary to go into that question at present.

Difficulties could be avoided if Courts, when called upon to pass decrees relating to mesne profits, follow strictly the provisions of Order XX, rule 12 of the Code of Civil Procedure, read with section 11 of the amended Court-Fees Act. Courts should also remember that it is not now permissible to leave the amount of mesne profits to be ascertained in execution proceedings.

The first point on which our opinion is asked—having regard to the facts of the case—is whether the decree-holder is entitled to execute the decree and claim possession of the immovable property, without paying the court-fee, if any, payable on the future mesne profits. It was held in *Fulchand v. Bai Ichha*(1) that a plaintiff, who obtained a decree for delivery of a house, and for account books and documents, and also for mesne profits, could execute that part of the decree which ordered delivery of the house, books and documents, without paying the court-fee payable on the amount of mesne profits. The intention of the Legislature, as gathered from the amendments made in 1922, would also seem to point out in the same direction; for, in cases coming under paragraph 2 of section 11 as amended, the claim for the excess past mesne profits only shall be dismissed, if the necessary court-fee be not paid; and, similarly, under paragraph 3, a final decree regarding the future mesne profits shall not be executed until the necessary court-fee be paid—(it may be noted that the court-fee payable in respect of such future mesne profits is calculated on the basis that a separate suit for the said amount of mesne profits has

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(1) (1898) I.L.R. 21 Mad. 371.

(2) (1909) 20 M.L.J. 98.

(3) (1890) I.L.R. 15 Bom. 416.

(4) (1906) I.L.R. 33 Cal. 1232.

(5) (1930) I.L.R. 54 Mad. 1 (F.B.).

(1) (1897) I.L.R. 12 Bom. 98.

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been instituted—a principle different from that underlying the other paragraphs of section 11, and which may have relevancy in considering which of the two sets of decisions mentioned above would be more consonant with the amended section). The penalties therein referred to relate only to the amounts of profits in question in respect of which court-fee has to be paid. The penalty does not extend to the other portions of the decree. Further, at the time of applying for execution of the decree by delivery of possession of the immovable property decreed, it may not be possible to fix the exact amount of future mesne profits due, and therefore it may be impossible at that time to fix the amount of court-fee payable in respect of the same. The decree-holder may apply for possession of the immovable property soon after the decree, and may not know when exactly possession would be delivered to him and for what exact period he would be entitled to claim future mesne profits. In such circumstances, it is difficult to say on what amount he is to calculate and pay court-fee in respect of such future mesne profits.

The answer, therefore, to the first question is that the decree-holder would be entitled to execute his decree with reference to possession of immovable property, irrespective of the question whether court-fee has or has not to be paid on the future mesne profits decreed to him by the same decree.

As our answer to the first question is in the negative, the second question need not be considered, and we accordingly record no opinion on the second point referred to us.

REILLY J.—I agree.

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Reilly and Mr. Justice Anantakrishna Ayyar.

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1 TO 4 AND 6), APPELLANTS,

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v.

THE OFFICIAL RECEIVER OF TINNEVELLY,
REPRESENTED BY AIYAPPA NAIK AND THREE OTHERS
(RESPONDENTS 1 TO 3 AND 5TH APPELLANT), RESPONDENTS.*

Provincial Insolvency Act (V of 1920), ss. 4, 53, and 75—District Munsif's order annulling sale under section 53—Second appeal against—Maintainability of—Second appeal—Decision in—Leave to appeal against—Grant of—Reasons for decision—Record of, necessary.

No second appeal lies against an order made by a District Munsif annulling a sale under section 53 of the Provincial Insolvency Act.

The words “whether of title or priority or of any nature whatsoever” and especially the words “of any nature whatsoever” in section 4 of the Act are plainly and in themselves incompatible with the *ejusdem generis* rule of interpretation.

The words “subject to the provisions of this Act” in section 4 of the Act mean “excluding questions otherwise provided for by the provisions of this Act.”

Per REILLY J.—When leave to appeal against a second appellate decision is granted, the reasons which led to the decision should always be recorded.

APPEAL preferred under clause 15 of the Letters Patent against the judgment and the order of CURGENVEN J., dated 9th October 1929, and made in Appeal against Appellate Order No. 104 of 1928 preferred against the order of the District Court of Tinnevely, dated 10th

* Letters Patent Appeal No. 114 of 1929.

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October 1927, and made in Civil Miscellaneous Appeal No. 52 of 1926 (Civil Miscellaneous Petition No. 1254 of 1924 in Insolvency Petition No. 8 of 1920, District Munsif's Court of Tuticorin).

T. L. Venkatarama Ayyar for appellants.

T. M. Krishnaswami Ayyar and *V. K. Mahadeva Sastri* for respondents.

JUDGMENT.

REILLY J.

REILLY J.—I have had the advantage of reading the judgment which my learned brother is about to deliver, and I entirely agree with his conclusions.

I find myself in some embarrassment in dealing with this appeal. It is an appeal under the Letters Patent against CURGENVEN J.'s dismissal of a second appeal against an order made by a District Munsif annulling a sale under section 53 of the Provincial Insolvency Act. The learned Judge held clearly that no second appeal lay in such a case. It is true that he used the words "I am inclined to think that . . . the decision of the District Court is final." But in spite of that language he appears to have thought the answer to the question so clear that he did not think it necessary to discuss it, and he went on to deal with the case in revision, to which different considerations would apply, and eventually dismissed the revision petition filed by the appellants with their appeal before him. Nevertheless he afterwards granted leave to them to appeal under the Letters Patent against his dismissal of their second appeal. We are therefore left in the curious position of hearing an appeal against the learned Judge's decision that no second appeal lay without the benefit of knowing his reasons for that decision, but with the knowledge that at one stage he thought the answer to the question so obvious that no discussion was necessary

and that at another he thought it so doubtful that he granted leave for further appeal. With the greatest respect I venture to express the opinion that, when leave to appeal against a second appellate decision is granted, we should always be placed in possession of the reasons which led to the decision.

However the question whether a second appeal lies in this case has been argued at length before us, and in the circumstances we must deal with it as a new question. This case was instituted as one under section 53 of the Provincial Insolvency Act and was disposed of by annulment of the sale concerned in a manner possible only under that provision. That being so, it is admitted that the Act precludes a second appeal unless a proceeding under section 53 is also a proceeding under section 4 of the Act. Mr. Venkatarama Ayyar for the appellants contends that every proceeding under section 53 involves a question of title, that section 4 embraces all decisions on questions of title and that section 75 allows an appeal on law from every decision of a District Court on appeal from a Court subordinate to it made under section 4. Section 4 gives an insolvency Court power, subject to the provisions of the Act, "to decide all questions whether of title or priority or of any nature whatsoever". Mr. Venkatarama Ayyar in order to minimise his difficulties wishes to interpret the words "or of any nature whatsoever" as covering only questions *ejusdem generis* as title or priority. But that is not possible. The words "whether of title or priority or of any nature whatsoever" and especially the words "of any nature whatsoever" are plainly and in themselves incompatible with the *ejusdem generis* rule of interpretation and I have no doubt were deliberately chosen to avoid any possibility of that rule being applied to them. We must take it therefore that section 4 (1)

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gives the Court power subject to the provisions of the Act to decide all questions "which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case." That is a very wide provision, and obviously questions under section 53 of the Act will come within section 4 unless they are excluded by the words "subject to the provisions of this Act." The question before us appears to me to turn upon the interpretation of those words. If I may say so, they do not appear to me to be very happy words, because they are capable of at least two interpretations. They may mean "subject to the provisions of this Act in regard to rules of law, procedure and evidence", in which case proceedings under section 53 would be proceedings under section 4, or they may mean "excluding questions otherwise provided for by the provisions of this Act", in which case proceedings under section 53 would be excluded from proceedings under section 4. An examination of certain provisions of the Act will, I think, show us what meaning was attached by the Legislature to the words "subject to the provisions of this Act" in section 4.

Firstly, section 4 (3) of the Act provides that the Court need not decide every question within section 4 (1) which may arise in an insolvency case before it but may decline to go into such a question and yet may sell the debtor's interest in the property concerned, if there is reason to believe that he has any saleable interest. If proceedings under section 53 are included in proceedings under section 4, the Court under that provision may decline to go into an application under section 53. Could such a refusal to exercise jurisdiction under

section 53 have possibly been intended? A transfer covered by section 53 is voidable against the Receiver, and surely the question whether a transfer comes within the section is not one which the Court could decline to decide. That section moreover was in existence in the Provincial Insolvency Act of 1907, in which there was no such provision as that contained in section 4 of the present Act. When the law had already given the Receiver the right to avoid such a transfer, could the new Act by a side-wind and without the most explicit language have given the Court the right to decline to decide whether a transfer was of the nature covered by the section? If the Court could decline to decide an application under section 53 of the Act and send the Receiver elsewhere for his remedy, he would be met by a different rule of evidence and some transfers which he could attack under section 53 would be unassailable elsewhere. The right of the Receiver to obtain a decision under section 53—and I do not doubt that by that section and the corresponding section in the Act of 1907 it was always intended that he should have that right in order to be able to dispose of what is really the debtor's property to the due advantage of the creditors—is incompatible with the Court's right to decline to go into questions under section 4, unless proceedings under section 53 are excluded from proceedings under section 4.

