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Ordering the despatch to the Government of India of a letter forwarding the opinions of the various officers and bodies consulted the revision of the---with the remarks of this Government.

BACK PAPERS.

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G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

No. 2193, JUDICIAL, 30TH OCTOBER 1895.

JUDICIAL DEPARTMENT.

LETTER—from

THE CHIEF SECRETARY TO THE GOVERNMENT OF
FORT ST. GEORGE,

To

THE SECRETARY TO THE GOVERNMENT OF INDIA,
HOME DEPARTMENT.

SIR,

In continuation of my letter, No. 2092, dated 9th October 1895, I am directed to forward the opinions of the various officers and bodies consulted on the revision of the Code of Civil Procedure. These opinions will, no doubt, in due course receive the consideration of the Government of India. The only sections on which His Excellency the Governor in Council considers it necessary to offer any special remarks are the following:—

(1) *Section* 53.—There is no express provision in the code permitting the Court to stay proceedings in suits of a manifestly frivolous or vexatious character. A provision to this effect seems desirable.

(2) *Section* 111.—It is not clear whether the section was intended to indicate the time when a set-off should be allowed or whether it was meant to regulate only the procedure in matters of set-off. This should be made clear; and also how far the written statement containing the particulars of the set-off should fulfil the requirements of a plaint, and in particular whether it is to bear the usual *ad valorem* Court-fee stamp.

(3) *Section* 129.—Attention is invited to the amendments of this section suggested by the Advocate-General and the Madras Attorneys' Association. This Government is inclined to support the proposal that the words "at any time before the first hearing" should be omitted.

(4) *Section* 138.—His Excellency in Council would support the suggestion made by the Advocate-General that this section should be amended so as to provide that the documents referred to therein should be produced and marked for identification at the time the issues are settled, or on such short date thereafter as the Court may order. This course will tend to prevent the manufacture, substitution or suppression of documents during the progress of a suit to meet the exigencies of the case.

(5) *Section* 171.—It seems desirable that Civil Courts should be empowered to summon and examine any person as a witness in a suit, whether such person is a party to the suit or not, or whether he has been named as a witness or not. The law as it stands at present seems to preclude a Court from summoning and examining of its own motion as a witness a party to a suit who is not present in Court, or a person whose name is included in the party's list of witnesses but whom he may not choose to examine at the trial. Nor does the code indicate the source from which the expenses of witnesses summoned by the Court of its own motion is in the first instance to be met. Some provision for this purpose should be made.

(6) *Section* 181.—An explicit provision would seem to be required authorizing the Court to dispense with the examination of a witness who appears to have been summoned for the purpose of obstructing or defeating justice. The object may be effected by the insertion of a proviso to the effect that the Court may refuse to allow a witness to be examined if it considers that the witness is tendered for the purpose of delaying or defeating the ends of justice.

(7) *Section* 198.—It is recommended that a clause may be added providing that, when a short-hand writer is appointed to a Court, the Judge may dictate his judgment, such judgment, when reduced to writing, being signed by him in open Court at the time of delivery. Short-hand writers have been appointed in most of the District Courts of this Presidency, and their employment is extending.

(8) *Section* 210.—(i) It is suggested that the procedure of clause 2 of the section as regards security, interest and attachment should be made applicable to decrees under clause 1 which originally order the decree amount to be paid by instalments.

(ii) Power should be given to the Court to postpone the payment of the amount decreed until the expiration of a fixed time, where there appears to be sufficient reason for such a course. There does not seem to be any more objection to this than to instalment-decrees.

(iii) It is not clear why the Court should not exercise the power conferred in paragraph 2 of the section *without* the consent of the decree-holder.

(9) *Section* 223.—The question has been raised whether a Court can execute a decree for a larger amount than the limit of its pecuniary jurisdiction. The attention of the Government of India is invited to the point and to the conflicting decisions of the High Courts thereon.

(10) His Excellency the Governor in Council is disposed to concur generally in the remarks of the Advocate-General and the Attorneys' Association as to the desirability of simplifying, if possible, the procedure which regulates the execution of a decree beyond the local jurisdiction of the Court which passes it. The complaint is widespread that the existing rules are in several respects cumbersome, costly, dilatory and favourable to fraudulent judgment-debtors who desire to evade or to nullify proceedings taken against them in execution.

Among the suggestions made with this object the more important are—

(i) the assimilation of the procedure laid down for the execution of decrees outside the local jurisdiction of the decreeing Court to the practice prevailing in the High Court of Justice and in the County Courts in England in like case, the decreeing Court being empowered to issue its writ of execution direct to the Court or to the chief ministerial officer of the Court, within the local limits of whose jurisdiction the judgment-debtor may reside or own property; and

(ii) the authorizing the Court to which a decree is sent for execution, if it is unable to execute the same, to transfer it direct, instead of through the original Court, to any other Court within whose jurisdiction the judgment-debtor or property is certified to be.

It may not be desirable to require that this procedure should be invariably adopted, since it will have the effect of transferring to the original decreeing Court questions relating to mesne profits, interest, set-off, cross-decrees and the like which are now disposed of by the local executing Court to which the decree is transferred. But where the convenience of parties and the interests of justice will gain by such a course, it may be left in the discretion of the Courts to adopt the procedure suggested.

(11) *Section* 236.—It is pointed out by the Attorneys' Association that to require an inventory of movable property when an application for an attachment is made is frequently a requirement with which it is impracticable to comply. It would seem sufficient if the last words of the section were altered to run :—

"The decree-holder shall annex to the application a reasonably accurate description of the property to be attached."

(12) *Section* 253.—For the words "in an original" the words "in a" should, it is considered, be substituted so as to make the provisions of the section apply also to the decrees of Appellate Courts.

(13) *Section* 265.—In the cases reported in I.L.R., 6 Madras, 97 and 7 Madras, 382, the Madras High Court has held that the words "estate paying revenue to Government" occurring in the section refer to zamindari and not to ryotwari estates. It is suggested that the section be amended to make this clear.

(14) *Section* 266.—Wedding rings and "talis" or marriage token sworn round the neck should be specifically included in clause (*a*) of the proviso to the section.

(15) *Section* 268.—Attention is invited to the suggestion of the Madras Attorneys' Association that the provisions of the code in regard to the attachment and realization of garnishee debts should be revised so as to assimilate the Indian to the English practice. The procedure of the code in respect of garnishee debts is tedious and costly.

(16) *Section* 271.—The Government is inclined to think that it is not necessary to retain the provision prohibiting an attaching officer from breaking open the outer door of the dwelling-house in which movable property to be attached is contained. It is founded on an English doctrine for the transplantation of which to this country there appears to be no sufficient reason.

(17) *Section* 276.—His Excellency in Council would suggest that a clause be added to the section limiting the period (say, to six months) during which an attachment in execution should remain in force. An attachment should be followed up within a reasonable time, otherwise the judgment-debtor may be greatly prejudiced.

(18) *Section* 278.—Provision should be made for the admission and investigation of claims to property directed to be sold under a decree. The law as it stands provides only for claims in case of attachments.

The postponement of the sale pending the investigation might also, as the Attorneys' Association suggests, be made "upon such terms as the Court thinks fit."

(19) *Section* 305.—The section in its present form allows private alienation only in cases where the value of the immovable property concerned is not less than the decree amount. The scope of the section may be advantageously extended to cases other than those in which the full amount of the decree can be so realized and made to include all cases where the Court is satisfied that an arrangement by mortgage, lease or private sale will realize a larger amount on behalf of the decree than a Court sale.

(20) *Section* 310-*A*.—The Hon'ble the Judges of the High Court point out that, under the existing law, poundage, or the fees levied on the amount realized in sales in execution, is lost when a sale is set aside, since the amount is not ascertainable before the sale and cannot therefore be specified in the sale proclamation. They accordingly recommend that the section should be amended so as to render the judgment-debtor liable for such fees. The Government supports the recommendation.

(21) *Section* 339.—His Excellency in Council approves a proposal made by the Inspector-General of Prisons, that a provision be inserted requiring payments of subsistence allowance to be made to the jail officers *during ordinary business hours*. The law as it stands would allow a tender of such payments at any time of the day or on Sundays or holidays—a course which may prove very inconvenient. The refusal to receive the amount may result in the debtor's release.

(22) *Section* 340.—On the same officer's suggestion it is recommended that the words "while in intermediate custody or" be inserted between the words "judgment-debtor" and "in jail," so that any sums disbursed for the subsistence of the judgment-debtor before he reaches jail may be recoverable as costs.

(23) *Section* 372.—If this section in its present form does not apply to the execution of a decree assigned by the decree-holder, the section should, it is considered, be amended to include such cases. The attention of the Government of India is invited to the point.

(24) *Section* 373.—In view of the numerous decisions that have been passed in explanation of the section, it is desirable that it should be made clearer.

(25) *Section* 380.—The first clause of the section has no application unless the plaintiff resides out of British India; but this Government would recommend that it be considered whether its provisions should not be extended to all cases, whether the plaintiff is or is not residing in British India, so as to enable the Court, where such a course appears to be proper, to require from the plaintiff security for the payment of the defendant's costs. If this is done, an appeal should be allowed against the Court's order requiring security.

(26) *Section* 424.—In the case of suits against the Secretary of State or a public servant as such, the interval of two months allowed by the code between the delivery of the notice and the institution of the suit is frequently insufficient to enable the Government or the public servant concerned to take the necessary action or receive the necessary orders. This is especially the case where a compromise appears to be the most suitable arrangement and terms have to be settled. His Excellency in Council would recommend that the period be extended to three months.

(27) *Section* 463.—A provision is required empowering a Court to appoint after enquiry a guardian *ad litem* in any case in which a party to a proceeding is a lunatic but in which no adjudication under Act XXXV of 1858 has been made. The code does not expressly permit this. Cases may arise where the Court cannot be moved under the Act of 1858 for an adjudication, and where, in the absence of a provision to the effect suggested, a party may be in danger of losing his legal rights or remedies. Attention is invited to the decisions in I.L.R., 6 Mad., 380, 13 Bom., 656, and 16 Bom., 132.

(28) *Section* 532.—Under the procedure of this section interest cannot apparently be recovered to date of decree unless interest is explicitly stipulated for in the instrument. There does not seem to be any sufficient reason why the plaintiff should be deprived of interest before decree on the amount which is recovered under chapter XXXIX, and which is due by the defendant on a negotiable instrument left unpaid at its term.

(29) *Section* 539.—There have been contradictory rulings on the question whether the section embraces the appointment of trustees when this is merely a non-contentious relief, or whether it extends also to the removal, hostilely or contentiously, of trustees on the ground of fraud and the appointment of other trustees in their place. The section should, in the opinion of this Government, include both classes of cases.

(30) *Section* 622.—Attention is invited to the recommendation of the Advocate-General that the section should be made clearer in view of the conflicting interpretations that have been given as to its scope.

This Government also considers that a proviso should be added specifically requiring the High Court to give notice to the parties interested before an order which may prejudice them is passed under this section.

I have the honour to be,

Sir,

Your most obedient servant,

Ootacamund,
30*th October* 1895.

J. F. PRICE,
Chief Secretary.

APPENDIX.

Read—the following papers:—

From the District Judge, Gódávari, to the Chief Secretary to Government, dated Rajahmundry, 21st January 1895, No. 103.

In reply to G.O, No. 2795, Judicial, dated 17th November 1894, regarding the Civil Procedure Code, I have no remarks of my own to offer, but I forward in original a memorandum by Mr. White, District Munsif of Ellore, which contains practical suggestions.

2. The District Munsif of Tanuku asks that the code may decide the vexed question whether standing crops are moveable or immoveable property. He also points out that when an instalment decree is given under section 210, the judgment-debtor after judgment and before an instalment falls due can alienate his property. He therefore suggests that power be given to the courts to attach after judgment and before the instalment is due.

(Signed) G. T. MACKENZIE,
Ag. District Judge.

Enclosure.

Memorandum of Suggestions for amendment of the Civil Procedure Code.

Section 2, "*Signed*".—Marks to be made by executant himself, to point the way to avoidance in private documents of dangerous abuse (now widely prevalent) of one person marking for another. Every man can make a mark for himself.

Section 36.—Add a clause permitting one pleader to appear for another in the unavoidable absence of pleader originally retained. It has now, in spite of absence of sanction in Code of Civil Procedure become the universal practice of courts to permit such appearances, without which the business of all courts would be seriously retarded. Pleader appearing for another should be required to produce a written authority.

Sections 43, 44, 45.—Explanation and illustration of "same cause of action" necessary, to avoid disputes now continually arising, as to multifariousness, *e.g.*, in case of suits for land and damages to land or trees thereon, suits for houses and damages to houses or for property deposited therein, suits to set aside widows' alienations to different persons and suits to remove attachments by different creditors.

Advisable to make it clear that a plaintiff is not bound to include claim for mesne profits in suit for land. Claim for mesne profits usually compromised once title is settled. Unnecessary expense and delay to parties caused by compelling ejector to sue at once for mesne profits, if he wants them.

Section 45.—Authority needed to enable court to "split suits" as is now frequently done without authority. To provisions for separate trials add provision for separate numbers, judgment and decree. Especially necessary in case of widows' alienations where half-a-dozen alienations have often to be kept pending until disposal of question as to one.

Section 49.—Provision to be reversed. Plaints to be written in English, or, with the permission of the court, in the language of the district. All judges, pleaders and clerks now know English, and vernacular pleadings belong to a past age. Evidence (more important than pleadings) now taken in English. Ambiguity and prolixity of vernacular pleadings and commonly diglott nature (English expressions continually made use of in default of vernacular) done away with.

Section 58, *Penultimate clause.*—No head clerk can find time to compare all copies. If he attempted to do so he could do no other work. Useless burden put on head clerks which they generally evade by perfunctory examination.

Substitute following:—

"All copies and statements above said shall be certified by the plaintiff or his pleader and any plaintiff who puts in a copy or statement disclosing a material error or omission shall be liable to have his suit dismissed on such error or omission being brought to the notice of the court by the defendant."

Section 100 (*a*).—For "may proceed *ex-parte*" substitute "may pass a decree against him or make such order in relation to the suit as it thinks fit" (section 113).

This will obviate the useless waste of time now involved in taking evidence in *ex parte* cases. The number of such cases is very large and at least one witness has to be examined in each case, involving the loss of two or three hours daily before contested litigation can be taken up.

Section 138.—Amend to "the parties or their pleader shall produce in court at the first hearing of the suit all the documentary evidence", &c. As matters stand, the defendant is not bound to put in his documentary evidence until it is called for by the court. The court cannot know what documents he has. No order is consequently made and the defendant produces his documents when he pleases, to the disadvantage of the plaintiff.

Re-enact here sections 59 and 60, with reference to defendant, requiring him to produce all his documents with written statement, or put in list. No reason why these provisions should apply to plaintiff and not to defendant.

Chapter XII.—Insert a provision authorizing the court at the first or any other hearing to suggest terms of compromise to the parties or to appoint a pleader or other person to act as a conciliator. A large number of suits would thus be amicably adjusted.

Section 159.—Insert provision permitting services of summonses and warrants to witnesses by any court in any other court's jurisdiction by its own officers; necessity for transmitting summonses and warrants (latter through District Court) a useless and troublesome clog on disposal of suits.

Section 160.—For "shall" substitute "may." Parties should be allowed option of paying witnesses' *batta* to witnesses directly. All witnesses do not expect payment of batta and may frequently be willing to come to court (especially for short distances) without payment. Witnesses' batta often forms a heavy item of costs of suits. No reason to insist on payment with every witness summons. An immense amount of account keeping will be avoided. Witnesses may take payment from parties as they please, or not. But tender must be proved (section 174 explanation) before warrant of arrest can be obtained.

Section 163.—Insert that every witness summons shall direct witness to attend the court on all days to which the suit may be adjourned, unless his further attendance is dispensed with by the court or the party summoning him, by endorsement on summons. This will obviate necessity of taking out fresh summonses to witnesses for each adjournment involving useless expense and delay in case of non-service.

Chapter XIX.—Insert a provision for execution of warrants of arrest of any court within the jurisdiction of any other court, by its own officer without necessity of transmitting decree to such other court. Reasons obvious. The tedious process of going from court to court with decrees before satisfaction can be obtained should be done away with.

Section 230.—For "Court which passed the decree or officer if any appointed on this behalf" and "the proper officer" substitute "chief clerk." Substitute "chief clerk" for "court" in all provisions relating to the execution of decrees. The head clerks of all courts are now men of education and ability to whom the task of executing decrees can be fully delegated, subject to a provision that in all contested matters the parties shall have the right of submitting orders made by the chief clerk to the court for revision. This would relieve all judges of an immense amount of purely ministerial work which can be performed with equal efficiency by chief clerks, leaving judges free to devote twice as much time to the disposal of suits.

Particular functions (section 278 *et seq.*, section 244, sections 311, 312, 328, &c.,) may, if thought fit, be reserved to judges.

It will be a considerable measure of relief to judges if disposal of even uncontested execution applications only is relegated to head clerks.

Section 266 (*c*).—Imperfectly understood. Ryots' houses are as a matter of fact being attached and sold everywhere, regardless of this provision. No benefit to ryot to provide that his house site may be sold under him but not timber and stones. Better to allow materials to be attached and not site. Exempting materials and sale of house site is a positive injury to him as he gets only a fraction of value of house and site. Ryots have great difficulty in getting sites in villages. No difficulty in procuring mud and sticks. Sell a ryot's site and you turn him out of the village and break him completely; sell his materials only and he builds a new house to-morrow.

Far better to exempt both house and site or exempt site and make materials liable.

Section 278 *et seq.*—The code contains no provision for claim petitions in case of property ordered to be sold under mortgage decrees. Property ordered to be sold by decree is not now attached; consequently, section 278 not applicable and claimants are compelled to file suits without summary remedy.

Section 278 might be amended by inserting the words "or to the sale of any property ordered to be sold in accordance with a decree."

Chapter XIX.—Provision to be made for "striking off" of execution application (long-standing practice for which code contains no authority) as to effect of which there is a conflict of decisions. Matters would be simplified by provision that execution application not prosecuted may be struck off the file and that attachments made under such application shall enure, notwithstanding the striking off of the application, and that applications struck off may be restored on application.

Section 283.—Doubtful if claimant against whom order made has right of applying for review, which right may be usefully granted.

Section 291.—Provision to be made that no immoveable property shall be knocked down except in presence of court and after court's approval and that court shall satisfy itself before knocking down immoveable property that a fair price has been obtained or that it is not likely that a better price will be obtained. A Government valuation is now put on all property, but it depends entirely on individual Munsif whether sale is adjourned for better prices or not. Usually left to mercy of Amin.

Chapter XXV.—Provision to be made for commissions for sale of immoveable property. It would be a great advantage if courts, in place of invariably selling immoveable property by auction, had option, after failure of public sale, of deputing a commissioner to negotiate private or commission sales, within a limited period. There would be some assurance in this case that every effort had been made to obtain a fair price, especially in frequent case of minors' estates which are imperfectly protected from sale in collusion with fraudulent guardians.

Section 460.—Provision to be made that no immoveable property of a minor shall be sold in auction until the court is satisfied that the debt cannot be discharged by sale of any property of the minor other than that sought to be sold, by commission sale or otherwise.

Chapter XXXIV.—Doubtful whether section 276 applies to attachments before judgment. This should be made clear.

Disputes often arise whether attachment or alienation by deed was first in point of time and often next to impossible to decide question. Advisable to make provision that where an alienation by deed has been made on same day as attachment of property alienated, presumption shall be that attachment was first in point of time.

(Signed) E. J. S. WHITE,
District Munsif.

From the Acting District Judge, Gódávari, to the Chief Secretary to Government, dated Rajahmundry, 26th January 1895, No. 130.