Secondly, it is not disputed that a decision of a Subordinate Judge or a District Munsif under section 53 or any other section of the Act except section 4 is subject to appeal to the District Judge, whose decision is final under section 75 subject to the High Court's power of revision and to the second proviso to section 75 (1) (newly added in the present Act). Under that

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proviso there is a second appeal on law from "a decision of the District Court on appeal from a decision of a Subordinate Court under section 4". What can be the meaning of introducing those words "under section 4" if section 4 is all-embracing and covers all questions arising under the Act? The only explanation which can be suggested for the appellants is that the Legislature has done its work when deliberately introducing this new proviso in a stupid, careless, misleading way—an explanation which we cannot entertain for a moment while any other explanation is available. Section 75 (1), as it now stands, providing that there shall be no second appeal generally but that there shall be a second appeal on law under section 4, is to my mind a conclusive indication that section 4 is not all-embracing.

Thirdly, Schedule I of the Act gives a list of classes of cases in which there is an appeal under section 75 (2) from original decisions of a District Court. That list first mentions decisions under section 4 and then sets out a number of other classes of cases, including as a separate class orders annulling a voluntary transfer under section 53. If section 4 embraces all classes of questions, then everything after the first entry in that schedule is stupid surplusage. It is certainly not permissible for the appellants to accuse the Legislature of wholesale carelessness and stupidity in framing the schedule, as they have to do in order to maintain the position that section 4 is all-embracing. Even Mr. Venkatarama Ayyar's modified suggestion—which, as I have said, must be rejected—that section 4 includes all questions of title, priority and others *ejusdem generis* cannot be reconciled with the entry in Schedule I first of decisions under section 4 and later of orders annulling transfers under section 53.

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The three provisions which I have mentioned are, I think, enough to show that the Legislature did not intend section 4 to embrace proceedings under section 53 and that the words "subject to the provisions of this Act" in section 4 mean "excluding questions otherwise provided for by the provisions of this Act." This interpretation I may add is in accordance with the history of section 4, which was first introduced in the Provincial Insolvency Act of 1920. The previous Act provided for proceedings such as now come under section 53 of the present Act and for other particular classes of proceedings. But a doubt was felt whether the Court could decide other questions arising in insolvency cases but not specifically provided for, and that doubt led to conflicting decisions. In those circumstances section 4 was newly introduced in the present Act, and from those circumstances it could reasonably be inferred—even if an examination of the provisions of the Act did not make that unnecessary—that it was intended, not to affect, override or embrace existing provisions, but to fill what some Courts had felt to be a gap in insolvency jurisdiction. If the new section had been introduced towards the end of the Act instead of near the beginning, its introduction, as supplementary to and not including the other provisions of the Act, would I think have been recognized at once.

In my opinion the annulment of the sale in this case was not made under section 4 of the Act, and no second appeal lay in respect of it. The dismissal of the second appeal by the learned Judge was therefore right, and this appeal should be dismissed with costs.

ANANTAKRISHNA AYYAR J.—Pethappa Naik filed a petition on 5th October 1920 (Insolvency Petition No. 8 of 1920) on the file of the District Munsif's Court of

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Tuticorin to have himself adjudicated an insolvent, and he was accordingly adjudicated an insolvent by order dated 26th February 1921. On 2nd October 1919, Pethappa Naik had executed a sale deed (Exhibit I) in favour of Alagirisubba Naik and five others for Rs. 12,500 in respect of his immovable properties. On 28th November 1924, an application was filed in the Court of the District Munsif of Tuticorin under section 53 of the Provincial Insolvency Act (V of 1920) to have the sale deed annulled by the Court. The vendees under the sale deed opposed the application; but the District Munsif allowed the application and annulled the sale, and directed the Official Receiver to sell the properties for the benefit of the creditors. The civil miscellaneous appeal preferred by Alagirisubba Naik and five others to the District Court, Tinnevely, having been dismissed, they preferred Civil Miscellaneous Second Appeal No. 104 of 1928 to the High Court. They also filed a civil revision petition in the alternative to the High Court, Civil Revision Petition No. 1013 of 1928, against the same order passed by the District Court. Both the civil miscellaneous appeal and the civil revision petition came on for hearing before CURGENVEN J. A preliminary objection having been taken that no second appeal lay to the High Court against the order passed by the District Munsif under section 53 of the Provincial Insolvency Act, the learned Judge disposed of the objection as follows:—

“This civil miscellaneous appeal and civil revision petition arise out of proceedings taken, under section 53 of the Provincial Insolvency Act, to annul a transfer of property by the insolvent in Interlocutory Petition No. 8 of 1920 on the file of the District Munsif of Tuticorin. The alternative method of approach has been adopted because the appellant-petitioner has doubt whether a second appeal lies. It can only lie if the original proceedings be held to have been taken under section 4

of the Act. But that is a general provision, and I am inclined to think that a case disposed of under section 53 is a decision such as is contemplated in section 75 (1), and, accordingly, that, subject to the first proviso of that section which in wide terms allows of revision, the decision of the District Court is final. I shall accordingly entertain the matter as a civil revision petition.”

The learned Judge then went into the merits of the civil revision petition and finally dismissed the same. He dismissed Civil Miscellaneous Second Appeal No. 104 of 1928 with costs, and Civil Revision Petition No. 1013 of 1928 without costs. Leave to appeal however was granted in Civil Miscellaneous Second Appeal No. 104 of 1928. The vendees under Exhibit I, Alagirisubba Naik and others, have accordingly preferred Letters Patent Appeal No. 114 of 1929 against the decision of the learned Judge in Civil Miscellaneous Second Appeal No. 104 of 1928. Of course no appeal lies against the order passed by the learned Judge in the civil revision petition. When this appeal was opened by the learned Advocate for the appellants, Mr. T. M. Krishnaswami Ayyar, the learned Advocate, who appeared for the respondents, raised a preliminary objection to the hearing of the letters patent appeal on the ground that no second appeal lay to the High Court against an order passed under section 53 of the Provincial Insolvency Act, and that the learned Judge himself, who heard the civil miscellaneous second appeal, held that no such appeal lay. Though leave to appeal has been granted by the learned Judge under section 15 of the Letters Patent, yet, if no second appeal lay to the High Court, no letters patent appeal could lie either, in the circumstances. He drew our attention to a decision of the Lahore High Court, *Ilahi Jan v. Hari Kishen Das*(1), and he also relied on *Sambamurthi Ayyar v. Ramakrishna Ayyar*(2).

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(1) (1921) 67 I.C. 887.

(2) (1928) I.L.R. 52 Mad. 337.

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The learned Advocate for the appellants argued that the application filed in the District Munsif's Court should be taken to have been filed really under section 4 of the Provincial Insolvency Act, though the application mentions section 53 as the provision of law under which it was made. He argued that, having regard to the allegations in the application, it must be taken to come substantially under section 4 of the Act, and not under section 53; he further argued that, even if the application be taken to come properly under section 53, yet, having regard to the very wide wording of section 4, inasmuch as the District Munsif decided questions relating to the title of the appellants to the properties covered by the sale deed (Exhibit I), a second appeal lies to the High Court under the second proviso to section 75 of the Act, which enacts:

"Any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section 1 of section 100 of the Code of Civil Procedure, 1908."

He relied on *Kallukutti Parambath Perachan v. Puthen Peetikakkal Kuttiali*(1) and *Seth Sheolal v. Girdharilal*(2).

I am clearly of the opinion that the application made to the District Munsif was under section 53 of the Act, that it was so treated in both the lower Courts, and that we must dispose of the matter before us on the footing that the proceedings were taken under section 53 of the Act. The allegations necessary to be made in an application under section 53 have been made in the application in question. The sale impugned took place within the two years mentioned in the section, and the prayer in the application is in the terms of section

(1) (1925) 49 M.L.J. 595.

(2) (1923) 78 I.O. 140.

53. We find that an appeal is provided for, by section 75 read with Schedule I, against the order of the District Munsif annulling the sale under section 53. No further second appeal to the High Court is provided for specifically in such a case. Section 75 (1), on the other hand, provides:

"A person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to the District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final."

There are two provisos added to the section. Under the first proviso:

"The High Court for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to the law may call for the case and pass such order with respect thereto, as it thinks fit."

This does not give a right of appeal, but provides for the exercise of powers of revision by the High Court in respect of such orders passed on appeal by the District Court. Reliance however was placed on the second proviso which enacts:

"Any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of section 100 of the Code of Civil Procedure."

The question then is whether the decision passed by the District Munsif in the present case could be said to be a decision passed under section 4 of the Act; if it is a decision under section 4, then a second appeal lies to the High Court; if not, no second appeal lies.

There was no provision in the Insolvency Act of 1907 similar to, or corresponding with, section 4 of the Act of 1920. Under the Act of 1907, decisions passed under section 36 (which corresponds to section 53 of the Act of 1920) were open to one appeal only; there was

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no provision for second appeals to the High Court. Under the Act of 1920, an appeal to the High Court from a decision passed under section 53 annulling a voluntary transfer is provided for by Schedule I. The same schedule also provides for such appeals from "decisions of questions of title, etc., arising in insolvency, under section 4". If decisions under section 4 include decisions under section 53, it is difficult to understand why separate provisions for appeal to the High Court have been made by Schedule I. Further, according to the contention of the appellants, all decisions of questions of title under section 4 are appealable to the High Court; whereas Schedule I gives such a right of appeal only against orders annulling voluntary transfers—(not against orders declining to annul such transfers). The provisions of Schedule I relating to sections 4 and 53 are thus inconsistent with each other if the contention of the appellants be upheld. Finally, if section 4 covered the whole field of disputes arising under the Insolvency Act, then one is unable to understand why, after providing for an appeal to the High Court from decisions of title, priority, etc., arising in insolvency under section 4, the Legislature thought it necessary to provide separately for similar appeals from orders passed under the various other sections, viz., sections 25, 26, 27, 33, 35, 37, 41, 50, 53 and 54, mentioned in Schedule I. The learned Advocate for the appellants, however, argued that the scope of section 4 was limited to decisions of questions of "title or priority or other questions" "*ejusdem generis*", and that section 4 had not any wider scope; but the wordings of the section are—

"The Court shall have full power to decide all questions whether of title or priority or of any nature whatsoever which may arise in any case of insolvency."

The words "of any nature whatsoever" could not be taken as only limiting the operation of the section under the principle of *ejusdem generis*. The expression "all questions of any nature whatsoever" is too comprehensive to be limited in the way contended for by the learned Advocate for the appellants.

Further, the section begins with the words "subject to the provisions of this Act." Before, therefore, we seek to apply section 4 to any case, we should be satisfied that the case is not provided for elsewhere by the Act. Turning to section 53, we find that it provides for a particular class of cases mentioned in the section. Therefore, *prima facie*, section 4 should be taken to have no application to cases coming under section 53 of the Act. As remarked by the learned Judges of the Calcutta High Court in *Fool Kumari Dasi v. Khirad Chandra Das Gupta*(1),

"as has been explained in *Muhammad Habibullah v. Mushtaq Husain*(2), this section (section 53 of the Provincial Insolvency Act) is in one sense wider in its scope than section 53 of the Transfer of Property Act, because under this section all that is necessary to show is that the transfer was made within two years of the adjudication, unless it is a transfer made before or in consideration of marriage and further that under this section it is not necessary to show that the transfer was made with intent to delay or defeat a creditor."

In *Anwar Khan v. Muhammad Khan*(3) the majority of the learned Judges were of opinion that provisions relating to appeal contained in the other portions of the Insolvency Act were not in any way affected by the provisions of section 4, but were saved by the words "subject to the provisions of this Act" occurring in section 4. It is difficult to imagine that the Legislature, having specifically provided for particular matters and

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(1) (1927) 81 C.W.N. 502, 505.

(2) (1916) I.L.R. 39 All. 95.

(3) (1929) I.L.R. 51 All. 550 (F.B.).

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regulated rights of appeal with reference to the same, intended to have the said specific provisions affected and substantially modified by a general provision like that contained in section 4—more especially when the Legislature has taken care to add the words “subject to the provisions of this Act” to that section. This is in accordance with the view adopted by this Court in *Venkatram v. Chokkier*(1).

Section 4 is a re-enactment of section 7 of the Presidency Towns Insolvency Act and section 105 of the English Bankruptcy Act of 1914, with some modifications. There was a difference of opinion among the Courts in India whether the Court exercising insolvency jurisdiction has got power to decide upon questions of title, priority, etc., which may arise in the course of the administration of the estate, in circumstances which could not be brought under sections 36 and 37 of the old Act (corresponding to sections 53 and 54 of the Act of 1920). Evidently the Legislature, in enacting section 4 of the present Act, gave the Courts exercising insolvency jurisdiction a discretion to exercise powers in such matters, if they thought fit to do so, while allowing them at the same time a discretion to direct that such matters should be adjudicated by the ordinary courts in the ordinary way. The intention does not seem to have been to affect the specific provisions contained in the other portions of the Act, but only to provide for other matters arising in insolvency not specifically provided for elsewhere in the Act. In this view, it is easy to understand why a right of second appeal is given against decisions passed under section 4; for, if the Court in its discretion referred the parties to litigate in the ordinary courts in the usual way, then a

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right of second appeal would exist in respect of decisions relating to title or priority passed by the ordinary courts; and the Legislature did not think it right to take away such right of second appeal simply because the insolvency Court resolved in the circumstances to adjudicate upon such matters itself. I am unable to agree with the contention of the learned Advocate for the appellants that section 53 only provides for a special rule of evidence, since it is difficult in that view to understand why a right of appeal should be specifically provided for against decisions passed under that section. Further, I have remarked already about the wider scope of the provisions contained in section 53 of the Provincial Insolvency Act.

The reasoning of the learned Judges in *Sambamurthi Ayyar v. Ramakrishna Ayyar*(1) is in favour of the view I am inclined to adopt. At page 339, the learned Judges remarked as follows:—

“This order is one made under Schedule I and quite obviously on the terms of this section there is no second appeal in the matter. It has been sought however to argue from the second proviso to section 75, that the order can be taken to be one under section 4 of the Act and a second appeal lies against any order passed under section 4 on a question of law. To say that this order is passed under section 4 amounts to saying that every order under the Act can be brought under section 4 and that therefore a second appeal lies on a question of law against every order passed under the Act. This is to render the schedule and the plain proviso of section 75 (2) meaningless. A sort of analogy was sought to be drawn from the Civil Procedure Code but that does not in our opinion apply. There is nothing in the decisions quoted in that analogy which renders one part of that Act inconsistent with another whereas the effect here is to wipe out a definite proviso as to appeal. It is a settled principle of construction that an Act must be construed

(1) (1927) I.L.R. 51 Mad. 667.

(1) (1928) I.L.R. 52 Mad. 337.

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if possible consistently with itself. We therefore find against the contention."

We have not been referred to any case where the present question has been discussed by any Court.

The decision in *Seth Sheolal v. Girdharilal*(1) does not contain any discussion or reasoning—the learned Judge simply follows a prior unreported ruling of that Court. The remarks in *Kallukutti Parambath Perachan v. Puthen Peetikakkal Kuttiali*(2) are *obiter*, and the question is not discussed in that case. Further, the question there was not with reference to section 53 of the present Act. In *Ilahi Jan v. Hari Kishen Das*(3) this point is decided in favour of the respondents' contention; but, here again, there is no discussion of the question, and the decision is largely based on the admission of Counsel.

The Provincial Insolvency Acts (both of 1907 and 1920) provide for appeals in a manner different from that provided for by the Madras Civil Courts Act. From the decisions passed by a Subordinate Judge exercising insolvency jurisdiction an appeal lies to the District Court, though the value of the property affected might be more than Rs. 5,000. This is now clear under the decisions, and in fact was not disputed before us. No right of second appeal was given by the Act of 1907 against decisions passed under section 36 thereof, and, if the Legislature wanted to provide for second appeals in such cases, one should have expected it to do so in a clearer manner. No doubt, having regard to the nature of the questions that arise for decision—for example, under sections 53 and 54 of the present Act—it is probably advisable that a right of second appeal to the High Court should be provided for against orders passed

(1) (1923) 78 I.C. 140.

(2) (1925) 49 M.L.J. 595.

(3) (1921) 67 I.C. 887.

under sections 53 and 54 of the Act; transactions affecting properties of the value of several thousands of rupees could be set aside or upheld under those sections, and it would seem to be a matter for consideration whether second appeals from such decisions should not be provided for. At present there is only the remedy by way of filing a revision petition to the High Court on a question of law under section 75 (1), first proviso, in such cases, but no right of second appeal. Of course, there is a substantial difference between revision and second appeal. But that is a matter for the Legislature to resolve upon, and not for the Courts as the statute now stands.