I have the honour, in continuation of my letter No. 103, dated the 21st instant, to forward a memorandum by the District Munsif of Narasapur on the Civil Procedure Code.

(Signed) G. T. MACKENZIE,
Acting District Judge.

ENCLOSURE.

MEMORANDUM showing the amendments to be made in the Civil Procedure Code.

Sections.	Particulars of amendments.	Remarks.
2	After the definition of decree-holder add "Immoveable property includes standing crops, timber on a land or sight, and window shutters of and attached to a building or house and mortgage deed mortgaging immoveable property."	See 4 Cal., 665. ,, 11 ,, 164. ,, 9 ,, 511. ,, 9 M. 5. ,, 1 All., 348, but 12 Cal., 546, and transfer of Property Act, section 3, are in direct opposition to the above rulings in defining immoveable property.
2	In the definition of Public officer in paragraph 4 after the words "Court of Justice" add the words "a Commissioner appointed by a Court of Justice."	
31	After paragraph 2 add "and against different defendants."	
50	After clause (*b*) add "If the suit be for immoveable property land, site or house or garden or lane or way, the area or measurements and position or boundaries of such immoveable property should be shown and also survey or settlement number should be entered or shown if the immoveable property sued for be a land jirayati or inam registered in Collector's or Inam Commissioner's office.	This information is necessary for section 207.
201	To be struck out or expunged	This section has virtually become absolete as none now requires a translation of a judgment written in English owing to the overspread of the English language.
215 (*b*)	When a suit is for foreclosure or for the recovery of a debt on a mortgage-deed by sale of the mortgaged immoveable property the judgment in its decretal part and decree should be in accordance with the provisions of sections 86 and 88 respectively of the transfer of Property Act.	See ruling of the High Court, dated 24th April 1894, No. 1319.
215 (*c*)	When the suit is for the recovery of money on a bond mortgaging moveable property by the sale of the said mortgaged moveable property, the judgment shall direct payment of the debt within the time to be fixed by the Court not exceeding 30 days from the date of the decree according to the nature of the property mortgaged or in default the sale of the same under the decree debt. The judgment shall further direct the immediate production in Court of the said mortgaged moveable property if the plaintiff apply for such an order or direction before or at the time of pronouncing judgment showing sufficient reasons for such an order.	
234, para. 1	After the words "legal representative of the deceased" add "or against the property of the deceased if he had left any and if it did not vest in his heirs by survivorship."	
234, para 2.	Before paragraph 2 add "if the decree can be executed against the legal representatives."	

Memorandum showing the amendments to be made in the Civil Procedure Code—*cont.*

Sections.	Particulars of amendments.	Remarks.
260 A in lieu of the procedure laid down in the section for execution of decrees in suits for restitution of conjugal rights.	When a decree for restitution of conjugal rights has been made, the decree shall be executed by delivering the person of the party (wife) to the decree-holder at her residing place; and if the party were to be a woman who according to the custom of caste or position in life would not appear before the public, the Court officer shall assist the decree-holder by doing all that is necessary for decree-holders' taking possession of the person of the party against whom the decree is passed (*i.e.*) by conveying the decree-holder to the place at or to the room in which the wife might be, without prejudice or detriment to her privacy or ghosha.	If the Legislature thinks that this procedure suggested also is improper or unjust it may be ruled that suits for restitution of conjugal rights are not maintainable.
263	After the word property at the end of the section add "and if necessary by breaking open the lock of the house if it was locked up and by removing the things in the house, or other building or garden or land to be delivered according to the decree."	
266 (*a*)	After the word "wearing apparel" add "including Mangalasutram or Tali (marriage token)" worn by a woman.	See I.L.R., 9 Bom., 106.
266 (*b*)	After the word "such cattle" add "unless specifically mortgaged."	See I.L.R., 4 Bom., 25.
266 (*c*)	At the end of the clause C add "unless they were specifically mortgaged."	
274, para. 4.	No property, moveable or immoveable mortgaged, need be attached if the decree directs the sale of the said property.	See 4 Bom., 515 and 529.
276	Add as paragraph 2. "But the sale of the attached property by the decree-debtor after attachment is valid if the sale money were to be paid into Court in satisfaction of the decree debt under which it was attached." Add as paragraph 3. "In that case other decree-holders are not entitled to rateable distribution unless they all attached the property before sale."	See I.L.R., 3 All., 698; 5 All., 86; 6 All., 33; 7 All., 702.
279	The wording of this section tends to show that evidence should be taken only on the side of the claimant. If the legislature meant otherwise, the following sentence or clause should be added to this section:— "And the decree-holder also may adduce evidence for refuting that on claimant's side."	
284	Add as paragraph 2. "But when a property is sold in the execution of a decree it cannot be sold again at the instance of another decree-holder though the property was attached by him before the attachment made at the instance of the decree-holder under whose decree it was actually sold."	See I.L.R., 12 Cal., 317.
290	Add as paragraph 2. "The time 30 days need not necessarily be allowed or entered in the proclamation of sale if the property to be sold were to be standing crops of paddy and other grain crops, sugar-cane garden, turmeric garden and the like.	Such standing crops, &c., are being now considered as immoveable property; and they are being attached as such. So if 30 days were to be allowed as in the case of houses and lands, the said standing crops, &c., which require always watering and doing something for their growth or preservation would be entirely spoilt and become valueless as they would generally be left uncared for after attachment, and therefore I think this clause is necessary. In some cases immediate sale would be necessary where crops are fit to be mowed and threshed immediately.
307 271 336	After the words "Court closes" add or "before the sunset." The words "no person shall break open any outer door of a dwelling house" in section 271. The words "no outer door of a dwelling house shall be broken open" in section 336 are to be struck out, and the words "shall break open any door of a dwelling house or compound or yard of a dwelling house if necessary" should be substituted for the above wording to be struck out.	In some cases the Court officer cannot gain access to any dwelling house if he cannot break open the outer door of such dwelling house; and thus the execution of a decree can easily be frustrated.
330 331	Civil Courts should have power to punish the persons who resist or obstruct the execution of a decree or order at least with fine not exceeding Rs. 500 as in the case of a witness who disobeys Court's summons without lawful excuse.	

From the Acting District Judge, Gódávari, to the Chief Secretary to Government, dated Rajahmundry, 28th January 1895, No. 143.

I have the honour to forward letter No. 34, dated 25th January 1895, from the Subordinate Judge of Ellore containing suggestions for the amendment of the Code of Civil Procedure with reference to G.O., No. 2795, Judicial, dated 17th November 1894.

(Signed) G. T. MACKENZIE,
Ag. District Judge.

ENCLOSURE.

From the Subordinate Judge, Ellore, to the District Judge of Gódávari, dated Ellore, 25th January 1895, No. 34.

With reference to the Circular Proceedings of the District Court, No. 1475, of the 7th ultimo, I have the honour to submit my following suggestions.

My inability to submit the above within the specified date was due to my absence from the station during the Christmas holidays for which I solicit your pardon.

Section 13.—It is not clear—

(1) how far a decision operates as *res judicata* between co-defendants;
(2) whether an *ex parte* decision operates as *res judicata*;
(3) wheher the decision in a suit subject to one appeal operates as *res judicata* in a suit subject to two appeals.

Section 32.—It is not clear if this section contemplates the addition of a party on his own application. It is fair and proper that such a provision should be expressly made.

The clause "All the questions involved in the suit" has to be clearly explained.

Section 43, *paragraph* 2.—I think that the provision in this paragraph should be made applicable to intentional omission as it applies to intentional relinquishment.

Section 44, *Rule* (*b*).—This provision may be made applicable to a partner also.

Section 57, *paragraph* 2.—It is not clear whether *the date of return* means the date of the order of return passed by the Judge or the date of the actual return to the party or pleader after the necessary entries being made in the office books. It will be quite reasonable and appropriate to insert the date on which it is ready for return to the party concerned, as the latter date is the proper time from which the period of limitation under section 14 of the Limitation Act has to be computed.

Section 172.—It is desirable that a provision should be made as follows, namely:—

A witness who once appears in court in obedience to a summons should, if directed by the court, take notice of any further date to which the hearing may be adjourned and be made answerable to the provisions of law in case of his non-appearance on the latter date, as if he had been actually summoned afresh for that date. This will avoid unnecessary resummoning and delay on that account and repeated expense for the party concerned.

Section 206.—It is necessary that a clear provision should be made as to which court is competent to amend a decree when there has been an appeal.

Section 278.—A provision may be added that such claims may be made even in cases where no attachment is made, but a sale is ordered under a decree.

Section 283.—A provision may be made to say in what cases a judgment-debtor is a party to the order under this section and where he is not.

Chapter XXXI.—Clear provision has to be made as to the procedure to be followed when a person suing as a minor or a major is, on contention, found to be otherwise.

Again, as to the mode in which a person not adjudged to be insane is to sue or be sued.

Section 483.—It is desirable to remove the words "*from the jurisdiction of the court in which the suit is pending*" in clause (*a*) and the words "*within the jurisdiction of the court*" in the last paragraph but one, so that a defendant may not be able to commit fraud even with respect to property in the jurisdiction of another court.

Section 484.—When under section 483, the court is *primâ facie* satisfied by affidavit or otherwise of the truth of the plaintiff's allegations, there may be no necessity to examine the applicant before giving a preliminary order. Therefore, the examination of the applicant may be made optional with the court and need not be a necessary step as is now given in section 484.

(Signed) N. SRINIVASSA AYER,
Subordinate Judge.

From the Collector and District Magistrate of Nellore, dated Nellore, 29th January 1895, No. 112-Mag.

ABSTRACT.—Stating that he has no remarks to offer on G.O., No. 2795, dated 17th November 1894.

From the Inspector-General of Prisons, to the Chief Secretary to Government, dated Ootacamund, 30th January 1895, No. 547.

I have the honour to submit the following reply to G.O., No. 2795, Judicial, dated 17th November 1894, regarding suggested amendments in the Codes of Civil and Criminal Procedure.

A.—CIVIL PROCEDURE CODE.

Section 339.—Words should be added to this section requiring payments of monthly subsistence to be made to officers in charge of jails *during ordinary business hours*. As the section at present stands, such monies can be tendered at any hour or on Sundays or holidays. Refusal to receive them may result in the debtor's release, which may afterwards be held to have been illegal.

Section 340.—The words "while in intermediate custody or" should be inserted before the words "in jail." There is no reason why the sums disbursed for the debtor's maintenance before he reaches the jail should not also be recoverable as costs.

* * * * *

(Signed) A. G. CARDEW,
Inspector-General of Prisons.

From the Acting District Judge of Trichinopoly, to the Chief Secretary to Government, dated 30th January 1895, No. 208.

With reference to the order of Government conveyed in G.O., No. 2795, Judicial, dated 17th November last, inviting proposals for the amendments of the Codes of Criminal and Civil Procedure, I have the honour to submit that I regret I have not had time to go into the subject thoroughly, but that I offer a few suggestions.

* * * * *

II. (*a*) It is very often, especially in appeals, of great importance to know whether certain evidence was objected to or not before the lower court. As the practice at present stands, if it is any one's business to note such an objection, it is the business of the court. Lower-class pleaders take advantage of this. They raise all sorts of frivolous objections. If the court denudes the objection of its verbiage and makes a note showing the foolishness of the objection clearly, the pleader charges the court with misrepresenting him and an unseemly dispute may follow, which may influence jurors or assessors, of any, or indeed a weak judge. Many men who will freely talk nonsense, hesitate to write it and affix their names thereto.

I would therefore suggest that the court shall not be bound to take a note of any objection which it over-rules, unless the pleader presents his objections in writing. The paper so presented should then become part of the record, with the Judge's written order rejecting or admitting the evidence with brief reasons. The present state of matters practically places the court at the mercy of unscrupulous pleaders, and compels the court to write down any nonsense the pleader chooses to say. I do not feel this difficulty much myself owing to the accident that I happen to be a Barrister; but in framing the Code, it must be remembered that Sub-Magistrates, and possibly to some extent junior District Munsifs, are apt to get nervous if they are bullied by an Advocate or a Vakil of the High Court imported from Madras for a case of some local importance.

(*b*) Where a case has been dealt with by a civil court in a perfunctory manner, the appellate court has at present no power to order a retrial. (The Criminal Procedure Code gives authority.) I think that the Civil Procedure Code should be made to grant an authority similar to that which the Criminal Code gives to the appellate court in such a case.

(*c*) In certain cases—chiefly civil cases—the burden of proving some points is on plaintiff and of proving others is on defendant. In such a case, of course, plaintiff begins. Suppose he confines his evidence to the points on which the burden is on him. Defendant in reply makes out a strong case on the issues left untouched by plaintiff. Plaintiff then claims to put in further evidence to rebut defendant's case. The proper procedure in a case of this kind should be clearly laid down.

(*d*) In civil pleadings, I think the statement of defence should not be, as at present, the final pleading, but that it should be served on plaintiff, and that then he should either file a reply or take and join issue on the statement of defendant.

(Signed) R. D. BROADFOOT,
Ag. District Judge.

RE-PROPOSED amendment of the Codes of Civil and Criminal Procedure.

OPINION.

I have the honour to submit the following remarks on the proposed amendments of the two Codes of Procedure, and take the opportunity of pointing out that the time allowed for consideration was very short.

* * * * *

CODE OF CIVIL PROCEDURE.

Section 54.—In Bhugwándás Bagla *v.* Haji Abu Ahmed and others (I.L.R., 16 Bom, 263, Telang), I held that notwithstanding the imperative form of this section, the Court which fixes the time therein mentioned may extend that time. This may or may not be a correct interpretation of the section, but one must admit, I think, that cases may arise when such an extension of time would be only just.

Section 129.—What is meant by the words "before the first hearing?" Until the written statement is filed and issues are settled, it may be almost impossible for the plaintiff to know whether discovery of documents is necessary. I think that the practice on this point should be similar to that under Order XXXI, Rule 12 of the Rules of the Supreme Court, 1883, framed under the Judicature Acts—see Wilson's Practice of the Supreme Court of Judicature, 7th edition, page 258, *et seq.*

Section 138.—What is meant by the phrase "when called for by the Court?" The object of the section is to prevent forgery to meet the exigencies of a case. This can be effected by a direction that all such documents as are mentioned in the section shall be produced and marked for the purposes of identification by the Judge or such other officer of the Court as may be authorized so to do at the time the issues are settled, or on such short date thereafter as the Court may order.

Chapter XIX.—The procedure for the execution of decrees should be simplified. At present it enables a fraudulent judgment-debtor to keep his creditor at arms-length by moving from place to place. I think the Court which passes a decree should be empowered to send its own writ of execution to the chief ministerial officer of the District Court within the jurisdiction of which the judgment-debtor resides or has property.

Section 539.—The power of removing a trustee should be given.

Section 584.—When the Court of First Instance and the Lower Appellate Court differ in their appreciation of the evidence in any case, an appeal to the High Court upon the facts of the case, as well as on the law, should be allowed.

At present there is too often a denial of justice.

Section 622.—I think this opportunity should be taken to make the language of this section clearer, and thus secure, if possible, a greater uniformity of interpretation than exists at present. I may call attention to the Full Bench decision in Kristamma Naidu *v.* Chapu Naidu (I.L.R., 17 Mad., 410).

MADRAS,
7th February 1895.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

From F. A. NICHOLSON, Esq., Collector and District Magistrate of Anantapur, to the Chief Secretary to Government, dated 8th February 1895, R. C. No. 1140.

ABSTRACT.—Stating that he has no remarks to offer on the proposed amendment of Civil and Criminal Procedure Codes.

From E. BARCLAY, Esq., Government Solicitor, Madras, to the Chief Secretary to Government, dated Madras, 12th February 1895, No. 80.

With reference to my endorsement, No. 70, dated 9th instant, relating to G.O., No. 2795, Judicial, of the 17th November 1894, I have the honour to forward herewith copy of memorandum, dated 11th instant, I have received from the Advocate-General on the subject and of its enclosure.

ENCLOSURES.

[*Re* amendment of the Codes of Civil and Criminal Procedure.]

With reference to my opinion, dated the 7th instant, I have the honour to enclose a suggestion by Mr. J. G. Smith, of the Madras Bar, for the amendment of the provisions of the Code of Civil Procedure relating to the execution of decrees.

* * * * *

MADRAS,
11th February 1895.

(Signed) J. H. SPRING-BRANSON,
Advocate-General.

Suggested Amendment of the Civil Procedure Code—Execution of Decrees.

There is frequently great delay and considerable expense caused to the judgment creditor under such circumstances as the following:—

A decree is obtained in one district and execution is required in another. Under section 223 the decree is forwarded for execution to the District Court within whose jurisdiction the judgment-debtor is or possesses property and that court either executes it or forwards it for execution to a court subordinate to it. Now possibly the judgment-creditor may have made a mistake as to whereabouts of his judgment-debtor or the latter may be absent; the consequence is that the court executing the decree fails to find the judgment-debtor and certifies its failure to the court passing the decree. Whereupon the judgment-creditor perhaps discovers that the judgment-debtor has either absconded to another district or to another local jurisdiction in the same district. He then has to make another application to the court passing the decree, and that court, acting again under section 223, forwards it to the first district named by the judgment-creditor and possibly on its arrival with the same result. To take an instance, a decree passed by the Munsif's Court of (say) Vizagapatam against a man believed to be at Pallávaram. Decree forwarded for execution to the District Court, Chingleput, and by it transferred to the Munsif at Pallávaram. Meantime the defendant has gone to Burma and so the Munsif's Court, Pallávaram, certifies the failure to execute to the District Court, Chingleput, which reports the fact to the Vizagapatam District Court. The judgment-creditor thereupon has to apply afresh to the Vizagapatam District Court to forward the decree for execution to the proper court in Burma. All this, of course, entails great delay and considerable expense for the various applications to the different courts, and this is only a very simple instance. Of course, if the judgment-debtor, as frequently happens, is absconding, the process may have to be repeated almost indefinitely and with but small chance of ultimately catching him. I would suggest, as a means of simplifying the procedure and rendering the position

of the judgment-creditor less arduous, that it should not be necessary to certify to the court passing the decree until it be satisfied, and that the first court to which it is sent for execution should be empowered to certify on the decree that it has not been satisfied and then send it direct to any other court within whose jurisdiction the judgment-debtor is said to be, thus avoiding the delay and expense of returning it to the court which passed it, and, by means of the increased celerity of the proceeding, affording the judgment-creditor a better chance of obtaining execution. For instance, in the above supposed case the Chingleput District Court should be empowered to certify non-satisfaction and forward it direct to the proper court in Burma, and that court in its time should be empowered to forward it direct, if necessary, to Assam or Bombay or Bengal, as the case may be, and so on until the judgment-debtor is run down.

The procedure above suggested would be similar to that enacted by Criminal Procedure Code, section 83, for the execution of warrants outside the local limits of the jurisdiction of the court issuing the same.

MADRAS,
11*th February* 1895.

(Signed) J. G. SMITH,
Barrister.

From the Government Solicitor, Madras, to the Chief Secretary to Government, dated Madras, 12th February 1895, No. 77.

With reference to the Order of Government, No. 2795, Judicial, dated 17th November 1894, I beg to inform you that the Attorneys Association of Madras, on receipt of the order, held a meeting and appointed a committee to consider what amendments are necessary to the Codes of Criminal and Civil Procedure and that I was appointed a member of such committee. The committee sent in to the Association its report on such amendments and, yesterday the Association met to consider and pass such report. The report will be forwarded to Government in a few days. Under the above circumstances I have not thought it necessary to make any separate remarks as to amending the Codes.

(Signed) E. BARCLAY,
Government Solicitor.

From H. W. FOSTER, Esq., Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 14th February 1895, No. 424.