The appellants relied on *Shikri Prasad v. Aziz Ali*(1), but I may remark that the question in that case related to a right of first appeal, and not to a right of second appeal. The case in *Fool Kumari Dasi v. Khirud Chandra Das Gupta*(2) related to an application filed by a person claiming certain properties as her own and objecting to the sale of the said properties advertised by the Receiver; such a case would not come under section 53 of the Act, but would come under section 4.

A very recent decision by one learned Judge of the Lahore High Court, *Budha Mal v. Official Receiver*(3), supports the view I am inclined to take.

As I construe sections 4 and 75 and Schedule I of the Provincial Insolvency Act, I am of opinion that no second appeal lies from a decision passed under section 53 of the Provincial Insolvency Act. I accordingly uphold the preliminary objection, and dismiss the letters patent appeal with costs.

A.S.V.

(1) (1921) I.L.R. 44 All. 71.

(2) (1927) 81 C.W.N. 502.

(3) A.I.R. 1930 Lah. 122.

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APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

1931,
February 18.

S. R. M. RAMASWAMI CHETTIYAR AND FOUR OTHERS
(RESPONDENTS), APPELLANTS,

v.

THE OFFICIAL ASSIGNEE OF MADRAS (APPLICANT),
RESPONDENT.*

Presidency Towns Insolvency Act (III of 1909), sec. 58 (2)—Property—Title of insolvent to, disputed—Insolvency Court—Power of, to authorize Official Assignee to take charge of same pending dispute.

In a case where the title of the insolvent to certain property is disputed, the Insolvency Court can, under section 58 (2) of the Presidency Towns Insolvency Act (III of 1909), authorize the Official Assignee to take charge of that property pending settlement of the dispute.

The question of jurisdiction must no doubt be investigated, but the Court is not bound to stay its hand upon the mere assertion of a paramount title.

APPEAL from the Order, dated the 26th January 1931, passed by WALLER J., in the exercise of the Insolvency jurisdiction of the High Court, in Application No. 107 of 1931 in Insolvency Case No. 14 of 1930 on the file of the High Court, Rangoon (In the matter of T.S.N. Chettiar Firm, insolvents).

V. V. Srinivasa Ayyangar for appellants.

M. Subbaraya Ayyar for respondent.

JUDGMENT.

CURGENVEN
J.

CURGENVEN J.—These two appeals arise out of two applications by the Official Assignee of Madras for the delivery to him of certain property alleged to belong to

* Original Side Appeals Nos. 7 and 11 of 1931.

a firm known as the T.S.N. Firm, which was adjudicated insolvent on 10th March 1930 by the High Court of Rangoon in Insolvency Case No. 14 of 1930. The applications recite that that High Court sent a copy of the order of adjudication to this Court, and requested that, under section 176 of the Presidency Towns Insolvency Act read with section 77 of the Provincial Insolvency Act, the Official Assignee of Madras should be directed to act as auxiliary to the Official Assignee of Rangoon in respect of the properties within the jurisdiction of this Court. This direction being given, the Official Assignee sent a representative to Tiruppappuliur to take possession of certain properties believed to belong to the insolvent firm, but the representative was met by a refusal to deliver, on the ground that the properties were trust properties, the income of which was dedicated to charitable purposes. The Official Assignee accordingly took out applications before our learned brother WALLER J. sitting in insolvency, calling upon certain members of the firm and their agents to show cause why they should not deliver possession. It is stated, and I think it must on the materials before us be conceded, that the respondents to these notices were not afforded sufficient opportunity to appear before the Court and show cause in accordance with the terms of the summonses issued to them. The Judge's summonses appear to have issued on the 16th January; orders in terms of the applications were passed on the 26th, and the appellants here have given reasons, which it is not possible at present to dispute, why they were unable to get their case ready in the interval. So far as appears from the record, therefore, the Official Assignee's prayers for orders directing the insolvents and their agents to deliver possession were granted *ex parte* upon the representations which his applications contained. This is as much as I can infer from the learned Judge's

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orders, which give no reasons for the summary character of the orders passed. The question now raised before us is whether the Court had jurisdiction under the terms of the Presidency Towns Insolvency Act to pass such orders.

This raises the general question whether the Insolvency Court, in a case where the title of the insolvent to certain property is disputed, can authorize the Official Assignee to take charge of that property pending settlement of the dispute, because I conclude that it was only to that length that the learned Judge's orders were intended to go, and that it was not his intention to deprive the respondents to the applications of further opportunity to contest, either the jurisdiction of the Court to make the orders or the liability of the property to form the subject-matter of them. Under sub-section (2) of section 58 of the Presidency Towns Insolvency Act,

"The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Code of Civil Procedure, 1908, and the Court may, on his application, enforce such acquisition or retention accordingly."

Now it is indisputable that under the terms of Order XL, rule 1 of the Code of Civil Procedure, it is perfectly open to a Court to commit property of which the title is in dispute into the hands of a receiver, pending settlement of that dispute. In fact, no receiver *pendente lite* could be appointed if it were first necessary to determine the ownership of the property. It seems further evident that this principle must extend, subject to sub-section (2) of rule 1 of Order XL, to cases where, as here, one of the parties alleges that the property is held under a paramount title. This point has, I think, been correctly dealt with in *Hudson v. Morgan*(1). The

circumstances of that case were of a more extreme kind than we have here, because there a stranger to the litigation set up a paramount title, whereas here it is the insolvents themselves (and their agents) who claim title, though in a capacity different from that in which they were adjudicated.

"If this",
the learned Judges say,

"were the true rule of law, the action of the Court might be paralysed by the groundless assertion of an entirely unfounded claim. But as was pointed out by this Court in the case of *Budh Singh Dudhuria v. Niradbaran Roy*(1), it is an elementary principle that when the jurisdiction of a Court to take cognizance of a matter brought before it is disputed, the Court must adjudicate upon the question. The jurisdiction of the Court is ousted, not by the mere assertion of the existence of the circumstances under which the Court loses its jurisdiction, but upon proof of their actual existence."

No doubt the question of jurisdiction must be judicially investigated, but the view that the Court must stay its hand upon the mere assertion of a paramount title cannot be supported. I cannot, therefore, accede to the appellants' contention that the learned Judge had no power to pass his orders, not only until they had had an opportunity of representing their case but until the Court had adjudicated upon such questions of jurisdiction and title as they thought fit to raise.

There remains the question whether we should interfere with the discretionary power exercised by the Insolvency Court. I think that, in view of the allegations contained in the Official Assignee's reports, there are no sufficient grounds at this stage to take this course. On the broad facts alleged, and without prejudging the issues, I am not prepared to say that the order was wrong. As however, the title of the Official Assignee is likely to be contested, I think that, until due opportunity for such

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(1) (1909) I.L.R. 36 Cal. 713.

(1) (1905) 2 C.L.J. 431.

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contest has been given, he should hold them as would an interim receiver, without disposing either of the properties themselves or their proceeds. The appeals are dismissed. The Official Assignee will get his costs out of the estate and the appellants will bear their own.

CORNISH J. CORNISH J.—I agree. If the property is held by the insolvents on trust for charity it will not be property of the insolvent which vests in the Official Assignee, and the Court would not be competent to order delivery of it to the Official Assignee. But it appears from the Official Assignee's report that the only ground for supposing the property to be trust property is the statement by an agent of the insolvents that the property is "ear-marked for charities", whatever that may mean. The insolvents themselves, who reside without the jurisdiction of the Court, have declined, in spite of several letters from the Official Assignee, to give him any information or assistance in discovering the true character of the property. On the other hand, the enquiries made by the Official Assignee show that these properties stand in the names of the insolvents personally in the municipal registers. This is not, of course, conclusive that the insolvents are not trustees of the property. But ostensibly the property is the property of the insolvents, and, in the circumstances, this would justify the order of the Court under section 58 (2), Presidency Towns Insolvency Act, for the delivery of the properties to the Official Assignee. The order, however, will not preclude the insolvents from showing to the satisfaction either of the Official Assignee or of the Court that they have no more than the legal interest of trustees in the properties.

Attorney for appellants : N. T. Shamanna.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and Mr. Justice Cornish.

HIS HOLINESS SRILA SRI VYTHILINGA PANDARA
SANNADHI AVARGAL, ATHINAKARTHAR OF
TIRUVADUTHURAI ATHINAM (PLAINTIFF), APPELLANT,

1931,
March 4.

v.