* * * * *

2. In this connection I am to bring to notice what appears to be a defect in the new section 310-A of the Civil Procedure Code, introduced by Act V of 1894. In this presidency, a fee in the shape of poundage is levied on the amount realized in all sales in execution. As the amount of the poundage cannot, however, be calculated before the sale, it cannot be specified in the sale proclamation, and the result is that when a sale is set aside under the section quoted, the poundage is lost, for neither the purchaser nor the decree-holder can justly be held liable, and under the terms of the section, the judgment-debtor is required to pay only charges specified in the sale proclamation. In the opinion of the High Court, he should be made liable for all expenses of the sale.

From the District and Session Judge of South Arcot, to the Chief Secretary to Government, dated Cuddalore, 15th February 1895, No. 24.

With reference to G.O., No. 2795, Judicial, dated 17th November 1894, I have the honour to state that I have no remarks to offer regarding the revision of the Codes of Civil and Criminal Procedure. I, however, enclose the remarks offered by two of

my District Munsifs, viz., M.R.Ry. P. A. Lakshman Chettiar Avargal, District Munsif of Tindivanam, and M.R.Ry. T. Varadarajulu Naidu Garu, District Munsif of Tirukkóyilúr, for the consideration of Government.

(Signed) W. F. GRAHAME,
District and Session Judge.

ENCLOSURES.

From the District Munsif, Tindivanam, to the District Judge, South Arcot, dated Tindivanam 3rd January 1895, No. 1.

With reference to the District Court's footnote to the G.O., No. 2795, Judicial, dated 17th November 1894, I beg to submit that as I understand the reported decisions upon section 258 of the Code of Civil Procedure, it seems to be a matter of doubt whether question of satisfaction of decrees, even if not certified as per section 258, can be considered under section 244 of the Code: thus it becomes necessary to add a footnote to section 244 that such a question of satisfaction does not fall under that section and cannot be inquired into. Orders under section 278 upon claim petitions are, as per section 283, final till disturbed by a regular suit, and I humbly think there must be a clause under section 244 that such orders don't fall under that section.

(Signed) P. A. LAKSHMAN CHETTIAR,
District Munsif.

From the District Munsif, Tirukkóyilúr, to the District Judge, South Arcot, dated Tirukkóyilúr, 9th February 1895, No. 28.

As directed in the Proceedings of the District Court, Nos. 769 and 60, dated 5th December 1394 and 28th January 1895, respectively, I beg to submit the following remarks embodying the difficulties which I have experienced in the practical administration of the Code of Civil Procedure, and suggesting certain alterations which it may be desirable to make in the present Code.

Section 13.—This is one of the sections of the Code on which legal ingenuity has been exercised to an abnormal extent. The whole of the law of *res judicata* has been condensed by the framers of the Code into seven small paragraphs of a section; and added to the brevity of the section, a number of decisions more or less irreconcilable with one another has emanated from the several High Courts, with the result that Judges have often to administer the law on the subject with considerable hesitation. Explanations I, II and III of the section especially afford ample scope for legal speculation and for the display of legal ingenuity, and I think it desirable that those explanations should be amplified in the light of the host of decisions bearing on the subjects covered by them. The words "any matter which *might* and *ought* to have been made a ground of defence or attack" in explanation II have been a fruitful source of contest; and explanation III will, if strictly followed, cause considerable hardship in some cases. As regards the question of mesne profits subsequent to suit, claimed in the plaint and not expressly allowed in the decree, the current of decisions appears not to give full effect to explanation III as it now stands. The law as regards points decided between co-defendants when the previous suit was dismissed, as well as the question whether the section is applicable to points of law previously decided between the parties, appear still to be unsettled. So also is the question whether the dismissal of a suit under section 102 would operate as *res judicata*. No doubt the legislature cannot be expected to make express provisions for all possible cases, but I feel that something can be done by it in the way of setting at rest many of the vexed questions which have cropped up since the enactment of the present law.

Sections 17, 26 *and* 43.—The expression "cause of action" is defined in section 17 so far as it relates to suits arising out of contracts; but that expression appears in several other places in the Code, chiefly in sections 26 and 43, where no definition of that expression is given. It is clear that the expression is not used in the same sense in all the places where it occurs. In sections 17, the expression is not limited to mean the whole cause of action, but includes any material portion thereof; but this construction cannot, I think, be safely placed on the expression as used in sections 26 and 43. It is desirable, therefore, that the expression should be defined in the places where it occurs, or in section 2 allotted for definitions, to remove the uncertainty which now besets the subject.

Sections 20 *and* 21.—The power to stay proceedings and to remit court-fees granted by these sections may, I think, be extended with advantage to suits relating to immovable property instituted in courts within whose jurisdiction only very small portions of the subject-matter are located. It sometimes happens that a plaintiff consults his own convenience alone in selecting a court for his suit where immovable property forming the subject-matter of the suit is situated

within the jurisdiction of more courts than one; but justice may be better done in some other court having jurisdiction, and in such cases the courts may be permitted to exercise a power similar to that now vested in them by these sections, with such limitations as regards the extent or proportion of property, &c., as may be deemed necessary.

Section 45.—There appears to be a difference of practice as to the form the decision should take when a court of appeal reverses a decree on the ground of misjoinder. Sometimes the plaint is returned for amendment and sometimes the suit is dismissed. The law on the subject requires to be settled.

Sections 46 *and* 47.—These sections do not provide for the refund or otherwise of the court-fees paid on the excluded cause of action. The provision in section 47 that the court "may make such order as to costs as may be just" cannot, I apprehend, cover an order for refund or otherwise of court-fees.

Section 74.—It is not clear from the section whether it is the intention of the legislature that service of summons on one partner is sufficient even in cases where the partnership had been dissolved prior to filing of the plaint. This point may be made clear.

Sections 73 *to* 84.—I think it desirable that an obligation should be imposed upon the village officers when they are in the village to assist the process-servers in the service of summonses, &c., and that, whenever practicable, the attestation of any one of the principal village officers should be obtained to the return of service. The expediency of at least a rule being framed on the subject by the High Court under the power vested in it by sections 72 and 652 of the Code appears to have been brought to the notice of the High Court (see page 141 of the Civil Rules of Practice). The process-servers cannot be expected to know all the persons to whom processes are issued, and in cases where the party at whose instance the process is issued cannot, by reason of his residence in a distant village or for other sufficient cause, accompany the process-server; the latter is actually left helpless, and his returns in such cases are generally unsatisfactory. The serious consequences to the parties resulting from a finding of proper service of processes impart to the subject a gravity which must be sufficiently met. The process-servers are low-paid officials, and when an influential man happens to be the person to whom the process is issued, the scope for fraud is considerable and the chances of detection are few. From the very nature of the case the enquiry directed by section 82 cannot always be satisfactory.

Section 111.—It is not very clear from the section itself that the written statement embodying the set-off claimed should be stamped in the same way as a plaint should be, though the decisions on the subject are to that effect. Paragraph 3 of the section may, I think, be amended to make the point clear.

Section 171.—Parties to suits and persons named as witnesses by the parties cannot apparently be summoned and examined by the court of its own motion. Sections 177 and 178 authorize a court to examine a party to a suit who is present in court as a witness, and there are other sections of the Code, such as sections 66, 120, &c., which authorize a court to direct the personal appearance of the parties for certain purposes; but there does not appear to be any express provision authorizing a court to summon and examine the parties as witnesses of its own motion; and the reason for the prohibition, if the legislature did intend it, is not patent. Again, the parties may include certain names in their list of witnesses, but may not at the trial choose to examine them; and if the effect of section 171 is to preclude the court from examining such persons of its own accord, it seems to me that the section requires amendment in that respect. The section further does not make any provision as to the source from which the expenses of the witnesses summoned at the instance of the court should be met. The courts may, I think, be given a power similar to that conferred by section 162 to direct either or both of the parties to deposit the expenses on pain of attachment and sale of his or their movable property.

Section 174.—As the law stands at present, the courts cannot punish a witness for disobedience to a summons except after the issue of a warrant. It not unfrequently happens that witnesses attend late, with the result that suits which had to be postponed in the early part of the day owing to absence of witnesses have often to be taken up for trial in the latter part of the same day, at the request of parties, and the witnesses that cause the inconvenience go scot-free, unless the court chooses to send them to a magistrate for an offence under section 174 of the Indian Penal Code, which it is generally reluctant to do, considering that the offence is not of such a grave character as to render it desirable to adopt the circuitous procedure involved in the taking of such a step. A power to fine such witnesses for contempt, similar to that conferred on courts of session by the Code of Criminal Procedure, section 318, in respect of jurors and assessors, may, I think, be granted to civil courts.

Section 193.—This section does not permit the re-calling of a witness who has been examined and permitted to depart, except in cases falling within section 191. The law as at present administered permits the court to grant time to parties for adducing additional evidence, if the ends of justice require it, and I fail to see any satisfactory reason why a witness once examined and permitted to depart should not be re-called, when such a step is rendered

necessary or desirable by any fact elicited in the evidence subsequent to the examination of the witness, or by reason of any oversight of the party at whose instance he was summoned. The disallowing of costs incurred in re-summoning the witness would be a sufficient punishment to the party whose neglect or default necessitated the re-calling of the witness. The power should be discretionary with the courts.

Section 206.—Whether a court of first instance can amend its decree after it has been confirmed by a court of appeal, is a question which seems to be not quite settled. A proviso added to the section on the subject would settle the matter.

Section 210.—It is doubtful whether under this section courts have power to postpone the payment of the whole decree. Applications are often made at the time of passing decrees for postponement of payment of the whole decree for some months, especially by the agriculturist who hopes to pay up the decree debt in the following harvest season; and in a number of cases the courts are inclined to comply with such requests, but are met by the want of any express provision on the subject. An amendment of this section so as to cover such cases expressly is, I think, desirable.

Sections 257 *A and* 258.—These sections do not provide what the effect is of agreements or adjustments sanctioned by the court. There seems to be a difference of opinion as to whether they could be executed as decrees, or separate suits should be instituted on such agreements and relief obtained therein. Further, the Limitation Act provides that applications for payment of the amount of a decree by instalments should be made within six months, and if the parties, therefore, enter into an agreement for payment of the decree amount by instalments after six months from the date of the decree, they will probably be debarred from applying for the court's sanction, which would be rather hard to the parties, as such agreements not sanctioned by a court are rendered void by section 257A. These sections may be amended or amplified to cover these points expressly.

Section 260.—The legislature has already taken action in the matter of making the infliction of imprisonment in execution of a decree for restitution of conjugal rights discretionary with courts. Such a limitation is, I think, very desirable, and will sufficiently meet the requisites of all possible cases. The extreme section of the reform party is no doubt for the total abolition of the remedy of imprisonment altogether; but there may be cases of such wilful and wholly unjustifiable disobedience as to render imprisonment highly desirable. The contract of marriage is the most solemn one in the land, and I fail to see why when the disobedience of court's orders for specific performance of ordinary contracts is visited with imprisonment, the breach of the most solemn obligation of marriage ought not, under certain aggravating circumstances at least, be placed in the same category. It is not in every caste that marriages take place at a very early age. Except among the regenerate classes, marriages are generally celebrated after the parties attain the age of discretion.

Section 265.—In this presidency the uniform practice has been for civil courts themselves to effect partition of lands paying revenue to Government, excepting permanently-settled estates. This is being done under a peculiar construction placed upon the word "estate" as used in the section. Taking the Code, however, as a whole, it is probable that the legislature did not intend that the word "estate" should be taken in the narrow sense of permanently-settled estates. Section 396, for instance, provides that a court may issue a commission when partition of immovable property other than that paying revenue to Government may have to be made, thereby implying, as it seems to me, that partition of immovable property paying revenue to Government has to be made as otherwise provided. In the other presidencies, I believe, partition of all lands paying revenue to Government is effected by the Revenue authorities. The practice which has grown up in this presidency and which, it is desirable, should be continued, may be given legislative sanction by the addition of a proviso to this section.

Section 268.—It has been held that a small cause court cannot issue an order of attachment under this section beyond its jurisdiction, but it is not apparent why a distinction should be made between a small cause court and a regular court on the subject. As a matter of practice, regular courts issue orders of attachment of salaries, &c., under this section, though the salaries, &c., have to be disbursed outside their jurisdiction.

Section 271.—The section prevents the entry into a dwelling-house for purpose of attachment after sunset, but does not expressly prohibit the stay of the attaching officer in the building after that hour, after he has gained access into the house legally. In some cases it may be desirable that the amin or the bailiff should, for completing the attachment, continue to remain in the house for some time after sunset. The intention of the law on the subject may be made clearer.

Under this section, the outer door of a dwelling-house cannot be broken open for the purpose of effecting an attachment. This prohibition operates as a hardship to the judgment-creditor in certain cases, while it affords to the judgment-debtor a loophole for evading the judgment-debt successfully. When a judgment-debt is about to be barred by the operation of section 230 of the Code, judgment-debtors not unfrequently avail themselves of this prohibition,

and it is generally difficult for the judgment-creditor to prove that the Act is fraudulent and to claim the benefit of section 230. The Revenue Recovery Act, section 20, provides that the outer door of a dwelling-house might be broken open for purposes of distraint, subject to certain conditions, and I think a provision similar to it may be introduced into the Code of Civil Procedure. The power to direct the breaking open of the outer door of a dwelling-house should be made discretionary, to be exercised by the courts on proof of fraud, and the presence of a police officer or village officer may be made necessary for the execution of such a warrant.

Section 272.—When property in court or in any public office is attached, it may be desirable that the person whose property is attached should be made acquainted with the attachment, and an addition to this section requiring that a copy of the attachment order should be sent to the judgment-debtor would, I think, be sufficient. After the attachment is made, the property, if it be money, as it generally is, is made over to the decree-holder, and there is at present no law or rule requiring that the judgment-debtor should be made acquainted with the use made of his property.

Section 273.—Similarly, when attachment of decrees of money are made under the first or the second clause of section 273, a copy of the attachment order should, I think, be communicated to the holder of the attached decree. This is desirable not only to keep him informed as to how his property is being dealt with by others, but also in the interests of the public who, in ignorance of the attachment, may be led to enter into contracts with the judgment-debtor in respect of the attached property. Section 276 invalidates any alienation of the attached decrees subsequent to the attachment; and it is rather hard that an order of the court passed probably in chambers and communicated to the head clerk of the court should have the effect of invalidating, so far at least as the attaching creditor is concerned, a transaction affecting the property entered into by both parties *bonâ fide* and in perfect ignorance of the order. Section 273 besides makes no express provision for the execution by the attaching creditor of decrees attached under the first paragraph of the section, and to such decrees also the provisions in the 2nd and 3rd paragraphs of the section should be made expressly applicable. There is no express provision as to what further steps should be taken after the attachment of attachable decrees other than decrees for money, for the satisfaction of the judgment-debts for which the attachment was effected. The execution of such decrees by the attaching creditor cannot of itself in a majority of cases result in the realization of money for the satisfaction of the attaching creditor's judgment-debt, without certain other steps being taken, which the law nowhere sanctions. It is desirable, therefore, that such of the decrees other than decrees for money as are liable to attachment should be sold, and the sale-proceeds appropriated towards the satisfaction of the decree under execution. Paragraph 1 of section 273 may also be extended to cases where the decree to be attached and the decree in execution of which attachment of the decree is sought are being executed by the same court, though not passed by the same court.

Section 295.—There seems to be a difference of opinion as to whether a regular court which is also invested with small cause jurisdiction is to be treated as a court different from that on its small cause side for the purposes of this section. The legislature may set at rest the doubt by the addition of a clause or a proviso to this section.

Sections 310 *A and* 311.—The words "any person whose immovable property has been sold" have been held to include not merely the judgment-debtor but also the beneficial owner where the judgment-debtor is only an ostensible owner (I.L.R., 20 Cal., 418); and I think these sections may be extended to persons who are not owners in the strict sense of the term, but are interested in the property sold, such as mortgagees, &c. No doubt a mortgagee who was ignorant of the sale at the time may have other remedies such as the institution of a suit, &c; but they cannot always be effective, and I fail to see any satisfactory reason why the summary remedy of protecting the property afforded by these sections, especially the new section 310 A, should not be allowed to him.

Section 367.—In some cases the strict enforcement of this section operates as a hardship. The suit in which the representative character of a person is disputed on the death of a plaintiff may be a trivial one, but the settlement of the question would involve an amount of labour out of all proportion to the importance of the suit, while the staying of the suit till the determination of the question in another suit might result in the extinction of necessary evidence when the suit comes to be actually tried—probably several years later. This is not unfrequently the case when succession to a large zemindari estate, for instance, is in dispute. In such cases the placing of both the rival claimants on the record conditionally, and the passing of a decree contingent upon the result of the suit in which the question of heirship is to be or is being tried, might probably meet all ends.

Section 375.—The words "so far as it relates to suit" are not sufficiently clear when they are applied in practice. A man sues, for instance, for recovery of a mortgage debt, and the parties agree that the mortgaged property should be made over to the plaintiff; or, taking a converse case, a man sues for the recovery of property, and it is agreed that the plaintiff should take some money and give up the property to the defendant. In such cases, there is a considerable room for doubt as to the form that the decree should take. Again, a man sues for a declaration

of his right, in respect of certain properties, and is subsequently satisfied, under an arrangement with defendant, with possession of a portion of the property in respect of which declaration was prayed for. In some cases the relief consented to by the parties may exceed the amount for which stamp-duty has been paid or the pecuniary limits of the court's jurisdiction. As no appeals lie against decrees passed under this section, these difficulties do not often attract the notice of the higher authorities; but it is none the less desirable that a uniform practice should govern the drawing up of decrees in such cases.

Section 397.—The Code does not make any provision for the mode in which the amount of commission has to be realized if the parties or any of them directed to deposit the same refuse or neglect to do so. The language of section 649 does not appear to me to cover the case. That section seems rather to prescribe the mode of executing processes issued for payment of money and does not of itself specify the process or processes which may be resorted to for the collection of the amount. This is also clear from the enactment in several sections of the Code of the mode in which any payment of money ordered should be enforced (sections 172, 293, 315, &c.). There is no section in the Code, which authorizes the dismissal of the suit or the shirking off of the defence according as the recusant party is the plaintiff or the defendant. Section 158 merely directs that in such a case the court may decide the suit forthwith, which would mean that the court should go into the evidence adduced and decide the suit. I think it is highly inexpedient that parties should be in a position to balk the court's order especially when the commissions are for local investigation or for examination of accounts, in which cases trials without the issue of preliminary commissions would involve extensive labour and ordinarily produce unsatisfactory results. I think, therefore, that a provision that the amount of commission ordered may be levied by the attachment and sale of movable property of the person in default may be included in the section with advantage.

Section 411.—The Bombay High Court has held (I.L.R. 15 Bom., 77) that section 412 applies only to cases of adjudicated failure, and that Government is not entitled to any stamp-duty if the parties settle the matter out of court and request the court to dismiss the suit; and it may be argued that section 411 similarly applies only to cases of adjudicated success; and if this contention were to prevail, a pauper plaintiff may, by putting in a razinama entirely in her favour, get the benefit of it without paying anything towards the costs of litigation. The legislature may perhaps deem fit to take action in the matter.

Section 463.—The Code does not make express provision for appointment of guardians *ad litem* of lunatics other than those adjudged to be so under Act XXXV of 1858 or other law. The Bombay High Court has held (I.L.R. 15 Bom., 132) that it is the duty of the Court to appoint guardians *ad litem* for even lunatics not adjudged to be so under any law, and as it is highly equitable that it should be done, the section may be amended so as to include all persons found to be lunatics on inquiry or adjudged to be such.