THE TEMPLE COMMITTEE, TINNEVELLY CIRCLE,
THROUGH ITS PRESIDENT, I. S. SUBRAMANIA PILLAI
AND ANOTHER (DEPENDANTS), RESPONDENTS.*

*Madras Hindu Religious Endowments Act (II of 1927, I of 1928),
sec. 73—Suit to establish right of hereditary trusteeship
of a certain temple—Bar of—Code of Civil Procedure
(Act V of 1908), sec. 92.*

Section 73 of the Madras Hindu Religious Endowments Act (II of 1927 as amended by Act I of 1928) is no bar to the institution of a suit to establish a right of hereditary trusteeship of a temple and for certain consequential reliefs.

The words "except as provided by this Act" in section 73 of the said Act mean "contrary to the provisions of this Act".

APPEAL against the decree of the Court of the Subordinate Judge of Tinnevely in Original Suit No. 15 of 1929.

T. Rangachari (with him V. N. Venkatavaradachari and R. Gopalachari) for appellant.

E. S. Chidambaram Pillai (with him C. Rangaswami Ayyangar) for first respondent.

T. M. Krishnaswami Ayyar (with him K. V. Ramachandra Ayyar) for second respondent.

JUDGMENT.

CURGENVEN J.—The plaintiff sued to establish his right as hereditary trustee of the Sri Papavinasaswami

* Appeal No. 210 of 1930.

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temple at Vikramasingapuram village in Ambasamudram taluk of the Tinnevely district, and for certain consequential reliefs. The plaint alleges that the temple committee, the first defendant, in disregard of the plaintiff's hereditary right as trustee, had held that he had vacated office under section 51 of the Madras Hindu Religious Endowments Act, and had appointed the second defendant as sole trustee of the temple. The learned Subordinate Judge of Tinnevely has found that a suit of this character is barred by the provisions of the Act above referred to, and this is the sole question which we have to decide in appeal.

There is ample authority for the view that a suit to establish a personal right of this character does not fall within the terms of section 92 of the Code of Civil Procedure. It is true that in *Subramania Pillai v. Krishnaswamy Somayajiar*(1) a suit by two out of three trustees of a temple for a declaration that the appointment by the devasthanam committee to fill a vacancy in the third trusteeship was invalid was held to fall under that section; but this decision was not approved in the Full Bench case, *Appanna Poricha v. Narasinga Poricha*(2), in which it was held that the class of suit contemplated in section 92 was one representative in character, one or more persons being enabled by it to sue on behalf of the public, and sanction being required as a precaution against wasteful litigation. The learned Judges who decided that case referred with approval to the elaborate judgment of WOODROFFE J. in *Budree Das Mukim v. Chooni Lal Johurry*(3), where the principle underlying the section has been explained and illustrated. So far as the suit is brought by a

(1) (1919) I.L.R. 42 Mad. 868. (2) (1921) I.L.R. 45 Mad. 113 (F.B.).
(3) (1906) I.L.R. 33 Cal. 789.

plaintiff in his individual capacity as a trustee to enforce his individual claim to be such trustee, it does not lie within the scope of the section. Mr. T. M. Krishna-swami Ayyar, who recognizes that the authority of the Full Bench case is fatal to his position upon this point, contends that it has been superseded by the judgment of the Privy Council in *Abdur Rahim v. Mahomed Barkat Ali*(1), but I cannot find that that decision does more than set at rest the question of the mandatory nature of the section, it being decided further that sub-section 2 does not extend the scope of sub-section 1. A reference to the arguments on behalf of the respondents in that case will show that it was conceded that a suit in respect of a private right, where no breach of trust is alleged may be maintained without the sanction of the Advocate-General.

Turning now to the Madras Hindu Religious Endowments Act, we have to see whether such a suit is barred by any of its provisions. The Act provides for the institution of suits, or for reference to a Court, in a number of circumstances—see, for instance, sections 55 (4), 57, 63, 65, and 67—and then ensues the more general section 73. It is admitted that if the suit is barred it must be by the terms of this last section. It runs as follows:—

“(1) The Board or Committee having jurisdiction over any math or temple or any person having interest and having obtained the consent of the Board may institute a suit in the Court to obtain a decree—

(a) appointing or removing the trustee of a math or excepted temple,

(b) vesting any property in a trustee,

(c) declaring what proportion of the endowed property or of the interest therein shall be allocated to any particular object of the endowment, or

(1) (1927) I.L.R. 55 Cal. 519 (P.O.).

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(d) granting such further or other relief as the nature of the case may require.

(2) Sections 92 and 93 and rule 8 of Order I of the first schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by this Act."

It will be seen that the first part of this section is modelled very closely upon section 92 of the Code of Civil Procedure, some of the reliefs which may be sued for under the terms of section 92 being reproduced verbatim, while others are provided for elsewhere in the Act. It is not possible, I think, to contend successfully that a class of suit to which section 92 would not relate can be brought within the scope of this first part of section 73; nor indeed does the plaintiff here ask for any of the reliefs which it contemplates. The argument addressed to us depends upon the construction of the closing words of sub-section 2, "no suit in respect of such administration or management shall be instituted except as provided by this Act." Now in the first place it appears to me very doubtful whether a suit by a trustee to establish his hereditary right to his office is a suit in respect of the administration or management of the religious endowment to which the trusteeship appertains. It is a suit relating to a personal right, and, though upon its decision may depend the question whether or not the plaintiff continues in office as trustee, that question is not one arising out of the administration of the trust, as for instance where a trustee is removed for breach of trust or mismanagement. The suit raises no issue as to the manner in which the trust property has been administered or should in future be administered. From that point of view, too, it will not fall within the terms of section 92 of the Code of

Civil Procedure, a provision which was designed to deal with every aspect of the management of endowments. As in *Budree Das Mukim v. Ohooni Lal Johurry*(1), so here, no directions are necessary for the administration of the trust. In dealing with the question whether a suit by hereditary muktesars for a declaration that certain persons were not properly appointed trustees fell within the provisions of section 92, it was held by the Bombay High Court in *Nilkanth Devrao v. Ramkrishna Vithal*(2) that the section did not apply because it provided only for two cases, (i) either there must be an alleged breach of any express or constructive trust or (ii) the direction of the Court must be deemed necessary for the administration of any such trust. This, I think, affords some authority for the view that a suit of this character is not one in respect of the administration or management of the endowment. For this reason alone I do not think that sub-section 2 of section 73 of the Act opposes any bar to the institution of a suit like the present.

Even assuming, however, that the qualification attached to such suits as the sub-section deals with is satisfied in the present case, a further question arises as to the meaning of the phrase, "no suit . . . shall be instituted except as provided by this Act." Mr. T. M. Krishnaswami Ayyar wishes us to read the phrase as meaning "no suit shall be instituted unless it is provided for by this Act", so that, since there is no express provision authorizing such a suit, no such suit can lie. The alternative view offered is that the words mean no more than that "no suit shall be instituted contrary to the provisions of this Act." At first sight the former construction may perhaps be thought the more natural meaning of the words, a meaning which,

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(1) (1906) I.L.R. 33 Cal. 789.

(2) (1921) I.L.R. 46 Bom. 101.

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except that "provided for" stands in the place of "provided" is to be attached to similar language in section 404 of the Code of Criminal Procedure. I am not prepared to say that "provided for" and "provided" convey exactly the same meaning. But the real difference to notice, I think, is that section 404 of the Code of Criminal Procedure deals with the right of appeal and that that right is created by the Code itself, whereas the right of a trustee to sue existed prior to the Religious Endowments Act and can only be restricted, not created, or extended, by its terms. It is a well-accepted principle of construction that a provision of law should receive a strict interpretation when it is sought by it to oust the ordinary jurisdiction of the Civil Court; see *Ali Muhammad v. Hakim*(1) and *Leach v. Rex*(2). In spite therefore of the similarity of language, I do not think that the meaning of section 404 affords a safe guide in the present instance. It is then urged that on the view that the words mean no more than that the Act must be examined to see if such a suit is barred the words are mere surplusage, which is no doubt true; and that to construe them as the appellant desires would allow certain suits to be brought, as for instance, for a scheme, which had previously been restricted by section 92, Code of Civil Procedure. The example given is a doubtful one as it is arguable that by affording an alternative remedy the Act impliedly bars such a suit. *Per contra*, if the section is read as the respondent proposes, the example of the present case is sufficient to show that it would create an absolute bar to any suit for the establishment of personal rights of the greatest importance to the person affected, and which have been perhaps in the enjoyment of his family for centuries. I am unable to believe that the drafters of

(1) (1928) I.L.R. 9 Lah. 504 (F.B.).