Sections 330, 412 *and* 493.—In these and certain other sections it is not clear in what sense the word "imprisonment" is used—whether the imprisonment is to be in the civil jail or in the penitentiary. The word "imprisonment" is defined in the General Clauses Act as "imprisonment of either description as defined in the Indian Penal Code." In these sections it is clear that the legislature intended that the imprisonment should be a punishment for disobedience of orders of courts, &c. The legislature may clear the doubt on the point.

Sections 477 *to* 505.—These provisions, it is desirable, should be extended to applications to sue *in forma pauperis* before they are registered as suits. It sometimes happens that in the interval between the presentation of an application under section 403 and the registering of the same as a suit, the defendants alienate their properties, and the law as it stands at present does not provide any remedy to prevent such dispositions.

(Signed) T. VARADARAJULU,
District Munsif

From the Acting District Judge, Chingleput, to the Chief Secretary to Government, dated Chingleput, 20th February 1895, No. 283.

In reference to G.O., No. 2795, of the 17th November 1894, on the subject of the revision of the Codes of Civil and Criminal Procedure, I have the honour to state that I regret my answer has not been sent by the 1st February 1895. It was only about that date, however, that I noticed a reply to the Government Order was pending from this office.

2. I find the permanent Judge, Mr. Russell, has referred the paper to the vakils here, and the Public Prosecutor informs me that their answer will shortly be sent.

He says that as the subject is not now going to be considered by the Legislative assembly at Calcutta this session, there was some delay in making a reply. I observe, however, that the Government of India wish for the replies before the end of this month.

3. In regard to the Civil Procedure Code, I have not had sufficient experience of its practical working to enable me to make any suggestions.

* * * * *

(Signed) C. H. MOUNSEY,
Ag. District Judge.

From J. SHORT, Esq., Honorary Secretary, Attorneys' Association, Madras, to the Chief Secretary to Government, dated Madras, 26th February 1895.

With reference to G.O., No. 2795, dated 17th November 1894, I now have the honour to forward the remarks and suggestions of the Association as to amendments in the Criminal and Civil Procedure Codes, and regret the delay in not sending in same earlier.

* * * * *

As to the Civil Procedure Code the Association observe, from paragraph 2 of such letter, that the Government understand that the local Governments and "Administrations and the High Courts have been registering the difficulties and obscurities, which practice has brought to light in the Codes" and in this view the Association have omitted, in their remarks, to refer to the reported cases in which the various High Courts are in conflict or have experienced any difficulty in arriving at an interpretation of the Code and the Association have therefore confined their suggestions mainly to the various instances in which difficulties have come to their notice in the course of practice.

ENCLOSURE.

* * * * *

Section.	Amendment suggested.	Remarks.
2	To insert in the definition of a decree after the words "not specified in section 588" the words "and an order passed under section 373."	It is not clear whether the definition of "decree" does, or does not, include an order passed under section 373 allowing an appellant to withdraw from his appeal or to abandon part thereof. There have been contrary decisions on this point.
13	To add an explanation VII this section is applicable to appeals.	It has been held that, although section 13 does not apply to appeals, the principle of *res judicata* does.
30	Omit the words "at the plaintiff's expense" and add at the end of the paragraph "and the Court shall direct by whom the costs of and incident to such notice shall be borne."	....
32	Insert after the word "added" in paragraphs 2 and 3 the words "or substituted."	....
	To add paragraph 4 to section 30.	
33	Omit the words "if previously filed."	....
37	Omit the words between "powers-of-attorney" and the word "authorizing."	Cases have repeatedly arisen in which persons holding powers-of-attorney have claimed the right of audience, &c., in Court thereunder, their principals being resident within the jurisdiction of such Court. Some Judges have held them entitled to appear, others have held the contrary. There does not appear to be any valid reason why persons who are prevented from press of business or other reasons should not appoint an attorney to act for them.
29	It should be specified whether the appointment in writing requires signing before an official or not.	Vakaulats both in the Appellate Court in Madras and in the Mofussil Courts have often been rejected because they are not signed in the presence of some official though the Code does not apparently warrant their rejection.

Section.	Amendment suggested.	Remarks.
43	To insert in paragraph 1 and paragraph 3 after the word "cause" the words "or causes."	....
51	That the section read as follows: "The plaint shall be signed by the plaintiff or by one of the plaintiffs and his or their pleader and shall be verified at the foot by the plaintiff or one of the plaintiffs or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. Provided that if the plaintiff is, or all the plaintiffs are, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him or them to sue on his behalf."	This section as at present framed makes it necessary to obtain orders at some expense, enabling one partner to sign and verify the plaint on behalf of his partners if from absence or other cause they are unable to do so. It also enables the person duly authorised to sign and verify "if authorised on that behalf." If a person is authorised to sue that should, it is submitted, be sufficient authority to him to sign and verify.
53	Omit (*a*).	....
54	Add a proviso "Provided that the Court may from time to time extend the time so fixed."	The section at present is imperative and cases have arisen and may arise where it was and is desirable that the Court should have discretionary power to extend the time.
72 73	....	The system in practice in England by which the summons is served by the parties themselves is preferable to the one which exists under these sections. The summonswould be served more expeditiously, especially where the party to be served is resident outside the jurisdiction of the Court which issues the summons.
89	....	It is suggested that service on a defendant residing out of British India should be effected in the same way as writs issued by the High Court of Justice in England are served in India.
102	For the words "the Court shall dismiss" substitute the words "the Court may dismiss."	It seems desirable to make this clause permissive and not mandatory.
106	....	If some defendants who have been served do not appear, it is suggested that instead of waiting until the time of passing the judgment against all the defendants, the Court may at once pronounce judgment and issue a decree against such of them as do not appear without prejudice to the plaintiff's right to proceed with the suit against the other defendants.
111	....	Regard being had to the numerous conflicting decisions on this section, it is suggested that the rights of set-off should be more clearly defined.
129	Omit the words "at any time before the first hearing."	The omission of the words suggested will assimilate this section to order XXXI of the Judicature Acts. At present the usefulness of the section is to a great extent impaired, at any rate in Madras, by reason of the day of settlement of issues, which takes place long previous to trial, being considered "the first hearing." If the amendment suggested is considered undesirable, then it is suggested that "the first hearing" be defined.
131	Insert after the word "produce" the words "or consent to the same being produced in Court."	At present section 131 seems somewhat inconsistent with section 140 which directs the Court to receive documents produced by the parties at the first hearing. If the documents are filed in Court the party cannot produce them. It is also desirable to define "first hearing."
137	Insert the word "any" instead of the first word "the."	Questions have arisen as to the power of a subordinate Court to send for the records of a superior Court.
138	....	Questions have arisen as to whether documents which the parties have had in readiness at the first hearing but have not been called for by the Court are admissible, and it is suggested that in this respect the section might be made more distinct. "First hearing" should be defined.
139	After the number "138" insert the words "or mentioned in the list added or annexed to the plaint."	....
153 157	....	*Vide* remarks on section 106. Questions have arisen as to whether a decree can be at once issued against the defendants against whom judgment has been pronounced. It is suggested that specific provision should be made enabling this to be done—*vide* order 14, rule 5, under the English Judicature Acts.
160 161	....	No provision is made for the payment of any special allowance to persons summoned to give evidence as experts, and it is suggested that a provision to that effect is desirable.

Section.	Amendment suggested.	Remarks.
168 169 170	....	In many cases the issue of a warrant would enable the suitor to obtain the attendance of the witness required which he is unable to obtain under the present cumbersome procedure, and many cases must arise where the witness has no property to speak of. It is desirable that the Court should have the power to issue a warrant of arrest.
180	....	
218	Add a proviso as follows: "Provided that if the Court shall make no order as to such costs the same shall be costs in the cause."	Provision should be made for allowing the defendant the right to address the Court on his own evidence and on the case generally.
Chap. XIX.	....	....
	....	It is suggested that the procedure to be followed in executing decrees should be assimilated to the practice existing in the High Court of Justice and the County Courts in England and that the Court which passes the decree should itself issue the required writ of execution and transmit it to the Chief Ministerial Officer of the Court within whose jurisdiction the judgment-debtor is living or his property is situated. The complaints of the public against the present procedure are numerous and in the opinion of this Association well founded; it is cumbersome, costly and lengthy; by it the judgment-debtor is enabled to avoid arrest by moving from one district to another and to dispose of his property before the judgment-creditor is in a position to attach it, in fact every facility is given to a dishonest debtor to hinder and defeat the execution of a decree obtained against him. At present there is an anomaly, as under section 648 a Court can send a warrant to another Court for execution before decree, but after decree has been passed it has no power to do so.
234	Insert at the end of this section the words "and examine him in relation thereto or as to the property of the deceased."	....
236	Omit.	In the case of moveable property it is in the majority of cases impossible to file an inventory.
238	Omit, or if the section is considered absolutely necessary, omit the word "attachment" and substitute therefor the word "sale" and make it an additional clause to section 284.	This section throws great and unnecessary impediments in the way of the execution-creditor, and the delay which necessarily arises in obtaining the extracts in most cases affords the judgment-debtor time to dispose of his property before attachment.
244	....	Having regard to the numerous conflicting decisions, this section will doubtless have the attention of the Legislature, especially as to the interpretation to be placed on the words "parties to the suit," "representatives."
245	....	
248	Omit (*a*) and the first paragraph of the proviso and if the procedure regarding the execution of decrees be adopted, omit explanation.	*Vide* remarks on section 238.
256	Omit the words from the word "only" to the word "Rupees" and omit from the word "judgment-debtor" to the end of the section adding after the word "judgment-debtor" the words "or his property."	It is not clear why the provision (*a*) is inserted unless it be to give notice to the judgment-debtor that his creditor is on the alert and to enable him to dispose of his property. It is not clear why the operation of this section should be limited either in amount or extent.
266	Omit K.	Though it might be impossible to actually attach the right and interest referred to still the Court should be empowered to issue a prohibitory order to the judgment-debtor restraining him from dealing with such right or interest.
268	In paragraph 6, omit the word "may" after the words "of this section" and substitute the word "shall". Add a provisio: "If the debtor does not pay the amount of his debt into Court, the Court shall issue a notice to him calling upon him to show cause, within a time fixed by such notice, why he should not pay the same into Court. If the debtor does not show cause, then the Court shall issue execution as in an ordinary suit."	It is suggested that the provisions of the Code relating to the attachment and realisation of debts due to a judgment-debtor should be entirely recast so as to assimilate the Indian to the English practice. The present procedure of putting up a debt for sale is costly and tedious and against the interests of the judgment-debtor as the debt may be bought in by the judgment-creditor for a nominal sum, which is all the judgment-debtor would get credit for.

Section.	Amendment suggested.	Remarks.
270	....	This is the only section that relates to the attachment of negotiable instruments, and from section 268 it would appear that the attachment of debts secured by such instruments is not contemplated by the Legislature. It is hardly necessary to point out the many difficulties that must necessarily arise in carrying out the procedure laid down in section 270, and it is suggested that the provision of section 268 regarding the attachment of debts should be extended to debts secured by a negotiable instrument.
272	....	No provision is made in the Code as to the mode in which moneys attached under this section are to be paid out of Court.
276	....	*Vide* remarks on section 270 as to the attachment of debts secured by negotiable instruments.
278	After the word attached insert the words "or directed to be sold," and after the word "attachment" insert the words "or sale." Add at the end of paragraph 3 the words "upon such terms as the Court thinks fit."	At present no provision is made in the Code for claims to property directed to be sold under a decree.
283	....	This is another section the various decisions on which have no doubt been brought to the notice of the Legislature.
284	....	*Vide* remarks on section 272.
302	For the words "the Judge may endorse" and "or may execute," substitute the words "the Judge shall endorse" and "or shall execute."	....
306	....	It has been held that, if the judgment-creditor purchases the property, he must pay in 25 per cent. of the purchase money. This appears to be in contradiction of section 294.
307	....	*Vide* remarks on the preceding section.
308	....	It is impossible to see upon what grounds the deposit should be forfeited to Government instead of being applied in part satisfaction of the decree.
311	....	Regard being had to conflicting decisions, it is desirable that the expression "material irregularity" should be defined.
351	Omit from in clause (*b*) the word "property" to the end of the clause.	The section as at present is opposed to section 359, and also to the proceedings under the Insolvent Act, to which it is suggested it ought to be assimilated.
373	....	Regard being had to the various decisions, it is desirable that the section should be amended.
380	After the word "money" to insert the words "or other property."	The insertion of the words is suggested looking to the number of instances which occur, of women being instigated to institute false suits, while no hardship is likely to occur, the power in the Court being a discretionary one.
407	Omit the words in paragraph (*b*) "within the two months next before the presentation of the application."	If the applicant has disposed of his property fraudulently or with a view to obtain the benefit of this chapter, such disposal should be a bar to the application irrespective of the date of such disposal.
479	....	Provision should be made for the realization by a successful plaintiff of the security in deposit under this section and also in sections 493, 545 and 546.
532	After the word "specified" insert the words "or, if not specified at the rate of 6 per cent."	There seems to be no reason why interest should be entirely disallowed only in proceedings under this chapter.
544	....	Provision should be made for a minor representative who wishes to appeal having a guardian or next friend appointed for that purpose.
561	....	This section should state in explicit terms whether a respondent is entitled to raise questions as to the effect of the decree between himself and a co-respondent.
562	....	There have been various contradictory decisions on the interpretation to be placed on the words "preliminary point" and a more explicit definition of what is meant by the term is desirable.
622	....	Regard being had to the decisions on the meaning of the words "illegally or with material irregularity," it is suggested that the section should be amended so that the High Court may call for the record of a case where a decree has been passed contrary to law.

From B. MACLEOD, Esq., B.A., Barrister-at-Law, Acting District Judge, Tinnevelly, to the Chief Secretary to Government, dated Tinnevelly, 28th February 1895, No. 97.

I have the honour to submit, herewith, a letter, dated 27th February 1895, from M.R.Ry. V. Ranga Chariar Avargal, a Pleader of this Court and Secretary to the Bar Library, suggesting certain amendments to the Civil and Criminal Procedure Codes, and I request, if it should please the Government, the suggestions may be transmitted to the India Government in the Legislative Department.

ENCLOSURE.

From M.R.Ry. V. RANG ACHARIAR Avargal, Secretary to the Tinnevelly Law Library, to the District Judge, Tinnevelly, dated Tinnevelly, 27th February 1895.

In regard to the proposed general revision of the Civil and Criminal Procedure Codes, I beg to submit herewith a few important suggestions which the members of the Bar in meetings duly convened have considered it desirable to offer, and, on behalf of the Bar, I beg to request that you will be so good as to place them before the Government.

2. The members of the Bar regret very much that they have not been able to submit their views earlier.

AMENDMENTS SUGGESTED.

* * * * *

Civil Procedure Code, Act XIV of 1882.

Section 278.—Under this section claims can be preferred only in regard to properties *attached*. Where a property is directed by the decree itself to be sold, as in mortgage decrees, no claim is allowed under section 278; there is no reason why any distinction should be made. Provision should be made in the section for entertaining claims to property *advertised to be sold*, whether after attachment or in pursuance of a direction in the decree. Considerable time and labour will be saved by making this provision.

Section 305.—This section is made applicable only to money decrees. It is highly necessary that the section should cover mortgage decrees also.

Section 463.—This section is limited to persons of unsound mind, adjudged to be so under Act 35 of 1858, or under any other law for the time being in force. Suitable provision should be made for a proper representation of persons of unsound mind *not* so adjudged; both in the case of lunatics against whom suits have to be brought and in the case of those who become mad after the institution of the suit.

Sections 451 *to* 453.—Provisions similar to those contained in these sections should be made to the case of minor defendants who come of age in the course of the suit.

Section 539.—There is considerable difficulty in making out the class of cases falling within this section as distinguished from those which come under the Native Religious Endowments Act, No. 20 of 1863. The distinction must be clearly defined.

Further, there is a conflict of decisions as to whether a trustee may be *removed* under this section. Distinct provision ought to be inserted in the section to that effect.

Section 541.—As in the case of plaints, copies of the memorandum of appeal must accompany every appeal to be served on the respondent or respondents as the case may be.

Section 253.—This section is restricted by the Calcutta High Court to cases of original decrees only, while the Madras High Court extend the section to include appeal decrees also. The section should be modified so as to be in accordance with the views of the Madras High Court and the surety be made liable *in execution* and *not in a separate suit*, whether the surety was for the performance of the original decree or appeal decree.

Section 584.—It is considered highly desirable, if not necessary, that second appeal should be provided for where there has been no concurrent finding on a question of fact by the Court of First Instance and the First Appeal court.

P.S.—There is no provision in the Civil Procedure Code for *attaching* documents as there is in the Criminal Procedure Code. Sometimes the plaintiff's case or the defendant's case mainly depends upon the documents in the possession of the other party, who, it is feared, will suppress them or tamper with them. In such cases, the party relying on them has got very little remedy in the present state of the law. It is, therefore, highly desirable to insert a provision in the Civil Procedure for attachment and seizure of documents.

From R. S. BENSON, Esq., M.A., LL.B., Barrister-at-law, Acting District and Sessions Judge, South Malabar, to the Chief Secretary to Government, dated Calicut, 13th March 1895, No. 507.

With reference to G.O., No. 2795, Judicial, dated 17th November 1894, I have the honour to submit, in original, the report of M.R.Ry. T. V. Anantan Nair Avargal, District Munsif of Kutnad, and the notes of M.R.Ry. P. P. Karunakara Menon, First Grade Pleader, Calicut.

ENCLOSURE.

From M.R.Ry. T. V. ANANTAN NAIR Avargal, B.A., B.L., District Munsif of Kutnad, South Malabar, to the District Judge of South Malabar, dated Ponnáni, 27th January 1895, No. 40.

With reference to G.O., No. 2795, Judicial, dated 17th November 1894, on the letter from the Government of India, dated the 22nd October 1894, No. II, Judicial 1148, inviting proposals for the amendment of the Codes of Criminal and Civil Procedure and referred to me for remarks, I have the honour to submit the following observations.

2. The Code of Criminal Procedure, Act X of 1882, and the Code of Civil Procedure, Act XIV of 1882, have now been in operation for more than twelve years, subject to special amendments and local modifications effected from time to time to meet the requirements of proved necessity. There can hardly be two opinions as regards the desirability of revising them in the light of the experience gained of their working, so as to remove the defects and to supply the omissions in them which practice has brougt to light during the last twelve years.

The leading branches of Indian Substantive Law have, within the last twenty years, been rendered into Statutory enactments of considerable juristic excellence, and it is therefore right and proper that the law of procedure, which is the handmaid of substantive law, should, *pari passu* with the progress of the latter, be so codified as to be in accordance with its general spirit and policy. The procedure law of a country affects the people more immediately than the substantive law, and its effect upon the weal or woe of the subject population is far greater than that of substantive law. However excellent the body of substantive laws may be, unless the adjective law, through the instrumentality of which the benefit of substantive laws is to be brought home to the people, is well conceived and well fashioned, the measure of happiness enjoyed by the public must always fall short of the beneficent intention of those substantive laws. To bring the great body of adjective laws into harmony with the system of substantive laws in accordance with the altered circumstances of society is a legislative function of the highest public utility; and to an attempt in this direction the general objection in principle to frequency of legislative changes is hardly applicable, regard being had to the well-known maxim of law *Salus populi Suprema est lex*. It is impossible to over-estimate the importance of having a clear, compact and methodical code of procedure law suited to the provisions, and in keeping with the policy, of the body of substantive laws. Having regard to these considerations, the proposed amendment of the two great codes of Indian adjective law, viz, the Codes of Civil and Criminal Procedure, is, in my humble opinion, not only desirable, but also highly expedient. With these prefatory remarks I shall proceed to consider as briefly as possible the defects and omissions in the codes aforesaid, and in so doing I propose to take up, in the first instance, the Code of Civil Procedure, Act XIV of 1882, because it is with the practical working of that code that my experience, first as a High Court Vakil and latterly as a District Munsif, has been more intimately concerned.