(2) [1912] A.C. 305.

the Act intended, not indeed to qualify by conditions the ordinary right of resort to the Courts in such a case but to exclude it altogether. Therefore I think that, if the language of the section is open to two alternative constructions, it is permissible to select that one which avoids such a result. This may be done by applying to the words except as provided by this Act the sense of "contrary to the provisions of this Act", which I think they may well have been intended to bear. This is the construction which has been placed upon them by WALLACE J. in *Alagappa Chettiar v. Arunachallam Chetty*(1). The learned Subordinate Judge has referred to a decision of my own as adopting the opposite view. The observations in that case must be read in the light of the circumstance that neither party contended for the position now assumed by the appellant; so that, it being granted that the suit fell either under section 73 of the Religious Endowments Act or under section 92 of the Code of Civil Procedure, the only question which I had to decide was under which provision it would fall.

My conclusion accordingly is that the Court had jurisdiction to entertain the suit. As my learned brother agrees with me, we allow the appeal, set aside the decree and remand the case for trial upon the further issues and disposal in due course. Costs would abide the result. The appellant will be entitled to a refund of the court-fee paid on the memorandum of appeal.

CORNISH J.—I concur.

G.B.

(1) (1926) 97 I.C. 489.

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APPELLATE CRIMINAL.

*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Sundaram Chetti.*

K. DHOLLIH (ACCUSED), PETITIONER,

v.

KING-EMPEROR (COMPLAINANT), RESPONDENT.*

*Code of Criminal Procedure (Act V of 1898), sec. 195 (1) (b)—
Person gave information to police alleging commission of
offence—After investigation police reported to Sub-Magis-
trate case false—Same complaint pressed before Sub-
Magistrate—Accused discharged under sec. 253 (2) of the
Code—Police filed complaint before Subdivisional Magis-
trate for giving false information to police—Conviction
under sec. 182, Indian Penal Code (Act XLV of 1860)—
Legality of—Offence committed whether not one under
sec. 211, Indian Penal Code—Complaint in writing
under sec. 195 (1) (b) of the Code of Criminal Procedure—
Necessity for.*

A person gave information to the police that certain persons had broken the seal and lock of a temple and entered it. After some investigation the police reported to the Stationary Sub-Magistrate that the case was false. Thereupon the said person pressed the same complaint before the Stationary Sub-Magistrate requesting the Court to make a judicial investigation of the charge. Subsequently the Magistrate discharged the accused persons in that case, under section 252 (2) of the Code of Criminal Procedure (Act V of 1898), finding the charge against them to be groundless. The police filed a complaint against the said person for giving false information to the police before the Subdivisional Magistrate who convicted him under section 182 of the Indian Penal Code (Act XLV of 1860).

Held, in revision, by the High Court, that, as the complaint disclosed clearly an offence under section 211 of the

* Criminal Revision Case No. 715 of 1930.

Indian Penal Code alleged to have been committed in or in relation to a proceeding in Court, the Subdivisional Magistrate could not take cognizance of the case without a complaint in writing by the Sub-Magistrate as required by section 195 (1) (b) of the Code of Criminal Procedure and that the conviction was illegal and should be set aside.

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 Subdivisional Magistrate of Coonoor in Calendar Case No. 52 of 1930.

K. S. Jayarama Ayyar and G. Gopalaswami for petitioner.

K. N. Ganpati for Public Prosecutor (L. H. Bewes) for the Crown.

JUDGMENT.

SUNDARAM CHETTI J.—This is a criminal revision petition filed by the accused against the conviction and sentence passed by the Subdivisional Magistrate, Coonoor, under section 182, Indian Penal Code, imposing on him a fine of Rs. 25. The Subdivisional Magistrate took cognizance of this case on a complaint filed by the Sub-Inspector of Police against the accused. In that complaint it is alleged that the accused gave false information to the Sub-Inspector of Police, Wellington, that three persons, namely, P.Ws. 3, 4 and 5, had broken the seal and lock of a temple in Karteri and entered into the temple. After some investigation, the police reported to the Stationary Sub-Magistrate that the case was false. Thereupon, the present accused pressed the same complaint before the Stationary Sub-Magistrate, Coonoor, requesting the Court to make a judicial investigation of the charge. Subsequently the Magistrate discharged the accused persons in that case under section 253 (2), Code of Criminal Procedure,

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finding the charge against them to be groundless. Embodying these facts in the present complaint and alleging that, by reason of these circumstances, the accused has committed an offence under section 211, Indian Penal Code, the present prosecution was launched by the Sub-Inspector of Police against the accused.

A preliminary objection was taken on behalf of the defence before the Magistrate that, in the face of the facts alleged in the complaint, the offence is one under section 211, Indian Penal Code, committed in or in relation to a proceeding in Court and, therefore, the Magistrate could not take cognizance of the offence, in the absence of a complaint in writing of the Stationary Sub-Magistrate, Coonoor. Overruling this objection, the learned Magistrate considered that the case should be tried under section 182, Indian Penal Code, and accordingly tried the case which resulted in the conviction of the accused.

It is argued before us that the facts as set forth in the complaint clearly bring the offence under section 211, Indian Penal Code, alleged to have been committed in or in relation to a proceeding in a Court, and, that being so, the learned Subdivisional Magistrate had no jurisdiction to take cognizance of this case in the absence of a complaint in writing of the Sub-Magistrate of Coonoor as required by section 195 (1) (b) of the Code of Criminal Procedure. In the first place, it must be observed that, if regard be had to the facts disclosed in the present complaint, the charge against the accused is not simply for giving false information to the police (section 182, Indian Penal Code), or making a false charge against some persons before the police (section 211, Indian Penal Code), but it is also distinctly stated that the false information to the police was followed by a complaint to the Stationary Sub-Magistrate who took

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cognizance of the case and eventually discharged the accused holding the charge against them to be groundless. When a complaint sets forth certain facts disclosing a minor offence and also a graver offence, the prosecution should ordinarily be for the graver offence. If in entertaining such a complaint there is a legal bar to taking cognizance of the graver offence by reason of the want of a complaint by the Magistrate, the legal consequence should not be allowed to be evaded by confining the case to the minor offence alone and disposing it of accordingly. A similar question was considered by CURGENVEN J. in a recent case, *Perianna Muthirian v. Vengu Aiyar*(1), and, after a review of the case-law on the point, that learned Judge has held that, if a graver offence is disclosed from the facts stated in a complaint, the condition fixed in section 195 (1) (b) of the Criminal Procedure Code for taking cognizance of such a case cannot be evaded by electing to name the offence under another section which is more general and less grave. The course which the learned Subdivisional Magistrate seems to have adopted in the present case is open to the objection pointed out by CURGENVEN J. in the above case.

A number of decisions have been brought to our notice, and there is doubtless a conflict of opinion ; but, in the present case, the question on which there is a conflict of judicial opinion does not, in our opinion, necessarily arise for determination. If, in the present case, the complaint made by the Sub-Inspector of Police against the accused was confined solely to the false information alleged to have been given to the police, or the false charge made by him before the Police, then, a question will arise whether by reason of the fact that

(1) (1928) 56 M.L.J. 208.

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this information or charge made to the police was followed up by a complaint to the Magistrate, the Sub-divisional Magistrate would be precluded from taking cognizance of this case without a written complaint from the Sub-Magistrate of Coonoor. The view taken by the Calcutta High Court is that, in such a case, even in respect of the false charge made to the police, it should be taken to be an offence under section 211 committed in relation to a proceeding in Court, and, therefore, the complaint of the Court itself would be necessary for taking cognizance of such a charge; see *Tayebulla v. Emperor* (1), *Brown v. Ananda Lal Mullick* (2), and *Sheikh Samir v. Sajidar Rahman* (3). In the case decided by a Bench of the Patna High Court in *Shaikh Muhammad Yassin v. King-Emperor* (4) the view taken by the Calcutta High Court has been followed. The view taken in that decision goes a step further, because it is stated that, even in respect of the false charge made to the police which alone is the subject-matter of the complaint, the complaint of the Court itself would be necessary for taking cognizance of the case, if it is shown that, after making a false charge, a complaint was also preferred to a Magistrate for judicial investigation, even though that Magistrate had not investigated the complaint. In a later decision of that High Court, *Daroga Gope v. King-Emperor* (5), the principle of the decision in *Shaikh Muhammad Yassin v. King-Emperor* (4) was upheld, if the prosecution be for an offence under section 211, Indian Penal Code, in respect of a false charge made to the police, but it is observed therein that the case can be proceeded with even without a complaint in writing by the Magistrate if the offence is treated to be one falling

(1) (1916) I.L.R. 43 Cal. 1152.

(3) (1926) I.L.R. 53 Cal. 824.

(2) (1916) I.L.R. 44 Cal. 650.

(4) (1924) I.L.R. 4 Pat. 323.