3. In considering the Code of Civil Procedure (Act XIV of 1882), the first matter that claims attention is the definition of terms contained in section 2, and here the point which requires to be remarked upon is the absence of any definition of *moveable* and *immoveable* property. Of all adjective laws, the law of civil procedure is most intimately concerned with property; and in a code which professes to be an exhaustive and self-contained embodiment of the rules regulating such a law of procedure, the omission to define the two great divisions of property, moveable and immoveable, is a serious drawback. No doubt, the General Clauses Act I of 1868 contains a definition of immoveable and moveable property, but that definition, in so far as it appears to make standing timber, growing crops, and grass, immoveable property as "*things attached to the earth*," cannot, without grave inconvenience, be adopted as suitable to the law of Procedure. Different enactments define the terms "moveable and immoveable" property differently. The definition which appears to be best suited to the procedure law is the definition contained in the leading Code of Indian property law, viz., the Transfer of Property Act, which is, next to the Penal Code, the most juristically perfect piece of Indian legislation. According to the definition given in the Transfer of Property Act, growing crops and grass fall under the category of moveable property, and this is in accordance with the definition given in the Registration Act III of 1877. For purposes of the law of civil procedure, practical convenience

requires that growing crops and grass should be defined as "moveable property." They cannot be treated as immoveable property without giving rise to considerable practical difficulties (*vide* I.L.R., 9 Mad., 193). To illustrate this by an example, I shall take the case of a decree-holder who, in execution of his decree, applies for attachment of growing crops which are about to be reaped. If such crops are treated as immoveable property, the attachment must be by a prohibitory order under section 274, and the sale following upon it cannot take place till after the expiry of 30 days from the date of proclamation (section 290). The purchaser can get possession of the crops only in execution of his sale certificate, and to get the sale certificate he must wait for at least thirty days from the date of sale (sections 312 and 316). If objections are made to the sale in the meanwhile, the sale can be confirmed only after the objections are disposed of and the purchaser can get his sale certificate only after the sale is confirmed. By the time that he gets his sale certificate after all these proceedings are gone through and proceeds to take possession, what would be the state of the crop? To a certainty, it would have matured and fallen and become absolutely useless, if not entirely decayed. In the presence of these risks, purchasers cannot be expected to bid more than a nominal sum in such illusory sales, and the result will be that the impecunious judgment-debtor will lose his crop and at the same time have his judgment debt not appreciably diminished. If, on the other hand, the crop in question is treated as moveable property, all this risk and inconvenience can be safely avoided. The decree-holder can in that case attach it as moveable property, and the attaching officer can take it into his custody under section 269. If the crop is likely to perish if not reaped at once, it may either be sold instantaneously under the rules prescribed for the sales of property which is subject to speedy and natural decay (section 269) or the court may depute one of its officers to have it reaped in time and converted into grain, as such conversion is the natural and necessary mode of conserving it from decay. This is the procedure generally adopted by the courts in Malabar in the case of paddy crops attached in execution of decrees, and it is a procedure highly convenient in practice and attended with much benefit both to the decree-holder and to the judgment debtor. For the reasons shown above, it is desirable, in my opinion, to set out in section 2 a definition of moveable and immoveable property and to expressly exclude from the definition of immoveable property growing crops and grass. Another matter for comment in section 2 is the definition of the term "decree." This definition, so far as it goes, is couched in terms of considerable legal precision, but it does not appear to be exhaustive. According to the letter of this definition, to constitute a decree there must be a formal expression of an adjudication upon any right claimed or defence set up in a Civil Court. In other words, it is only adjudications which formally dispose of matters in contest between the parties that fall under this definition of a "decree." The disposal of a suit on grounds which are preliminary to, and do not touch, the merits does not, strictly speaking, come under this definition. For instance, the dismissal of a suit for default of appearance (section 98) or default of prosecution (section 97) does not appear to fall under this definition. This is a defect the removal of which will be a decided improvement. Further, the section says that an order rejecting a plaint is within the definition of a "decree," but the definition of a "decree," as given in the section, does not, in terms, embrace such an order. A decree as defined presupposes an adjudication by the court on a right claimed or a defence set up, but an order rejecting a plaint does not involve such an adjudication and is based upon grounds which are preliminary to the merits, such as the frame of the suit, its valuation, stamp, &c. To say that such an order, which, construed according to its words, does not fall within the language of the definition of a decree, *is* within that definition has the appearance of an anomaly. This can be obviated by withdrawing such orders from the definition of a decree and by providing an appeal in respect of them in section 588, the leading section regulating appeals against orders.

4. *Section* 10.—The expression "descent or place of birth," as used in this section, is not clear and exhaustive, and it appears to be desirable to amend it by the insertion of some such words as "rank, nationality, or domicile," as the intention of the section appears to be to exclude privileges of this description as grounds of exemption from the jurisdiction of Civil Courts.

5. *Section* 13.—This section which embodies the rule of *res judicata*, which the Indian Legislature, differing from the view of English law, has placed in the domain of procedure, is one of the most important, and at the same time one of the most difficult, sections in the whole code, and accordingly considerable care and juristic research appear to have been bestowed in the preparation of it. It is a matter of legal history that on every revision of the law of civil procedure, the section relating to *res judicata* has, above all others, engaged the most careful and earnest attention of the Legislature. The wording of it has been enlarged and amplified on every successive amendment of the code, and the language of the present section is a decided improvement upon the language of the corresponding section of the earliest Code of Civil Procedure, Act VIII of 1859. Though such is the case, it cannot be said that the wording of the section, as it stands at present, is in every respect artistically perfect and that it leaves nothing to be desired. That notwithstanding the care and deliberation bestowed in the framing of this section, it is still defective in some respects and capable of improvement is evident from the hopeless conflict of judicial interpretation which it has given rise to. The Indian Law Reports teem with cases in which judicial constructions diametrically opposed to one another have been placed upon the various parts of this section by the different High Courts

in India, and in not a few cases Judges of juristic eminence have pointed out in clear and unmistakeable language many of the defects and obscurities which still enshrowd the section (*vide* I.L.R., 8 All., 324; 11 All., 159; 9 Bom., 75). As regards the wording of the section (paragraphs 1 and 2) it leaves room for improvement in some respects. The section, as it now stands, is highly complex and, to a certain extent, devoid of artistic precision. Dividing the section into two parts and reading the second part of it with the words following the disjunctive particle "or," the sentence which results will stand as follows: "No court shall try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court of jurisdiction competent to try the suit in which such issue has been subsequently raised and has been heard and finally decided by such court." The expression "any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit" does not read very happy. To speak of a matter being *in issue in an issue* is a use of language too technical for popular comprehension. An amendment of this phraseology will conduce to greater perspicuity. Then, again, the section, as it now stands, lays down that, to constitute the bar of *res judicata* in the case of an issue decided in a former suit, the court which tried it should have been competent to try not only such issue, but also the suit in which issue is subsequently raised. The effect of this provision is that no adjudication whatever of an inferior tribunal will be *res judicata* in a subsequent suit concerning the same subject-matter, provided that the subsequent suit can somehow be brought before a superior tribunal. Even if the court which tried the issue originally had full jurisdiction in every respect to try such issue with conclusive effect, its decision upon the issue will not be *res judicata* in a subsequent suit before a superior court in which that issue is again raised. This appears to be a state of things not having much of reason and principle to support it. I shall illustrate what I mean by an example: A plaintiff who claims title under a deed of gift which comprises properties worth Rs. 10,000 brings a suit in a Munsif's Court to recover an item of property worth Rs. 500 included in it. The defendant denies the validity of the deed of gift and the court, on an issue raised between the parties as regards the validity of the gift deed, finds it valid and decrees recovery of the property sued for. It is not clear why the adjudication as regards this particular item of property should not be *res judicata* in a subsequent suit in which the validity of the deed of gift is in contest before a superior court. The Madras High Court has held that in such a case the decision of the Munsif's Court as regards the particular item of property would be *res judicata* in a subsequent suit before a Sub-Court in which the validity of the gift deed is disputed (I.L.R., 8 Mad., 83). The result of a contrary view would be that no adjudication by a Munsif's Court on a matter within its jurisdiction could ever be conclusive between the parties in a subsequent suit, provided the adjudication involves the determination, incidentally, of a question of title to try which with definitive effect is beyond its competency. This could hardly have been the intention of the Legislature. If, however, such is the intention, the safest way of effectuating it will be to exclude such suits from the cognizance of inferior courts which are not competent to try the wider question of title. So long such courts are authorized to try such suits and to adjudicate upon them with reference to their subject-matter which is within the jurisdiction of such courts, it is not consonant to legal principles or conducive to public welfare to treat such adjudications as nullities in a subsequent suit. Juristic reason requires that the decision of a court upon a matter within its jurisdiction should always be conclusive between the parties, and that its adjudication upon that matter, conclusive at the time when it was made, should not be deprived of that character in subsequent proceedings between the same parties. A contrary rule would have the effect of upsetting titles acquired, and nullifying transactions entered into, on the faith of such adjudications. Then again suppose a suit is brought in a Munsif's Court for recovery of Rs. 1,000 due on a bond, and the court on an issue, joined between the parties as regards the genuineness of the bond, finds it to be a forgery and dismisses the suit. Suppose the plaintiff subsequently, uniting this claim on the bond with a claim on another bond for Rs. 6,000 against the same defendant, brings a suit in the Sub-Court for recovery of both the amounts. As the section now stands, the decision, in the first suit, of the Munsif's Court as regards the Rs. 1,000 bond will not be *res judicata* in the second suit instituted in the Sub-Court, because the Munsif's Court which tried it was not "a court of jurisdiction competent to try the suit in which the issue (as to the genuineness of the Rs. 1,000 bond) is subsequently raised." The consequence will be that the Sub-Court will be entitled to try the issue *de novo*, treating, as absolutely null and void, the adjudication previously arrived at by the Munsif's Court, which had full jurisdiction to decide it. This is only a typical illustration, and the anomaly pointed out above can be predicated of every case in which astute litigants, with a view to nullify the effect of adverse adjudications, bolster up speculative claims, and by ingenious joinder of other causes of action meant to enhance valuation manage to bring subsequent suits before courts of superior jurisdiction. The wording of the section leaves them considerable latitude to work such frauds upon the policy of the law, and it is therefore a matter worth considering whether the substitution of the words "such issue" for the sentence "suit in which such issue has been subsequently raised" in the concluding part of the 2nd paragraph will not better carry out the intention of the Legislature. Then again, reading the first half of the section relating to suits as distinguished from issues, we get the

following collocation of words: "No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit . . . . in a court of jurisdiction competent to try such subsequent suit. The section speaks of "any suit in which *the matter* directly and substantially in issue has been directly and substantially in issue in a former suit." The expression "*the matter*" refers to one particular matter and cannot be held fairly applicable to a suit which involves two distinct matters, one only of which was in issue in the first suit. Then again the question arises whether, to constitute the bar of *res judicata* in respect of the issue decided in the first suit, the court which tried it should have had jurisdiction to try both the issues raised in the subsequent suit. In my humble opinion, many of these difficulties can be got rid of by making "issues" instead of "suits" the basic ground of the rule of *res judicata*. In other words, the force of *res judicata* must be annexed to adjudications on "issues" made by courts competent to try such issues. The expression "competent to try such subsequent suit" does not appear to be exhaustive. It is not clear whether the word "competent" here means, as held by Mr. Justice West in I.L.R., 9 Bom., 75, competent to try the suit with conclusive effect. In this connection it is necessary to remark that the expression, as it stands, fails to solve in a satisfactory manner the vexed question as to how far the decision of a matter by a Small Cause Court will be *res judicata* in (1) a subsequent Small Cause suit concerning the same matter, and (2) a regular suit concerning the same matter. The wording of the section, as it stands, throws no clear light on the question as to how far and under what conditions a decision between co-defendants is *res judicata* in a subsequent suit, and as to whether a decision *inter partes* on a point of a law, afterwards declared to be erroneous, will operate as *res judicata* (*vide* I.L.R., 10 Cal., 1087; 15 All., 327; 5 Mad., 304). Then again the expression "parties under whom they or any of them claim" is literally deficient, though it is a convenient equivalent of the juridical term "privies." According to the strict letter of it, a decree passed against a mortgagor after the mortgage will be binding upon the mortgagee, because he "claims through" the mortgagor, but this is clearly not the law. It appears to be desirable, therefore, as observed by Mr. Justice Mahmood in I.L.R., 8 All., 324, to insert after the word "claim" the words "under a title arising subsequently to the commencement of the former suit." Moreover in the expression "competent to try such subsequent suit," there is nothing to indicate whether the "competency" meant refers to the time of the former suit or of the subsequent suit. This is an important matter in view of the possibility of jurisdictional changes. The interpretation which has been generally adopted by the courts on the point is that the "competency" aforesaid refers to the time of the former suit (*vide* I.L.R., 11 Cal., 153; 15 Mad., 494) and this is certainly the interpretation recommended by reason and principle. The omission in the section of any indication as to which of the two views has been accepted by the Legislature is a matter for comment. Then as to explanation II, the words "any matter which might and ought to have been made ground of defence or attack in such former suit" are very wide and to a certain extent indefinite. A liberal interpretation of these words will include within the scope of *res judicata* every possible matter which is relevant by way of defence or attack in a suit. No doubt the word "ought" restricts to some extent the extensive operation of the word "might," but no indication is given as to what are the matters which fall within the purview of the word "ought." A suit for recovery of property may be brought on half-a-dozen distinct and independent grounds of title, such as inheritance, devise, purchase, adoption, &c. Supposing that a suit is brought upon one of these grounds of title, does the adjudication upon it preclude a subjsequent suit based upon any of the other grounds of title? As the words stand in the explanation, the adjudication would probably operate as *res judicata* upon the other grounds, because it may well be contended that directly the plaintiff failed on the specific ground alleged by him, he should have put forward the other grounds available to him in support of his title. This could not, however, have been the intention of the Legislature. To restrict the operation of this "explanation" to its legally permissible scope, it appears to be necessary to insert after the words "defence or attack" some such words as "with reference to the basis of action on which the suit is brought." I may mention in this connection that the High Court of Madras has put this construction upon the words of the "explanation" as it stands (*vide* I.L.R., 7 Mad., 264). It is desirable to amend the phraseology of this explanation so as to make it accord with the restricted views aforesaid, deduced from a doctrinal interpretation of it. In explanation IV the sentence "a decision liable to appeal may be final within the meaning of this section until the appeal is made," is framed, to quote the words of Mr. Justice Mahmood, in "unspecific language" (*vide* his observation in the case reported in I.L.R., 11 All., 159). The wording of the sentence is silent as to what happens when the appeal *has been* made. This appears to be a defect, seeing especially that the wording of the preceding sentence attaches the quality of finality to all decisions duly perfected. In view of the inflexible structure of the main sentence, it is necessary to lay down in express terms in the subsequent sentence what the legal effect of an appeal is on a decision so far as the question of *res judicata* is concerned. It is not clear, on the wording of the sentence as it stands, whether the rule embodied in it is the rule of English law that a writ of error does not disturb the finality of a judgment except for the purpose of execution by operating as a "supersedeas," or the rule of continental jurists which, treating the "naturalia" of an appeal as the "effectus

devolutions et suspensions," holds that a decision is not final till all the legal means by which it can be impeached have been exhausted. It is a matter of legal history that in English law, a writ of error like its counterpart "provocatio" in Roman Law, was a process of gradual formation and that all judgments were originally final. The liability of a judgment to be impeached in error (appeal) does not, according to the doctrine of "English law," interfere with its finality for the purpose of the "*exceptio rei judicatæ*." The view adopted by the Indian Legislature in the last sentence of explanation IV appears to be more in accordance with the rule of English law than the theory of continental jurists. This is evident from the tenor of the sentence; but the use of the word *may* in it does not appear to be very opposite. The word "may" implies that there are cases in which a decision liable to appeal is not final; but it is not stated what those cases are. It will be well, if possible, to supply this omission. Then again, as I have already observed, the sentence requires to be enlarged by the insertion of words showing what the legal effect of an appeal is on the finality of a judgment for the purpose of *res judicata*. According to the decision of the Bombay High Court in I.L.R., 6 Bom., 110, the matter decided by a judgment becomes, after appeal is made, *res subjudice*; but in such a case section 12 precludes the trial of a subsequent suit in respect of the same matter pending the decision in appeal. In explanation V the words "in respect of a private right claimed in common for themselves and others" require comment. It is evident from the context that what is meant by a "private right" here is a right of easement or other right analogous to it, which several persons claim under a common title. That this is so has been expressly decided by the Calcutta High Court in the decision reported in I.L.R., 6 Cal., 49. The term "private right" is, however, a term of extensive legal import and embraces every kind of rights other than public rights. Strictly speaking, a right to property is such a right, but it is doubtful whether it is within the purview of this section. It is desirable, therefore, to define the scope of the term "private right" in such a way as to prevent all possible misunderstanding. Then again, having regard to the conclusive character of the presumption laid down in this "explanation," it is desirable that the law should provide all possible precautions for safe-guarding the interests of those against whom the presumption is to operate. For this purpose it is necessary, in my humble opinion, to enact not only that the litigation should have been *bonâ fide*, but also that it should have been conducted with the due legal formalities enjoined by law to make it a representative suit (*vide* I.L.R., 8 Mad, 496). Section 30 of the Code provides the mode in which such a litigation is to be conducted to make the adjudication in it binding upon persons not actually before the court. However *bonâ fide* the conduct of the litigation may have been, unless the legal pre-requisites prescribed by law for rendering an adjudication against a few individuals of a class conclusive upon all the individuals of that class are duly complied with, it is hardly legal to treat the result of such litigation as binding upon that class as a whole. It may be that the persons who conducted the litigation *bonâ fide* omitted certain legal formalities essential to its success or failed, through oversight, to utilize all the available means of proof at their disposal. In such a case, it will be unjust to treat the result of the litigation as binding upon persons not constructively parties to it; and it is desirable therefore to insert, after the words *bonâ fide* in this explanation some such words as "and with the requisite legal formalities."

6. *Section* 15.—It will be a useful measure of legal reform if, in connection with the contemplated revision of the code, this section can be so amended as to make the village courts, established by Madras Act I of 1889, the exclusive tribunals for the trial of petty suits up to Rs. 20 in value. As matters now stand, such village courts have concurrent jurisdiction with the regular Courts in regard to petty claims up to the amount of Rs. 20, but suitors in the majority of cases prefer to institute such claims before the regular courts on their Small Cause side. The result is that, notwithstanding the creation of a special tribunal meant to relieve the regular courts of the great bulk of petty litigation, the regular courts are still deluged with petty suits, which, in point of value, are cognizable by village courts. A good deal of the time and attention of the regular courts is thus taken up with the trial of such petty suits ranging in value from a pie up to Rs. 20 and the intention of the Government in establishing the village courts is practically frustrated. This is due to the fact that the suitor has the choice of two forums, the jurisdiction being *concurrent*. If the jurisdiction of the village courts is made exclusive in regard to such petty suits, the regular courts will be considerably relieved, and they will be able to devote greater time and attention to judicial work more important in character and better suited to their position and dignity. This desirable change in the law can be effected by making this section applicable to village courts established by Madras Act I of 1889. The term "Court" is not defined in this code, as it has been defined in the Code of Criminal Procedure, and in the absence of such a definition it is not possible to say that it includes courts established by special and local laws. Section 6 says that nothing in this code affects the jurisdiction of village munsifs under the provisions of the Madras Code. The Madras Code having been now replaced by Act I of 1889, the question arises how far the provisions of the Code of Civil Procedure affect it (*vide* I.L.R., 13 Mad., 145). In dealing with this question, it will be well if section 6 is so amended as to bring about the desired change. Another matter for comment as regards this section is the use of the word "grade" in the expression "Court of the lowest grade." Having regard to the meaning of the term "grade" as applied to courts in administrative matters, it is questionable whether this word is the most appropriate to express the idea involved in this section.

The term "grade" implies difference in rank in identity of functions; but the term "Court" as used in this section includes courts of different and dissimilar jurisdictions. It is therefore a matter worth consideration whether the word "grade" may not be usefully replaced by the word "class" or by the word "jurisdiction."

7. *Section* 32.—There is an anomaly in this section worth notice, and it is that while the court has power to add parties at any stage of the suit, its jurisdiction to strike out the name of a party is restricted to the time of the first hearing. The striking out of the name of a party is a matter which requires careful consideration and sound handling, and in many cases it cannot be properly effected till the evidence is entered upon. If, after the investigation is once begun, the court cannot strike out the name of an unnecessary party, it means that the name of the party should be retained on the record till the disposal of the suit, and that the party should be subjected to the vexation, trouble, and expense of such unnecessary retention which does good to nobody. The removal of this restriction, which appears to serve no useful purpose, will be a step in the right direction.

8. *Section* 44-A.—This section appears to be defective. According to the wording of the section, in suits for recovery of immoveable property damages can be claimed only if the property is held under a contract. Suppose a trespasser commits waste on the land or converts to his own use moveable property found on the land. In suing for the recovery of the land, the owner cannot, according to this section, claim in the suit recovery of damages for the wrong done as aforesaid. This is a defect and requires to be remedied. This can be effected by adding to clause (*a*) the words "damages arising from any wrong committed to the property."

9. *Section* 101.—There is a clear anomaly involved in this section, in that it does not empower the court to set aside the *ex parte* order and to hear the defendant then and there when he appears during the hearing of the suit *ex parte* and assigns good cause for his previous non-appearance. According to the section as it stands, it is only when the court has adjourned the hearing of the suit *ex parte*, but not when it is proceeding with the hearing *ex parte*, that the defendant is entitled to come in and apply to set aside the *ex parte* order. If the court proceeds with the hearing *ex parte* and concludes the trial then and there, the defendant who is all the while before the court is perfectly helpless, and is obliged to wait till the decree is passed, and then to come in under section 108 to set aside the *ex parte* decree. It is impossible to see the expediency of this procedure.

10. *Section* 111.—The last paragraph of this section requires a slight clearing up. It is said that a set-off pleaded in a written statement tendered under this section shall have the same effect as a plaint in a cross-suit. What the nature and extent of this effect is, and how far it is qualified by the words which follow, is not clear on the language of the paragraph as it stands. For instance, it is not clear whether such a written statement should fulfil all the requirements prescribed for a plaint, and whether it is to bear the *ad valorem* Court-fee stamp. Notwithstanding the obscurity of the section, the High Courts of Madras, Bombay and Allahabad have held, on a construction of it, that such written statements containing a claim of set-off should be stamped with the requisite Court-fee stamp—(*vide* I.L.R., 15 Mad., 29; 13 Bom., 67; 8 All., 396. It will be well if the result of these rulings is embodied in the section so as to make it more intelligible.

11. *Section* 120.—It is not clear from this section whether the power of the court to order the personal appearance of a party, on pain of a decree against him on default of appearance, is limited to the first hearing of the suit, or whether such power can be exercised by the Court at any stage of the suit. The words of the section are wide enough to cover all stages of the suit, but the position of the section in chapter IX, which relates to examination of parties by the Court prior to investigation into the merits, throws some doubt upon this view. It is very necessary for the efficient administration of justice that the court should have, throughout all the stages of a suit, this salutary power over parties. It is after the first hearing that such a power becomes most useful. Very often a party who is cited as a witness by the opposite side and whose evidence is very material on the question at issue finds it to his advantage not to attend, and accordingly he either absconds or wilfully evades service of summons. In such cases the court must have this summary power to enforce obedience to its mandate. Otherwise, an astute and cunning litigant will be enabled by means of a little stratagem to deprive his adversary of the benefit of his testimonial admissions. As the code now stands, a party to the suit cited as a witness stands, as regards the penalty for non-attendance, in the same position as an ordinary witness unconnected with the suit (section 178). It is a notorious fact, that notwithstanding the provision of such penalty, considerable difficulty is experienced by the Courts of First Instance in this country in securing the attendance of witnesses in time. It is, therefore, highly desirable that the court should have a stronger hold on a party to the suit, cited as a witness; and for this purpose a slight amendment of the section so as to warrant the exercise, by the court, of the power aforesaid at any stage of the suit, appears to be expedient. Another matter which requires notice in this section is the wording of the last paragraph of it. It lays down that in case the party ordered fails without lawful excuse to appear in person on the day appointed, *the court may pass a decree against him*. It is not stated what the nature and scope of such a decree is to be. A "decree" means any decree, a term of indefinite import. Suppose a part of the claim sued for is admitted by the defendant and the plaintiff at the hearing fails to appear as ordered. Is the whole suit to be dismissed? The same indefiniteness of language occurs in section 177 where also the same phraseology is used.

12. *Section* 174.—The omission to provide for the mode in which the fine imposed under this section upon a disobedient witness is to be realized is a serious defect in this section, and the effect of it is highly prejudicial to the administration of justice. In the absence of a clear guide as to the procedure to be adopted in such a case, many of the Courts of First Instance in the mofussil quietly decline to impose fines under this section, and the result is that witnesses, encouraged by the strange leniency of the courts, not seldom obstruct the course of speedy justice. It may be that under some other sections of the code taken with the provisions of the General Clauses Act and the sections of the Penal Code relating to fines, a sort of procedure can be constructively deduced for the realization of such a fine; but this is certainly an unsatisfactory way of dealing with the question. The penalty prescribed in this section is a penalty which, from its nature, the courts have constantly to put into operation, and to enforce then and there. A procedure of such constant and summary resort should be clearly defined, and it should be laid down in the section itself which authorizes the imposition of the fine. Seeing that the procedure for realizing a fine imposed upon a witness who has evaded service of summons is expressly provided in sections 168 and 170, the omission to provide for the procedure to be followed in the case of a fine under section 174 appears to be an oversight. The removal of this defect is a matter of extreme necessity in the interests of judicial administration. In my humble opinion, the procedure provided by sections 168 and 170, viz., attachment and sale of the property of the recusant witness, appears to be a very efficacious mode in which a fine imposed under section 174 can be realized, in addition to imprisonment. But both in the case of attachment and imprisonment, having regard to the unilateral character of the proceedings under section 174, express provision will have to be made as to the mode in which they are to be effected.

13. *Section* 177.—The phrase "to give evidence" in this section is not clear. Whether the refusal to give evidence spoken of in this section includes a refusal to answer a question while the party is in the witness box, giving evidence is a moot point. A verbal amendment calculated to remove this doubt will be a decided improvement.

14. *Section* 182.—This section does not require that the witness should sign the deposition given by him, but the practice in many courts in the mofussil is to get the witnesses to sign their depositions. This is a practice both useful and expedient. It serves as a guarantee of accuracy, and as a security against subsequent retraction. It will be well if this practice which has sprung up as a "*cursus curiæ*" is translated into a legislative provision and embodied in the section.

15. *Section* 206.—This section is silent as to which is the court competent to amend a decree when there has been an appeal against it. The rulings of the different High Courts on this point are conflicting. The Madras High Court has held in I.L.R., 9 Mad., 354, that it is competent to a Court of First Instance to amend its decree after it has been confirmed in appeal; but the contrary view has been held by the High Courts of Allahabad and Calcutta—*vide* I.L.R., 11 All., 267; 14 All., 226; 21 Cal., 259. The dissentient judgment of Mr. Justice Mahmood in the case reported in I.L.R., 11 All., 267, contains a masterly exposition of the principles underlying the question, and it agrees with the decision of the Madras High Court in I.L.R., 9 Mad., 354. The view taken by the learned judge in concurrence with the Madras High Court appears to be the view most in accordance with juristic principles and practical convenience. An amendment of this section is highly necessary in view of the decisions aforesaid which have construed it in diametrically opposite ways.

16. *Section* 223.—This section has given to considerable conflict of judicial opinion in regard to the question whether a court to which a decree is sent for execution should be a court competent to try the suit in which the decree is passed, with reference to the nature and value of its subject-matter. For instance, can the decree of a Sub-Court for Rs. 20,000 be sent for execution to the Court of a District Munsif! In the absence of any provision in the section laying down the condition of jurisdiction as regards the court to which a decree may be sent for execution, and in view of the fact that in section 25, which deals with transfer of suits from one court to another, there is an express provision prescribing competency of jurisdiction, the Madras High Court has held in I.L.R., 7 Mad., 397, and 17 Mad., 309, that a court can, by reason of the extraordinary jurisdiction conferred by this section, execute a decree of any amount sent to it, though the suit in which it was passed was beyond the limit of its jurisdiction. The Calcutta High Court has dissented from this view—*vide* I.L.R., 16 Cal., 457. It requires to be made clear which of these conflicting views is in accordance with the real intention of the Legislature in framing this section. In my humble opinion, there is no valid reason for creating by this section an extraordinary jurisdiction in courts for the purpose of execution, and the policy of investing a court with power to execute a decree in a suit beyond its jurisdiction is, to say the least of it, of questionable expediency. Very often the execution of a decree involves more intricate, more delicate and more responsible, legal determinations than the trial of the suit itself,

and it is an anomaly that a Court which has no jurisdiction to try such a suit should be competent to execute the decree passed in it. It will be well, therefore, if the section is amended by the insertion in it of the words of limitation regarding competency of jurisdiction such as are contained in section 25.

17. *Section* 232.—The section speaks of the transfer of a "decree." It is not clear whether the term "a decree" includes a portion of a decree, where the decree contains two or more distinct and separate decretal awards, such as a decree for rent, a decree for costs, and a decree for delivery of property, in the same suit. The Calcutta High Court has held in I.L.R., 17, Cal., 341, that a "decree" includes every component part of a decree, and that a part of a decree, distinct in itself can be the subject-matter of an assignment. This is, of course, quite in accordance with reason and principle.

18. *Section* 235.—The omission of the word "signed" in line 2 of this section is evidently an oversight. There is no reason why the important formality of "signature" necessary in the case of all judicial applications should be dispensed with in the case of such an important proceeding as an application for execution of a decree. That the law attributes to such an application as much solemnity and weight as a plaint is clear from the fact that it insists upon verification as a *sine qua non* of its validity, and such being the case, it is highly necessary to provide for signature as well. Then, again, having regard to the usual practice of the Courts in requiring the production of a copy of the decree along with the application for execution, it will be desirable to enact that a copy of the decree shall accompany the application for execution. Without a copy of the decree, it will be difficult for the Court to ascertain whether the various particulars set out in the application are correct. The practice adopted by the Courts as a matter of necessity may, with advantage, be embodied in the section.

19. *Section* 244.—It is a matter worth consideration whether in clause (*c*) of this section the words "parties to the suit in which the decree was passed" may not, with advantage, be replaced by the words "parties to the decree." As the words now stand, if a man is impleaded as a party to the suit and is afterwards exonerated from the decree, he is as much within the purview of the section as a party to the decree, although to all legal intents and purposes, he is in the position of a stranger. Whether the restriction enacted by this section should be made applicable to a party so situated is a matter open to question. In my humble opinion, it is not consonant to reason to hold him bound by such a restriction. Then, again, in clause (*c*) it is desirable to state in express terms whether the term "representatives" means representatives in their character as such or in such character as well as in their individual capacity. On this point there has been quite a crop of decisions by the High Courts, not in all cases reconcileable. The latest decisions of all the High Courts are in favour of the latter interpretation—*vide* I.L.R., 7 Mad., 255, 17 Cal., 711, 17 Mad., 399, 9 Bom., 458, 12 All., 313. It will be well if the result of these decisions is incorporated into the section, so as to place its intention beyond doubt.

20. *Section* 253.—The reason for restricting the summary liability for execution enacted by this section, to a surety who has become liable *before the passing of a decree in the original suit*, is not apparent. There appears to be no valid reason why a surety who has become liable for the decree pending on appeal, should be treated on a different footing. The wording of the section being defective in this respect, Courts have very often construed the word "decree" as including a decree in appeal, to prevent a failure of justice—*vide* I.L.R., 12 Bom., 411 . It is very necessary in the interests of speedy and efficient administration of civil justice that surety bonds executed pursuant to the provisions of this code, should in all cases be summarily enforceable. Otherwise, complications, delay, multiplicity of suits, and, very often, miscarriage of justice consequent upon legal technicalities, will be the inevitable result—*vide* I.L.R., 14 Mad., 473. Impressed with a due sense of this, the Legislature has in very many places in this code, made express provision for the summary enforcement of such surety bonds in the manner provided by this section (253). But there are still some cases of suretyship in regard to which the like provision has not been made. Reserving these cases for consideration in their proper places, all that I have to submit while dealing with this section is that it will be a desirable improvement in the law of procedure if all cases of suretyship under this code are made summarily enforceable.

21. *Section* 257-*A*.—It is a doubtful question, on the wording of this section, whether a bond in discharge of a judgment-debt made without the sanction of the Court is valid, and if so, to what extent—*vide* the decisions in I.L.R., II. Mad., 469, 12 Mad., 61. The removal of this doubt will be a great boon.

22. *Section* 259.—A decree for the recovery of a wife is placed by this section in the same category as a decree for the recovery of a chattel; but the mode of execution prescribed is different. In the case of a chattel, execution is to be effected by the seizure and delivery of it to the party entitled; but in the case of a decree for the recovery of a wife, execution is to be effected by attachment of the judgment-debtor's property or by his imprisonment. The decree contemplated by this section is evidently a decree for the recovery of a minor wife from the possession of a third party who keeps her back from her husband. If the wife is of sufficient legal volition and is a free agent, the case becomes very often one of restitution of conjugal rights, which is provided for by section 260. That the decree contemplated by section 259 is a

decree of the kind supposed above, is placed beyond doubt by the fact that the judgment-debtor is spoken of as *he* (meaning evidently the third party). If, then, the decree dealt with by this section is a decree for the recovery of a minor wife from the possession of a third party who detains her illegally, it is clear that the remedy by attachment of property and imprisonment, of that third party, is a very poor, and altogether inadequate, mode of execution. By making the recusant judgment-debtor suffer in property and liberty, the husband-plaintiff does not get the object of his suit, viz., his wife. He sues for the possession of his wife and the Court gives him a decree for it; but in execution of the decree, the law gives him quite a different thing instead, viz., the bare satisfaction of seeing his adversary suffer. For the law to tell a husband who has obtained a decree for the recovery of his wife, that it is powerless to execute the decree and give him possession of his wife, is an extremely sad confession of weakness. The glory of an enlightened legal system, strong in the reign of justice and order, consists in its ability to vindicate injured rights and to make complete and adequate "identical restitution" in cases where pecuniary or other satisfaction is useless. It is impossible to conceive of a more important and fit case of "identical restitution" than the case of a wife kept away from her husband, and, in a case like this, which concerns so intimately the domestic happiness of individuals, and by consequence the well-being of society, it is in the highest decree desirable that the law should exert its power to the utmost. There appears to be no reason for not delivering the wife into the possession of the husband in execution of such a decree. Such a mode of execution was not unknown in the early years of British administration in India—*vide* the dicta in 6 W.R., 105, and 11 Moore's Indian Appeals, 551. The objection to such a procedure is more sentimental than substantial, and it cannot be allowed to prevail in a case of such vital importance. To prevent all unseemly spectacle in executing such decrees, the seizure of the person of the wife may be left to the husband-plaintiff under the supervision of an officer of the Court. With some such safeguard as this, the section may well provide for the seizure of the wife in execution of the decree.

23. *Section* 260.—The spirit of modern civilization and refinement and the dictates of enlightened humanity, and sound morality, alike demand the abolition of imprisonment prescribed by this section as a mode of enforcing a decree for restitution of conjugal rights. A suit for restitution of conjugal rights is a remedy introduced into India by the British Law, and was originally unknown to the personal laws of the Hindus and Muhammadans. The Hindu law does not recognise a compulsory discharge of marital duties, but treat them as duties of imperfect obligation to be enforced by religious sanction. It is a well-known fact that in England, the land of its birth, restitution of conjugal rights as a matrimonial remedy has, in progress of civilization, lost much of its living force and operation. In the words of Mr. Justice Pinhey it has become "discredited" in England, and it is well worth consideration whether it may not be now usefully changed in India, in the present circumstances of its family and social life. The evil of this institution has been graphically depicted by the great Jurist Bentham in the following words:—"To live under the perpetual authority of a man you hate is, of itself, a state of slavery; but to be compelled to submit to his embraces is a misfortune too great even for slavery itself." Imprisonment of a wife as a means of enforcing conjugal obedience is a remedy unknown to Hindu jurisprudence, and the whole system of Hindu law and family life is opposed to it. The sacred character of a Hindu marriage as an indissoluble bond of union lasting for life, and the rules of conjugal life laid down by the Hindu law, are such as to render this remedy positively useless and unsuited to the Hindus. Decided cases having gone far, in establishing restitution of conjugal rights as a remedy in the law of India (*vide* 10 Bom., 301; 5 Cal., 500; 8 All., 149; 11 Mad., 237), it is perhaps not practicable to do away with it at present, but there can be no difficulty in making it, by means of a suitable amendment in the law of procedure, as little in conflict with the spirit of Hindu and Muhammadan law, as possible. The Hindu law is conspicuous for its tenderness towards the soft sex, and Menu, the Great Law-giver, says:—"Let not a husband strike even with the petal of a gentle flower, the wife of his bosom." When such is the profundity of kindness to a wife enjoined upon a husband by the shastras, it is a veritable irony of fate that the husband should be the means, by this section, of putting his wife in prison, and causing her mental anguish without measure and social degradation worse than death. The extreme unsuitability of this remedy to the condition of Hindu family life will be evident from the history of the famous Rugmibhai case reported in I.L.R., 9 Bom., 529, and 10 Bom., 301. In England, Statutes 47 and 48, Vic. Cap. 68 has recognized the propriety of abolishing imprisonment as a mode of enforcing a decree for restitution of conjugal rights, and there is no reason why the same should not be done in India. Then, again, imprisonment of a wife in execution of a decree for restitution of conjugal rights is not a remedy which does any real good to the party for whose sake it is enacted. In cases in which "identical restitution" is undesirable, no useful end is gained by the imprisonment of the wife. Considering that the institution of marriage is "the tie of a society and the basis of civilization," it is in the highest decree desirable that the law should treat obligations founded upon it on a different footing from a commercial contract. For these reasons, it is in my humble opinion highly expedient that the law should dispense with imprisonment as a mode of enforcing a decree for restitution of conjugal rights. In line 7 of the section the word *his* is used to denote the party bound by the decree. As the section includes cases where a wife may be the defendant, it is desirable to insert the words "or her" after the word "his."

24. *Section* 268.—The provisions of this section do not appear to be exhaustive. First of all, the word "debt" as used in this section is not clear. It is a moot point whether a debt secured by a hypothecation of immoveable property is a "debt," to be attached under the provision of this section—*vide* I.L.R., 9 Cal., 511; 15 All., 134; 20 Cal., 805. Secondly, there is no provision in this section as to the way in which the person in whose hands moveable property is attached under clause (*c*) can get a discharge. Paragraphs 3 and 6 deal with the cases of attachment under clauses (*a*) and (*b*), but there is no corresponding provision for clause (*c*). This appears to be a defect. Thirdly, clause (*a*) lays down that the creditor prohibited under it cannot recover the debt until the further order of the Court. It is not clear whether this means that he cannot sue for it. If so, the provision is hard, as the claim may be barred by limitation in the meanwhile. Having regard to the decision in I.L.R., 13 All., 76, it is necessary to provide for such a contingency. Fourthly, paragraph 3 of the section is silent as to the procedure to be followed when the debtor prohibited denies the existence of the debt. The Bombay High Court has held in I.L.R., 4 Bom., 323, that a claim does not lie in such a case, and if this is so, it is not clear what remedy a person has against whom a fictitious debt is alleged and made the subject of an attachment. Fifthly, the section provides for attachment of debts and moveable property in the hands of third parties; but in the whole chapter there is no provision as to the way in which moveable property in the hands of third parties is to be got at, for the purpose of eventual sale. If the third party fails to produce the property for the purpose of sale, it is not clear what the remedy is in such a case.