(5) (1925) I.L.R. 5 Pat. 38.

under section 182, Indian Penal Code, whereas a contrary view was taken in the case of *Rambrose v. King-Emperor* (1) decided by a single Judge who says that a prosecution under section 182 (a minor offence) should not be permitted and should be abandoned when the facts amount to a graver offence under section 211, Indian Penal Code. The view taken by that learned Judge is that the conviction for the minor offence when a charge under the graver offence could not be taken cognizance of without the complaint of the Magistrate would not be legal. But this view has been dissented from in a subsequent decision of the Bench of that High Court in the case of *Ma Paw v. King-Emperor* (2). On page 505 the learned Judges have however observed as follows:—

“In the ordinary way if a prosecution takes place, it should be for the more serious of the two offences committed. This may, no doubt, be a good ground for quashing proceedings under the minor section in their early stages; but when there has been no prosecution for the more serious offence and a person has been prosecuted and convicted for the minor offence and the whole case is complete, we see no reason for holding that the conviction is illegal and must be set aside.”

It is noteworthy that the facts in that case are clearly distinguishable from the facts of the present case. The prosecution in that case was solely in respect of the alleged false information made to the police which would bring the charge under section 182, Indian Penal Code, and no reference was made in that complaint to any false charge made before a Magistrate subsequent to the giving of information to the police. In fact, the complaint subsequently made to the Magistrate was not even disposed of by that time. It was, therefore, held that the offence disclosed in the complaint put in by the police was a distinct offence under section 182, Indian

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(1) (1928) I.L.R. 6 Rang. 578.

(2) (1930) I.L.R. 8 Rang. 499.

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Penal Code, which can be tried on the complaint of the police officer himself. The view taken in *Emperor v. Prag Datt*(1) and some other decisions of that High Court is in conformity with that expressed by the Rangoon High Court in *Ma Paw v. King-Emperor*(2). The present case relates to a complaint which disclosed not only a false charge made to the police but also a false charge subsequently made to the Magistrate on the strength of the same facts. Such a case could not be taken cognizance of without a written complaint by the Magistrate as required by section 195 (1) (b) of the Code of Criminal Procedure. The view expressed in the Calcutta decisions has been followed by a learned Judge of this Court in the case of *Swaminatha Aiyar v. Guruswami Mudaliar*(3). We are not now dealing with a complaint by a police officer in which the charge is confined only to an offence under section 182, Indian Penal Code. In such a case alone, it may be doubted, in view of the conflict of judicial opinion pointed out above, whether a complaint by the Magistrate also is necessary; but much of the ground for conflict has been steered clear, inasmuch as the present complaint disclosed clearly an offence under section 211 alleged to have been committed in or in relation to a proceeding in Court.

That being so, the want of a complaint in writing by the Magistrate is certainly a bar to taking cognizance of this case by the Subdivisional Magistrate. In this view, the conviction and sentence passed by him should be quashed as illegal, and the fine, if levied, will be refunded to the accused.

BEASLEY C.J.—I agree.

B.C.S.

(1) (1928) I.L.R. 51 All. 382.

(2) (1930) I.L.R. 8 Rang. 499.

(3) (1927) 53 M.L.J. 457.

APPELLATE CRIMINAL.

Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Cornish.

PUBLIC PROSECUTOR, APPELLANT,

1930,
December 4.

V. SATYANARAYANA AND TWO OTHERS (ACCUSED 8, 10
AND 9), RESPONDENTS.*

Police Act (V of 1861), sec. 30 (2)—Promulgation of order under, stating licence should be obtained before collecting assemblies, etc.—Whether execution of the law under sec. 30—Person directing procession after promulgation and with knowledge of it—Liability to conviction under section 143, Indian Penal Code (Act XLV of 1860)—Resistance to execution of the law different from refusal to comply with order to disperse—Refusal to comply with order to disperse—Whether necessary for conviction under section 143.

The promulgation of an order by the Police, under section 30 (2) of the Police Act (V of 1861), that persons collecting assemblies or directing or promoting processions for certain purposes within their contemplation are to apply to the Police authorities for a licence before so doing is the execution of the law as laid down in section 30 of the Act; and any person who after the promulgation of the order and with knowledge of it directs such a procession will be guilty of resisting the execution of the law and therefore liable to conviction under section 143 of the Indian Penal Code (Act XLV of 1860).

Resistance to execution of the law is different from refusal to comply with an order to disperse. A conviction under section 143 of the Penal Code does not require a refusal to comply with an order to disperse.

King-Emperor v. Abdul Hamid (1922) I.L.R. 2 Pat. 134, referred to.

APPEAL under section 417 of the Code of Criminal Procedure against the acquittal of the accused for

* Criminal Appeal No. 382 of 1930.

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offences under sections 143 and 145, Indian Penal Code, by the Sessions Judge of Kistna in Criminal Appeals Nos. 11 and 16 of 1930 on his file (Calendar Case No. 5 of 1930 on the file of the Court of the Subdivisional Magistrate of Bandar).

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

P. Satyanarayana Rao for respondents.

JUDGMENT.

The three respondents who were accused Nos. 8, 10 and 9 in the Court of Subdivisional First-class Magistrate, Bandar Division, at Masulipatam were convicted together with accused 1 to 7 for offences under sections 143 and 145 of the Indian Penal Code and section 32 of the Police Act (V of 1861). They were sentenced under section 143, Indian Penal Code, to one month's rigorous imprisonment and under section 145 to rigorous imprisonment for six weeks each, the sentences to run concurrently; and they were called upon to execute bonds for Rs. 200 each, with two sureties each for similar amounts, to keep for one year after the expiry of the sentences. As the accused had been sentenced under sections 143 and 145, Indian Penal Code, no sentence was passed with regard to the charge under section 32 of the Police Act. The accused 8, 9 and 10 appealed to the Sessions Judge of Kistna Division who set aside their convictions under sections 143 and 145 of the Indian Penal Code but upheld the conviction under section 32 of the Police Act. The facts of the case are as follows:—His Excellency the Governor of Madras paid a visit to Masulipatam on the 8th February last. Some public meetings were held there by Congress adherents and resolutions for boycotting the Governor's visit, for bringing about a hartal of shops in the town on the day of his visit, and for taking a

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procession at the time of his visit of persons carrying black flags in their hands and crying "Governor, go back" were passed. The Circle Inspector of Police of Masulipatam apprehending a breach of the peace made a report to the District Superintendent of Police, Exhibit C, and the latter, after obtaining the permission of the District Magistrate, issued an order under section 30 (2) of the Police Act to the effect that persons collecting assemblies or directing or promoting processions as contemplated were to apply to him for a licence before so doing. This notice is Exhibit B, and was given to Valluri Rama Rao, one of the leading spirits at the meeting already referred to. A similar notice, Exhibit F, was issued which is a notice generally to all concerned. These notices are dated the 7th February 1930. On the morning of the 8th February, when His Excellency the Governor was expected to arrive, a procession of about sixty people started at about eight o'clock in the morning, and went along the Fort Road towards the Robertson Square which included a part of the route along which His Excellency was to go. Accused 1 and 2 were at the head of the procession and the other persons included in the procession were the other accused and the three respondents. The Sub-Inspector of Police, P.W. 1, met the procession on the way, and told its members about the order, Exhibit B, and served copies of it on the first and the second accused, who were leading the procession, individually. The procession then turned back and entered the premises of the Spinners' and Weavers' Association and a meeting was held there inside the building. The Sub-Inspector followed the procession to the Association but did not enter the premises but waited outside on the road. There is no evidence on the prosecution side as to what took place within the building although

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there is some evidence on the defence side. The first and the second accused came out of the premises, and according to the prosecution case formed themselves into a procession carrying black flags and crying "Governor, go back". As before stated the first and the second accused were leading the procession. P.W. 1 asked them whether they were going to disobey the order and, when they said that they were, he arrested them then and there. It must be remembered that they had already been served with copies of the notice, Exhibit B. The third accused then came forward and tried to lead the procession. He was also served with a copy of the order but on persisting in his attempt he was also arrested. The learned Sessions Judge finds that after the first, the second and the third accused were arrested, accused 4 to 11 one after the other put themselves at the head of the procession and began to direct it and this finding of fact is of considerable importance in this case. They were arrested by P.W. 1 one after the other. The prosecution case is that before arresting these persons P.W. 1 gave oral orders to all persons in the procession to disperse but that they refused to do so. It is only, of course, on those facts being found that the accused can be convicted under section 145, Indian Penal Code. The learned Sessions Judge goes on to say with regard to the conduct of the accused 4 to 11: "At that time they were not merely in the rank and file of the procession. They had begun to direct it". The defence version with regard to the accused at this time is that it was resolved inside the premises, in view of the order of the Superintendent of Police, that they should not go out in procession but that each man should go his own way carrying a black flag shouting "Governor, go back". That sets up the case that each person was acting individually and not

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collectively with the others. That version is not accepted by the learned Sessions Judge in view of the evidence of D.W. 2 and D.W. 11. The learned Sessions Judge, however, acquitted the three respondents of the charge under sections 143 and 145, Indian Penal Code, and in acquitting them adopts the dissenting judgment of Das J. in *King-Emperor v. Abdul Hamid*(1) and dissents from the rulings of the two Judges forming the majority of the special Bench which decided that case. He says that there is no evidence that the respondents acted together with others with the common object of resisting the execution of the District Superintendent's order, and also holds that in this case there was no order to disperse and therefore no refusal, and that there was no overt act of resistance. With regard to the evidence, in this case, of an order to disperse, we think that the prosecution evidence does not sufficiently prove that any such order was given. Therefore the respondents cannot be convicted, under section 145 of the Indian Penal Code, of having refused to disperse after such an order. There remains, however, their conviction under section 143 of the Indian Penal Code. For the prosecution, it is contended that the second clause of section 141 applies to this case. Section 141 defines an unlawful assembly as follows:—

"An assembly of five or more persons is designated an 'unlawful assembly' if the common object of the persons composing the assembly is—

Second.—To resist the execution of any law, or of any legal process;"

The prosecution case is that the respondents resisted the execution of the law, namely, by directing a procession without a licence. For the accused, it is argued that the order, Exhibit B, is not a law that neither was

(1) (1922) I.L.B. 2 Pat. 134.

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the law being executed and, that there has been no resistance. To constitute resistance, an overt act, it is argued, is required, and there is the authority of *King-Emperor v. Abdul Hamid*(1) already referred to in support of that argument. In that case it was held that resistance connotes some overt act, and that mere words, when there is no intention of putting them into effect, will not be sufficient to prove an intention to resist. Where there is, as in the Patna case, a refusal to disperse at the command of the Police, that clearly constitutes an overt act. Here, it is argued by the defence that in this case there was no order to disperse given by the police and therefore no refusal, and that there has been no overt act which would connote resistance. This argument appears to us to be based upon a mistake which the learned Sessions Judge has made. Resistance to execution of the law is one thing and refusal to comply with an order to disperse is another thing. Section 145 is an aggravated offence. A conviction under section 143 does not require any refusal to comply with an order to disperse at all. The question to be considered is whether the accused in this case have been guilty of some overt act, and in paragraph 11 of his judgment the learned Sessions Judge finds facts which clearly do amount to overt acts because he agrees that the accused 4 to 11 one after the other put themselves at the head of the procession and began to direct it. If the Police order, not to direct a procession without a licence, is the execution of the law, then clearly the direction of the procession, after such an order or after the respondents became aware of such an order, amounts to resistance of the execution of the law. It is perfectly clear that, after the procession had been stopped in the first instance and the first and the second

(1) (1922) I.L.R. 2 Pat. 134.

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accused personally served with a copy of Exhibit B, the procession turned back to the premises of the Spinners' and Weavers' Association and there held a meeting. It is obvious that the subject under discussion at the meeting was the Police order not to continue the procession without a licence. At the end of the meeting the accused came out, the first two at the head of the crowd, and after they had been arrested, the other accused in turn put themselves at the head of the procession. Obviously it had been decided at the meeting that the procession should go on without a licence from the Police: the learned Sessions Judge has rejected the defence story that each of the accused was acting independently of his fellowmen in going out and carrying black flags. The evidence clearly points to an agreement by all the members of the procession to defy the police order and that all the accused had that common object. We are amazed at the statement of the learned Sessions Judge in paragraph 9 of his judgment where he says: "So far as these appellants are concerned there is not even an iota of evidence on the prosecution side tending to show that they either collected assemblies of men or directed or promoted processions along with others forming an association of five or more with the common object of resisting the execution of law. P.W. 1's very words quoted above only show that each one of the accused 4 to 11 acted individually when he came forward to direct the procession, and his evidence renders it impossible to attribute concerted action and a common object to these appellants." In view of the fact that in paragraph 3 he has rejected that contention of the respondents, his observations in paragraph 9 are amazing, and in paragraph 11 he contradicts what he has said in paragraph 9. If any support to the prosecution case is required,

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the evidence of D.W. 2 provides it. He says, "From the conduct of the procession I inferred and thought that the decision was to go out in procession and disobey the orders issued under the Police Act. I thought that they were purposely disobeying orders." This being so, the only question that remains to be considered is whether the Police order was the execution of law. In *King-Emperor v. Abdul Hamid*(1), to which reference has already been made, the majority view was thus expressed :

"When a notification is issued by an executive authority in exercise of a power conferred by statute, that notification is as much a part of the law as if it had been incorporated in the body of the statute at the time of its enactment. The command is in effect a command by the appropriate legislative authority. In the present case if the notification was in compliance with section 30 of the Police Act, then, in my opinion, it was a law and certainly a legal process."

We are not prepared to say that such an order is a legal process but it appears to us quite clear that the Police order is an execution of the law. The law is enacted in section 30 of the Police Act and it is, that under certain circumstances persons directing a procession shall apply for a licence. The conditions are that such a procession, in the judgment of the Magistrate of the district or the Subdivisional Magistrate, if uncontrolled, would be likely to cause a breach of the peace. Then in such cases the District Superintendent of Police or the Assistant District Superintendent of Police may issue an order requiring the person directing such procession to apply for a licence. The issuing of the order by the Police is the execution of the law as laid down in section 30 of the Police Act, and it seems to us to make no difference whatever that a discretion is given

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to the District Superintendent of Police or the Assistant Superintendent of Police to execute the law. When he exercises his discretion in issuing a notice, he is executing the law; and for the reasons already stated, the respondents, in directing the procession after the promulgation of the notice by the Police and after they were aware of such a notice, were resisting the execution of the law. Hence their conviction under section 143, Indian Penal Code, by the Subdivisional Magistrate of Bandar was perfectly correct. We agree that the conviction of the respondents under section 145, Indian Penal Code, cannot be upheld and that the learned Sessions Judge was correct in setting it aside. The order here is that the judgment of the learned Sessions Judge setting aside the conviction of the three respondents under section 143 of the Indian Penal Code must be reversed and the order of the Subdivisional Magistrate, Bandar, restored. As the respondents cannot also be sentenced under section 32 of the Police Act, the sentences passed upon them by the learned Sessions Judge under that section must be set aside.

B.C.S.

(1) (1922) I.L.R. 2 Pat. 134.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1931,
January 30.

SAMARAPURI CHETTI (ACCUSED), PETITIONER,

v.

CORPORATION OF MADRAS (COMPLAINANT), RESPONDENT.*

Madras City Municipal Act (IV of 1919), sec. 287—Use of premises for purpose specified in sch. VI—Licence under sec. 287—Charging fee for manufacturing, another equivalent fee for storing and another for packing—Propriety of.

For the use of premises for any purpose specified in schedule VI of the Madras City Municipal Act (IV of 1919) the owner must under section 287 of the Act apply for a licence. He cannot get a licence for manufacturing oil and then pack or store it without a licence. But it would obviously be inequitable to charge a person a fee for manufacturing, and then another equivalent fee for storing, and another for packing.

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 Third Presidency Magistrate, Georgetown, Madras, in Calendar Case No. 11237 of 1930.

K. S. Jayarama Ayyar and M. P. Sundararaja Ayyar for petitioner.

C. Unikanda Menon for Crown Prosecutor (*K. P. M. Menon*) for the Crown.

JUDGMENT.

The Petitioner has been fined Rs. 76 under section 287, Madras City Municipal Act (IV of 1919) read with section 357. It is found that he is liable to pay a licence fee of Rs. 50 for storage of oil on his premises,

* Criminal Revision Case No. 798 of 1930.

and Rs. 25 for a filth press. Apparently the demand for the filth press was not disputed.

By the wording of the statute it is clear that, for the use of premises for any purpose specified in Schedule VI, the owner must under section 287 apply for a licence. He cannot get a licence for manufacturing oil, and then pack or store it without a licence. But it is obviously inequitable to charge a person the same fee for manufacturing and packing or storing. This point was raised before the Standing Committee of the Municipal Council, and on 12th September 1923 it resolved that no separate licence is necessary for each process in respect of the same article, Exhibit I. What it probably meant was that no separate fee is necessary, for under section 287(3) a licence is obligatory.

In these circumstances the present prosecution is difficult to understand. When confronted with Exhibit I, the Assistant Revenue Officer, P.W. 1, merely said that he was not aware of it, and the learned Presidency Magistrate ignores it altogether. The right fine would therefore seem to be Rs. 26. This is not a question of law, but a mere matter of Municipal routine; and the resort to the Courts for what should be done in the Office is strongly to be deprecated. When the matter does get to the Court, however, the Court should read the exhibits and not merely issue a summary ukase.

The fine is reduced by Rs. 50.

B.O.S.



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