25. *Section* 271.—The prohibition enacted by this section to breaking open the outer door of a dwelling house is fraught with considerable hardship to decree-holders, and is calculated in practice to encourage fraud and concealment on the part of cunning judgment-debtors; and it is a matter for consideration whether the prohibition may not be safely removed. There are cases in which a dwelling house consists of but a couple of rooms, without any outer door, as distinguished from the door of the rooms themselves; and in such cases officers executing the decree feel reasonable doubt as regards their power to break open the rooms. Taking advantage of this doubt fraudulent judgment-debtors conceal themselves and their property inside such dwelling houses and defy the law. In my humble opinion, it is not expedient in a country like India to push the right of domestic sanctuary so far as this section has done, in deference to the doctrine of English law, that every man's house is his own castle.

26. *Section* 273.—The first paragraph of this section is silent as to the way in which the proceeds of the attached decree are to be realized for the purpose of being applied in satisfaction of the decree sought to be executed. It is not clear whether, notwithstanding the attachment, the holder of that decree can execute it; and what the procedure is to be in case he fails to execute the decree, is not stated. It appears to be desirable to insert a provision in the section enabling the attaching decree-holder to execute the decree in such a case, on the analogy of the provision in clause (*b*). In the case of money-decrees passed by other Courts, it is laid down in the section that the Court receiving notice of attachment shall stay execution unless and until the attaching decree-holder applies to it for execution of the decree. Supposing that he neglects to execute the decree within the period of limitation, it is not clear whether the decree-holder therein can interfere for the purpose of taking out execution himself. As this point is doubtful, it will be well to make an express provision in the section enabling the decree-holder therein in such a case to take out execution, subject to the money realized being detained in Court to satisfy the decree under execution. In the case of decrees other than money-decrees, there is no provision made in the section as to how, after the attachment, they are to be made available for satisfying the decree for which they have been attached. Perhaps, they are considered to fall under the term "saleable property" as used in section 266 (*vide* I.L.R., 16 Bom., 522), but even if this is so, the express statement of the procedure relating to them is highly desirable.

27. *Section* 276.—It seems to be a serious defect in this section that it does not fix the period during which an attachment is to be in force. Very often, decree-holders, with a view to vex and injure their judgment-debtors, effect an attachment and then keep quiet till it suits their fancy to resume proceedings. The absence of a provision in this section as regards the period during which an attachment is to have legal efficacy is a direct encouragement to such evasiveness, and it is in a great measure responsible for the great dilatoriness which attends execution of decrees in Indian Courts. It gives rise, moreover, to innumerable complications and legal difficulties—*vide* I.L.R., 10 Cal., 416; 17 Mad., 58, 180. It will therefore be a highly desirable improvement, if a provision fixing the period during which an attachment is to be in force is inserted in this section, as in sections 259 and 260.

28. *Section* 278.—Under this section, a claim lies only in the case of property *attached in execution of a decree*. When the decree itself directs sale of the property, there is no necessity for attachment, and in such a case no claim can lie on the wording of this section. This gives rise, in practice, to considerable hardship and injury. This may be illustrated by an example. A man fraudulently mortgages property belonging to another and the mortgagee brings a suit upon the mortgage and gets a decree for sale. When the property is advertised for sale in execution of the decree, the owner intervenes with a claim

objecting to sale. The Court being powerless to entertain the claim can give him no relief and has to tell that he must wait till the purchaser comes to eject him. In the meanwhile he has to quietly reconcile himself to seeing his property being brought to the hammer through the fraud of another. This is an eminently unsatisfactory state of things, to say the least of it. But this is not all; the existence of a claim put forward, but not decided, very often deters purchasers, and results in the property being sold for far less than its real value. These injurious consequences can be avoided if a claim legally lies in such a case. To achieve this object, all that has to be done is to add the words "or proclaimed for sale" after the words "attached in execution of a decree," in the first paragraph of section 278, and to amend the subsequent paragraphs in conformity with it.

29. *Section* 283.—Whether a judgment-debtor is included in the term "party" as used in this section is a question which has given rise to considerable legal speculation. This question has not been solved by decided cases, beyond contraversy—*vide* 4 M.H.C.R., 47 I.L.R., 11 Bom. 114, 15, Cal, 674, 13 Mad., 366; 17 Cal., 57 and 711. Having regard to the conclusive character of the order dealt with by this section, it is necessary that the doubt entertained by Courts on this point should be set at rest. Another point deserving notice in this section is as to how far the declaratory suit enacted by it is controlled by the provisions of section 42 of the Specific Relief Act. Whether, notwithstanding the restriction contained in section 42 of the Specific Relief Act, a suit for declaration lies under this section is a moot question—*vide* I.L.R., 9 Mad., 206, 16 Mad., 140. The balance of public convenience appears to be in laying down a provision in the affirmative.

30. *Section* 287.—To ensure the correct description of the property and to minimize as far as possible subsequent disputes in regard to it, it will be well if the amin whose duty it is to proclaim the order of attachment under section 274 in the locality of the property is empowered to ascertain the necessary particulars regarding the property and to embody the result in a report to the Court. I understand that in some parts of the Madras Presidency, this procedure obtained while Act VIII of 1859 was in force and was attended with much benefit. Such ascertainment of particulars by a responsible officer of the Court will, subject to objections, serve as a useful check upon the information furnished by the decree-holder. Decree-holders in their hurry to bring the property to sale cannot always be expected to be very scrupulous in the manner in which they furnish the particulars, and it is necessary that the Court which sells the property of the judgment-debtor should maintain a check upon them. As things stand at present, the correctness of a court-sale depends exclusively upon the accuracy of the decree-holder; and the result is that judicial sales in this country are in many cases eminently unsatisfactory.

31. *Section* 291.—It is not clear from this section, whether, when there are decree-holders who have applied for rateable distribution, the sale can be stopped on payment of the attaching decree-holder's judgment-debt and costs alone. The Madras High Court has held in I.L.R., 10 Mad., 157, that the sale cannot be stopped in such a case. If so, the question arises whether the other decree-holders can go on with the sale on the existing proclamation. It is desirable to clear up this obscurity.

32. *Section* 292.—It will be a useful measure of reform if the prohibition to purchasing in court-sale enacted by this section is extended to pleaders practising in the Court. It is a well-known fact that pleaders very often exercise considerable influence upon sales by reason of their local influence, and knowledge, and their position which gives them opportunities of secret information. The rule of public policy embodied in section 136 of the Transfer of Property Act, which prohibits the purchase of an actionable claim by a pleader practising in the Court within whose jurisdiction it falls is *á fortiori* applicable in the case of a court-sale; and in the interests of sound administration of justice, the prohibition suggested above appears to be salutary.

33. *Section* 295.—This is a section which has given rise to innumerable difficulties in practice. The following are some of the vexed questions which have arisen on this section:—

(1) What is the point of time when "assets" can be said to be realized by sale? There is considerable diversity of judicial opinion on this point. Some Courts have held that "assets are realized" on the date of sale (*vide* I.L.R., 6 Bom., 16), while others have held that they are realized when the whole purchase money is paid in and the sale is confirmed—*vide* 18 Cal., 242.

(2) What is meant by "sale or otherwise?" Does it include a case of payment by the judgment-debtor after arrest in execution, or is the word "otherwise" used as *ejusdem generis* with the word "sale"—*vide* I.L.R., 13 Cal., 225; 6 Bom., 588.

(3) Is it necessary that an execution application filed prior to realization should be pending undisposed of, to enable a decree-holder to rateable distribution?—*vide* I.L.R., 4 Mad., 383.

One of the objects of this section appears to be to prevent a multiplicity of attachments of the same property by different decree-holders; and for this purpose, the section enacts that, where a decree-holder has already attached the property and is bringing it to sale, all the other decree-holders who are then in position to attach it shall share rateably in the benefit of such sale brought about by the attaching decree-holder. After the sale is actually effected at the instance of the attaching decree-holder, the property becomes the purchaser's; and as the decree-holders

are not then entitled to attach the property, those decree-holders who come in after the sale have no right, consistently with the object of this section, to share in the sale-proceeds. If this is a correct view of the policy of the section, the words "prior to realization" in line 3 should be altered into "prior to sale, or realization otherwise."

34. *Section* 305.—According to the wording of this section, and the decision of the Madras High Court in I.L.R., 14 Mad., 277, sanction for private alienation can be granted only in cases in which there is a reasonable prospect of the whole decree-amount being realized by such alienation. In other words, the section can have application only in cases where the value of the property is equal to, or larger than, the decree-amount; but not in cases where the value of the property is less than the amount of the decree. The great majority of attachments with which the Mofussil Courts have to do are cases where the property is of little value compared with the decree-amount; and if the section does not apply to such cases, it cannot have much operation. It is not clear why the beneficent provision of this section should be restricted in the above manner, seeing especially that it is a provision enacted in the interests of impecunious judgment-debtors who are about to be sold up in Court by their unscrupulous decree-holders. All that reason requires is that the private alienation should be *bonâ fide* effected, for such fair value as the property is capable of fetching, and that the money realized should be produced in Court. Subject to this condition, and the condition prescribed by the last paragraph, this section may usefully be amended so as to apply to all cases without the limitation aforesaid.

35. *Section* 306.—In view of the decision of the Madras High Court in I.L.R., 14 Mad., 235, that a bidder can withdraw his bid even after the lot is knocked down, a provision as regards the point of time up to which such withdrawal is allowable appears to be a *desideratum* in this section.

36. *Section* 310-A.—This new provision of law enacted by the Amending Act V of 1894 would have been more appropriately posited as a rider to section 311, or as an independent section, as section 310 to which it is now annexed appears to have very little connection with it. This newly added provision is a highly indulgent measure of legislative amelioration; but its juristic consistency with the principle and scheme of the other provisions of the chapter *in pari meteria*, may well admit of doubt. To put it in the power of a judgment-debtor to set aside a sale regularly effected by a Court, for no reason affecting the sale, but simply because he chooses to come forward, does not appear to be very much consonant to legal principles, and it looks a little incongruous by the side of section 311, which, in words of considerable strictness, lays down that a sale can be set aside only on the ground of material irregularity combined with substantial injury. The result of making a court sale so uncertain in point of legal efficacy will be to deter purchasers by the fear of the risks involved, and to render court sales more unsatisfactory than they are at present. If, as is probable, the object of this new provision is to protect the rights of honest debtors who, in spite of due diligence, find themselves unable to raise the judgment in time to save their property from sale, this object can be achieved by a provision of less general scope. The addition of a clause to section 311 making it discretionary with the courts in cases of real hardship to set aside the sale within thirty days on the application of the owner of the property is quite sufficient to attain the desired end. In my humble opinion it is not expedient to enact a general right in favour of all judgment-debtors, both honest and dishonest. Even as the section stands at present it is desirable to restrict the unduly wide operation of it by substituting for the words "the court shall pass an order setting aside the sale" the words "the court may, if it appears to it that there are sufficient grounds for so doing, set aside the sale." On the section as it now stands, it is not clear whether it applies to proceedings in execution commenced before Act V of 1894 came into operation. Notwithstanding clause (2) of section 1, which enacts that it shall come into force at once, it has been held by the majority of a Full Bench of the Calcutta High Court in I.L.R., 21 Cal., 940, that this new provision is not applicable to sales held in execution of decrees passed before it came into force. In view of this decision it appears to be necessary to render this point clear. Then again it is not stated whether the limitation of thirty days prescribed by this section is subject to section 5 of the same Act, and if it is, it is desirable to provide an appeal against an order under this section; and this can be done by adding in clause 16 of section 588 the words "and section 310 A," before the words "under section 312." Another point worth notice is whether, by reason of this new provision, section 312 does not require to be amended by the insertion of the word "310 A" in line 2 of it. Then again the expression "any person whose immoveable property has been sold" used in sections 310 A and 311 is not clear. Whether it includes a mortgagee of the property is a moot-point.

37. *Section* 311.—As regards this section, a question which has been the subject of conflicting decisions is whether substantial injury proved can be presumed to have been the result of material irregularity, or whether the casual connection between the two requires to be established by positive evidence (*vide* I.L.R., 20 Cal., 599; 11 Mad., 227). Another point worth consideration in this section is the term "decree-holder." This term has been construed by the Calcutta and Madras High Courts as including a decree-holder claiming rateable distribution (*vide* I.L.R., 20 Cal., 673; 10 Mad., 57). If this view is correct, the term requires to be amended.

38. *Section* 313.—This section has been construed by the Madras High Court in I.L.R., 17 Mad., 228, as meaning that if the person whose property purported to be sold has any the slightest interest in the property sold, the purchaser cannot claim to set aside the sale. In other words a total want of interest in the property, it is held, must be proved to justify the application under this section. This is hard upon the purchaser. An amendment of this section is useful to remove this hardship. Besides this it is a point worth considering whether it is not advisable, by an enlargement of the scope of this section, to give a right to the purchaser to apply for the setting aside of the sale where he is damnified by the fraudulent conduct of any of the parties to the sale.

In division H of chapter XIX treating of resistence to execution, sections 331, 332 and 335 speak of "possession" in third parties in the sense of actual possession. The result of restricting the term to actual possession is that parties who are in constructive possession through their mortgagees, lessees or tenants are altogether deprived of the remedy prescribed by these sections. This is hard. It is not right that the protection of their interests in the property should be left to the tender mercy of their mortgagees, lessees or tenants. In case of a collusion between the latter and the decree-holder or the purchaser, they are obliged to bring regular suits with the disadvantage of being *plaintiffs in ejectment*. This hardship will be removed if the wording of the sections aforesaid is amended in such a way as to include cases of constructive possession in the term "possession."

39. *Sections* 336 *and* 337 (*a*).—These sections do not show what the procedure is to be when a judgment-debtor, who is a substantial man, is brought before the court under arrest, and he applies for a few days' time to enable him to produce the judgment debt in court. It will be a cruel injustice to commit such a man to jail when the court is satisfied that he is likely to produce the judgment if a few days' time is allowed. But as the sections now stand the court has no power to grant him time, leaving him in the custody of an officer of the court. Even in the absence of an express power in this behalf courts sometimes adopt this practice to remedy clear cases of hardship. The express enactment of such a power in the courts is at once useful and necessary. No reasonable objection can be alleged against it seeing that such a power is conferred upon courts by section 337 A, clause (3), in the much less deserving case of a judgment-debtor whose object is to escape committal to jail.

40. *Sections* 339 *and* 341.—A defect involved in these sections may be illustrated by the following case. A judgment-debtor brought before the court under arrest (section 336) is ordered to be committed to jail; but the decree-holder fails to make payment of the monthly allowance fixed by the court and which he is bound, under section 339, to pay to the proper officer of the court. It is not clear whether the discharge of the judgment-debtor in such a case is a "discharge from jail" within the meaning of section 341. This is a question of much practical importance, as the effect of such a discharge is to exempt a judgment-debtor from liability for re-arrest. On this question the decisions of the Madras and Bombay High Courts differ, the former holding that a discharge of the kind supposed above is not a discharge from jail within the meaning of section 341 (*vide* I.L.R., 8 Mad., 21), while the latter holds that it is (*vide* I.L.R., 9 Bom., 181). This point requires to be made clear in view of this conflict of judicial opinion.

41. *Section* 349.—It will conduce to greater convenience and practical benefit if the security furnished under this section be made summarily enforceable as in section 336. As decisions now stand, such security cannot be enforced in execution (*vide* I.L.R., 7 Mad., 273). This is a manifest omission, and there appears to be no legal justification for it, seeing that other provisions of the Code bearing upon this matter enact such a power (*vide* section 549).

42. *Section* 351.—In view of the usual practice of the courts on the subject it is desirable to enact, in continuation of the last paragraph of this section, an express provision empowering the court, on the application for insolvency being rejected, to retake the judgment-debtor into custody, if already released on security, for the purpose of being committed to jail.

43. *Section* 368, *paragraphs* 3 *and* 9.—It is not stated what the procedure is to be when the person brought in by plaintiff as the legal representative of a deceased defendant under paragraph 3 happens to be a different person from the individual who comes in as such legal representative under paragraph 9. How and at what stage this dispute is to be decided by the court is not shown by this section.

44. *Section* 373.—Paragraph 2 of this section enacts that in the case of a withdrawal of a suit by plaintiff without the permission of the court he shall be precluded from bringing *a fresh suit for the same matter*. This prohibition appears to be unduly wide, and to extend to suits for the same matter, though based on a different cause of action. All that reason and principle require is that suits based on the same ground of action should be prohibited, and it does not appear to be right that every suit, whatever its legal character may be, relating to the same matter should be brought within this prohibition. It seems desirable, therefore, to add the words "on the same cause of action" between the words "a fresh suit and for the same matter." In paragraph 3 of this section it will be well to replace the word "consent" by the words "written consent" to prevent unnecessary disputes as to whether there was consent or not in any particular case.

45. *Section* 374.—It is possible that the case of a suit withdrawn under section 373 may be a case of "defect of jurisdiction or other case of a like nature" within the meaning of section 14 of the Limitation Act, and in such a case there will be a conflict between the provisions of this section and the provisions of section 14 of the Limitation Act, which allows a deduction of time. It is desirable to avoid this likely conflict by the use of appropriate words directed to that end.

46. *Section* 380.—As I have remarked above, it will be a decided improvement in procedure to enact that every case of security given under the provisions of this Code is summarily enforcible in execution. The security for costs furnished under this section may accordingly be made summarily enforcible in the manner provided in section 353.

47. *Section* 386.—It is not clear why the examination of a witness on commission is limited to the case of a "suit." Very often courts find it necessary to examine a witness on commission in execution proceedings, the trial of which is, in some cases, more important than the trial of suits. It will be better to remove the words "in any suit" from this section and to substitute for them the words "in any case in which the court thinks fit to do so."

48. *Section* 392.—Commissions issuable under this section are limited to cases where it may be necessary to ascertain (1) market value of any property, (2) mesne profits, (3) damages, and (4) annual profits. To the cases so specified must be added the case of compensation for value of improvements which, in the Malabar district of the Madras Presidency, is the most frequent, and the most important, subject-matter of commissions under this section. According to the customary law of Malabar which has always been recognized by the courts as a *lex loci* and which has lately been the subject of legislative interpretation by Madras Act I of 1887, every person sued in ejectment has a right to claim the value of improvements effected by him on the land; and before his ejectment is ordered the court has to fix by its decree the amount of compensation for such improvements effected by him. More than 90 per cent. of the "land suits" tried by the courts in Malabar involve this question of improvements, and the inveterate practice of the courts in such suits is to issue commissions to experienced persons to prepare and submit *valuation account* of improvements. On the return of the commission, the courts proceed to decide the question of improvements on the basis of such *valuation accounts*, after hearing the objections of the parties thereto, and on the evidence which they may adduce. This practice of issuing commissions to ascertain the value of improvements being a practice of general prevalence in one entire district of the Presidency it appears to be worth recognition in the law of procedure enacted by this Code. It will be well, therefore, to add the words "value of improvements in respect of any property" immediately after the words "market value of the property" in the first paragraph of this section.

49. *Section* 393.—When section 392 is amended in the way suggested above it will be necessary to enact in this section a provision for directing a further enquiry, and for setting aside a Commissioner's account, as provided for in the last paragraph of sections 395 and 396.

50. *Section* 402.—The collocation of the words of this section is not very happy. "No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language or assault." This sentence has the appearance of laying down that a pauper is absolutely precluded from bringing suits of the above description, whether he sues as *a pauper* or not. It has, moreover, the *appearance* of a promulgation of rule by law that a poor man has no right to caste, honour, reputation or personal liberty. It is not meet that the law should have the appearance of countenancing such an ethically unsound and politically unwholesome doctrine. The object aimed at by this section can well be achieved without such undesirable result by changing the form of the sentence as "no person shall sue as a pauper to recover, &c."

51. *Section* 425.—This section lays down that no warrant of arrest shall be issued in suits against Government or against public officers without the consent in writing of the District Judge. It is not clear whether the prohibition enacted applies to a warrant of arrest for enforcing the appearance of a disobedient witness. The words used are wide enough to cover such a case, but the reason for extending the prohibition to such a case is not apparent. The section appears to require amendment in this respect.

52. *Section* 463.—This section says that the provisions of sections 440 to 462 (both inclusive) shall, *mutatis mutandis*, apply in the cases of persons of unsound mind, adjudged to be so under Act 35 of 1858, or under any other law for the time being in force. The effect of this provision is that before a person can sue as the guardian of a lunatic or before a lunatic can be sued through a guardian, the lunatic must be adjudged as such, in an independent proceeding taken under the Lunacy Act. This is attended with considerable hardship in practice, especially in the case of a creditor who has to recover a small debt. It is not clear why the court trying the suit should not be empowered to enquire into the fact of lunacy and to appoint a proper person as guardian *ad litem*, when the fact of lunacy is proved to its satisfaction (*vide* the analogy of section 443). Not to vest such a power in the court will be a practical denial of justice in the case of poor suitors.

53. *Section* 491.—Having regard to the highly penal provisions of this section, it appears to be necessary to provide sufficient precautions against its being put in operation against suitors

who are the victims of *bonâ fide* mistakes. If possible, it will be better to make separate provisions for compensation in the case of improper arrests and in the case of improper attachments, as the consequence of an improper arrest is altogether different from that of an improper attachment of property. If this is not possible, the wording of the first and second paragraphs requires to be recast by importing into them a little more strictness of language. As the section now stands the court can fine a plaintiff Rs. 1,000 if it is of opinion that the arrest or attachment was applied for on insufficient grounds. This is hard. The grounds which led him to make the application may have appeared to him sufficient; but if the court happens to take a different view of the sufficiency of grounds, he becomes liable. Such a difference of opinion, which is inevitable in many cases, ought not to subject the party to punishment. Then again paragraph 2 says that in the case where the suit fails the plaintiff can be fined under this section if it appears to the court that there was no probable ground for instituting the suit. This too appears to be hard. The plaintiff may have had a strong case on the merits, but the suit may have failed on some technical ground of law, in regard to which the plaintiff might have made a *bona fide* mistake. It is clearly unjust that the section should operate in such a case. It will be more in accordance with reason and justice to restrict the penalty prescribed by this section to cases where a plaintiff, without reasonable and probable cause, makes such an application.

54. *Section* 497.—The same remarks as those made above apply to section 497. As the effect of an improper injunction is more serious than that of an improper attachment of property, a little more severity is allowable in the penal provision of this section; but it is open to doubt whether the difference of phraseology made in paragraph 2 of the section is sufficient for the purpose.

55. *Section* 521.—In the expression "misconduct of the arbitrator" used in clause (*a*) of this section, it is not clear whether the term "misconduct" means misconduct in a moral sense, or legal misconduct such as irregularity of procedure or a conscious violation of the principles of justice. It is desirable to include both these phases of misconduct in clause (*a*), and for this purpose the wording of it requires to be amended.

56. *Section* 539.—It was decided by two Judges of the Madras High Court (the Honourable Mr. Justice Muttuswami Iyer dissenting) in I.L.R., 14 Mad., 186, that, under this section, a suit could be instituted by two or more persons claiming an interest in a public trust to remove a hereditary trustee for breach of trust, but the recent Full Bench decision of the same High Court in I.L.R., 17 Mad., 462, has taken a different view. Having regard to the fact that the language of this section is borrowed from Sir Samuel Romilly's Act (52 George III, Cap. 101) and the decisions bearing upon it, and seeing that the statute aforesaid was enacted to provide a summary remedy by petition and that the section under notice appears in a chapter of the Code dealing with special and summary procedure, it is clear that the operation of this section is limited to non-contentious proceedings which do not involve the adjudication of disputed questions of title. If, however, the wording of this section admits of a different interpretation, it is desirable to remove all cause of doubt by a suitable recasting of it (*vide* I.L.R., 20 Cal., 810).

57. *Section* 540.—According to this section an appeal lies from all decrees of a court of original jurisdiction, unless otherwise provided. In other words an appeal is the rule in every case, and the only limitation to it is a provision to the contrary contained in any law. The section relating to appeal in the Code of Criminal Procedure is couched in terms quite the opposite of this. Under that section (404 of the Code of Criminal Procedure) no appeal lies from the judgment of a criminal court unless the same is expressly provided for. The provision relating to appeals in the law of Civil Procedure is thus wider and more comprehensive than the provision regulating appeals in the law of Criminal Procedure; and accordingly, greater finality attaches to the judgment of a criminal court than to the decision of a civil court. The reason and policy of the distinction so made is open to question. On abstract principles the judgment of a criminal court dealing with questions of life and liberty needs to be more carefully hedged round with safeguards than the decision of a civil court dealing with rights of property. If, having regard to the competency of the ordinary criminal courts in India, such a rule as is laid in section 404 of the Criminal Procedure is considered by the Legislature a safe one, there is greater reason for adopting that rule in the case of civil courts, having regard to their position and functions. It is a fact well recognized in all quarters that the Judges presiding over civil courts exercising original jurisdiction in India are, as a rule, more educated, more efficient and better trained in the theory and practice of law than the corresponding body of the judiciary exercising original criminal jurisdiction; and the high capacity of natives of India for judicial work on the civil side has been admitted over and over again by eminent and responsible authorities. In view of the high degree of efficiency which the civil Courts of First Instance in India have now generally attained, and having regard to the fact that such courts are now mostly presided over by Native judges of high character, high legal attainments and unrivalled experience of the society with which they have to deal, it is a question well worth consideration by the Legislature whether the time has not come for giving greater finality to the judgments of such courts. A good many of the more unimportant classes of appeals from the judgments of such courts may now be usefully done away with, and appeals in

important matters may be expressly provided, with a limitation analogous to that contained in section 404 of the Code of Criminal Procedure. The effect of doing this will be to improve the tone and status of such courts by giving them a higher sence of responsibility, and at the same time, to enable the Appellate Courts to bestow more time and attention to their legitimate work. This is a reform much to be desired.

58. *Sections* 545 *and* 546.—It is necessary for the proper and efficient execution of decrees that the security furnished under these sections should be made summarily enforcible. Section 546 appears to require a recasting. According to the first paragraph of it as it now stands the court can, in the case of a money-decree under appeal, go on with the execution proceedings after taking security from the plaintiff for the due performance of the appellate decree; but according to the third paragraph, when the execution proceedings have reached the stage of an order for the sale of the property, the sale has to be stayed on security being taken from the defendant. This is a little inconsistent. Why, when security has been already taken from the plaintiff, the operation of it should be arrested in the middle of the execution proceedings, and another security taken from the opposite party is, by no means, clear. Then again it is possible that the appeal may be by a party other than the judgment-debtor whose property is going to be sold. The wording of paragraph 3 is wide enough to cover such a case. But the reason for making it apply to such a case is not clear. Moreover, it is not clear why the provisions of this section are limited to immoveable property. Moveable properties require the same amount of protection, if not more. Immoveable property can be recovered in the event of a successful appeal by reversing the sale; but there is no means of getting at moveable property after it has once changed hands by sale. In the case of moveables of special value, such as heirlooms and other chattels possessing a value of affection not measureable in money, the absence of such a provision will be a great hardship. It is therefore a fit matter for consideration whether moveable property, or at least some kinds of moveable property, should not be brought within the purview of this paragraph.

59. *Section* 561.—The provisions of this section as it now stands on the amendment made by Act VII of 1888 are a decided improvement upon the section as it stood originally; but it is a matter admitting of doubt whether the period of one month from date of service of the notice of appeal prescribed for an objection memorandum is not too long a period. Formerly such objection memorandum had to be filed before seven days next preceding the date of hearing of the appeal, and now it is altered to one month from date of service of the notice of appeal. As in some courts, more than a month elapses before a notice of appeal can be served upon the respondent, the practical effect of the section is to make it impossible for an appeal in such a case to be disposed of till after the expiration of two months. The existence of the provision as regards one month renders it incumbent upon the court in every case to allow, between the filing of the appeal and its hearing, an interval of time composed of this one month *plus* the time requisite for serving notice of the appeal upon all the respondents. This will, in some cases, operate as a useless drag upon the freedom of the court, and by tending to avoidable delay in the disposal of appeals, produce administrative inconvenience, not to speak of public dissatisfaction. In unimportant cases of appeals, and in cases where the parties reside in the immediate vicinity of the Appellate Court, it is quite possible to dispose of an appeal within a month; but the section as it now stands renders this legally impracticable. For these reasons it will be well if the period prescribed is reduced to fifteen days.

60. *Sections* 562, 564, 565 *and* 566.—These sections as they now stand on the amendment made under Act VII of 1888 are perhaps less obscure than the corresponding sections in the Code of 1882, but it may well admit of question whether they are as exhaustive as those sections. As sections 562 and 565 now stand there is no express provision laying down the procedure in appeal where the Court of First Instance has disposed of the suit on a preliminary point *so as to exclude evidence as regards the merits*, and the decree on such preliminary point is reversed in appeal. Perhaps such a case falls within section 562. So does a case, where the evidence upon all the issues has been recorded, though the court has disposed of the suit upon a preliminary point (*vide* I.L.R., 16 Mad., 208). The propriety of making both these cases fall under section 562 may be doubted. Then again section 566 says that when the Court of First Instance has failed to *try* any material issue, the Appellate Court is to send down an issue for trial. In the case of a suit in which the material issues on the merits have been tried, though findings have not been recorded, the Appellate Court is to remand under section 562. In other words a fully-tried suit is to be remanded outright for a fresh decision, while an untried suit is to be disposed of by the Appellate Court after referring issues for trial. This is a little inconsistent. Moreover, as these sections now stand, cases falling under section 562 fall within sections 565 and 566 also, and this is not a satisfactory arrangement. It appears to be desirable to lay down distinctly in what cases a remand is to be made and in what cases *issues are to be referred*. Another matter for observation in section 565 is the expediency of giving an Appellate Court power to dispose of an appeal on the evidence, without having the benefit of the finding of the Court of First Instance upon it. A suitor is entitled to the benefit of the opinion not only of the Appellate Court, but also of the court by which the suit was tried; and it is hard to deprive him of this right, seeing especially that the Court of First Instance, before which the witnesses are examined, is in a better position to appraise the evidence at its proper value than the Appellate

Court. Such a power in an Appellate Court is not desirable seeing that the finding of an Appellate Court on questions of fact is final (*vide* section 584).

61. *Section* 568.—This section appears to confer upon an Appellate Court far more power than is either necessary or desirable, in the matter of admitting new evidence—clause (*b*) is unduly wide, and under it it is possible to make out a new case in appeal by the letting in of an indefinite quantity of additional evidence. Seeing that section 566 has already provided for cases of substantial exclusion of evidence, clause (*b*) of section 568 may well be limited to cases where the production of any document or the examination of any witness is necessary to clear up a particular obscurity or to supply an evident omission. Otherwise the record of the suit in appeal will be encumbered with a mass of new evidence on which the Court of First Instance had no opportunity of having its say.

62. *Section* 584.—The High Courts being the courts of final resort, and in public estimation the strongest palladium of justice in India under the British Government, nothing can be more desirable than to provide a right of ultimate appeal to them in every case possible. The clauses (*a*) to (*c*) of this section are not wide enough to cover all the cases in which a right of second appeal to the High Court is expedient in the interests of public welfare. According to this section the finding of an Appellate Court on questions of fact is final, and cannot form a ground of second appeal to the High Court. This is so even if the Appellate Court's finding is in conflict with the finding of the Court of First Instance, and even if the finding was arrived at by the Appellate Court on a manifestly wrong or perverse view of the evidence and in disregard of the reasons and arguments stated by the Court of First Instance in support of its finding. Having regard to the present state of high efficiency in general of the Courts of First Instance in India, and their capacity to deal with questions of fact arising in suits before them, it is a question worth consideration whether it is desirable to give absolute finality to an Appellate Court's finding on a question of fact when it dissents from the finding of a Court of First Instance. Having regard to the diversified customs and usages which often come up for decision before most of the appellate tribunals in India, it appears to be inexpedient to give absolute finality to their finding on a question of fact when it is opposed to the conclusion of the Court of First Instance. It will be a decided improvement in the benign policy of this section to provide for a second appeal to the High Court in cases where the Appellate Court's finding on a question of fact is contrary to the finding of the Court of the First Instance. The effect of enacting this provision will no doubt be to increase the appellate work of the High Courts, but having regard to the gravity of the interests at stake, such a situation must be faced. If the provision aforesaid is added to the section, a good many of the unimportant classes of appeals which now lie to the High Court may be done away with. Under the Code of 1882 the High Court often remedied the injustice of perverse appellate findings on questions of fact by a free and liberal use of the power of remand and reference of issues given by sections 562 to 566; but seeing that those sections have been considerably circumscribed in their scope by the amendment made by Act VII of 1888, and by the latest Privy Council ruling on the subject of remand, it has now become more than ever necessary to lodge in the High Courts an express power to remedy the clear injustice resulting from an appellate finding manifestly wrong or perverse.

63. *Section* 622.—This section, which prescribes the revisional jurisdiction of the High Courts in non-appealable cases, is couched in terms far too narrow and restricted, and the consequence is that the Indian Law Reports teem with cases in which the High Courts, while admitting the propriety of interference in revision, have confessed their powerlessness to interfere on the wording of the section as it now stands. This is an eminently unsatisfactory state of things, and is very much to be regretted. There appears to be no valid reason why in civil cases the High Courts should possess less extensive revisional jurisdiction than they have in criminal cases under section 439 of the Code of Criminal Procedure. The ruling of the Privy Council in L.R., 11 J.A., 237, which has been largely followed by the High Courts, has put upon this section the construction that a wrong decision of a question of law by a court having jurisdiction is not a ground for interference. The word "jurisdiction" and the expression "illegally or with material irregularity" in this section have been construed in very many decisions of the High Courts after the Privy Council ruling aforesaid. Mr. Justice Mahmood in the case reported in I.L.R., 7 All., 345, defines the term "jurisdiction" in its broad legal sense, signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by law upon the judicial authority. The same learned Judge in the case reported in I.L.R., 8 All., 519, interprets the term "jurisdiction" as including, over and above pecuniary or territorial limit to a court's power, the presence or absence of a positive authority or power conferred by law upon tribunals. The scope of this section was construed by the learned Judge in these words: "In framing the section the Legislature gave to the High Court power to interfere with the action of subordinate tribunal in cases where there is no remedy either by appeal or otherwise and where those tribunals, have either exercised, or wrongly declined to exercise, the authority, the power and the jurisdiction, which the law confers upon them, or under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law." This is a very liberal and salutary view of the scope of the section; but unfortunately this view has not always prevailed in practice.

The word "illegally" in this section has been construed by the Allahabad High Court in I.L.R., 8 All., 111, as referring to cases where the court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage; and in the same case the words "with material irregularity" were construed as referring to a material irregularity in procedure which may possibly have produced error or defect in the decision of the case on the merits. The same view has been taken by the Calcutta High Court in the decision in I.L.R., 13 Cal., 225, and by the Madras High Court in the cases reported in I.L.R., 11 Mad., 220, 303, 322, 144 and 17 Mad., 410. It is very desirable, in the interests of public welfare, that the section should be so amended as to bring it into conformity with the eminently liberal and juristic view enunciated by the decisions aforesaid. To ensure full scope for the maxim *ubi jus, ibi remedium*, it is necessary that the High Courts, as the tribunals of ultimate resort, should have plenary jurisdiction adequate to the redressing of palpable injustice in every case in which a party is without a remedy under the ordinary provisions of the Code. For this purpose the addition of a clause to this section conferring upon the High Courts a discretionary power to interfere in every case in which the ends of justice require such interference appears to be absolutely necessary.

* * * * *

Signed) V. ANANTAN NAIR,
District Munsif.

MEMORANDUM by M.R.Ry. KARUNAKARA MENON, First-grade Pleader, Calicut.

Now that there is a Bill to amend the Code of Civil Procedure before the Viceregal Legislative Council, the following points are suggested for consideration:—

Section 2.—The term "decree" requires further explanation. It is sometimes doubted whether decree means the decree of the last court when there has been an appeal or second appeal. Whether orders dismissing suits or appeals for default of prosecution or appearance or orders allowing the withdrawal of suits or appeals are decrees (*vide* I.L.R. 3 All. 382; 14 All. 361. *Contra.* I.L.R. 16 Bomb. 23).

The term "immoveable property" has not been defined. The omission causes numerous difficulties. Whether "growing crops" are moveable or immoveable property is a vexed question and requires to be decided. Different enactments define the term differently.

C. The General Clauses Act I of 1868 would seem to take growing crops as immoveable property, being "*things attached to the earth.*" The Transfer of Property Act IV of 1882 while defining the term "attached to the earth," expressly enacts that the term immoveable property does not include standing timber, *growing crops* or grass. The Indian Registration Act III of 1887 says that "moveable property" includes standing timber, growing crops and grass, fruit upon and juice in trees, &c. The Indian Penal Code, section 22, would seem to take growing crops as immoveable, being *attached to the earth.*

In the face of this conflict in the Statutes themselves, the High Courts of Bombay (5 Bom. A. C. 90), Calcutta (5 B.L.R. 124) and Madras (I.L.R. XI Madras 193) have coolly decided that growing crops ought to be treated as immoveable property. Evidently the mischievous result of the above decision has not been considered. For growing crops should then be attached by an order prohibiting the debtor from transferring or charging them in any way and all persons from receiving the same by purchase or otherwise. The sale can take place only 30 days after the said proclamation has been fixed up in the Court-house. The purchaser can get possession only by executing a sale certificate, which again can be issued only after the time allowed by law (30 days) for making objections to the sale, or if any had been made, only after the disposal of such objections; so that some three or four months must necessarily pass from the time of attachment to the time the crops can be harvested. What could be the state of the harvest then? Either the crops might be stolen or they might mature and fall. The attaching officer cannot take the crops into custody under section 269, for they are not *moveable* property. Intending purchasers know all these risks and would bid only a nominal price. The debtor already in distress loses his crops and yet the debt remains not much diminished. Some remedy ought to be provided for this evil.

Section 13.—The following questions deserve attention:—

(1) How far is a decision *res judicata* between defendants? (*vide* I.L.R. XI. M. 204).

(2) Whether decisions of Small Cause Courts will operate as *res judicata* in subsequent regular suits? (I.L.R. 15 B. 104).

(3) Whether the decision of a court of original jurisdiction will operate as *res judicata* in a Small Cause Court?

(4) Whether a decision on a point of law afterwards declared to be erroneous will operate as *res judicata*? (I.L.R. V. M. 304).

(5) How far the omission to urge a claim in a former suit will be a bar to advancing that claim in a litigation?

Section 15.—If after the institution of a suit or appeal in a court having jurisdiction at the time, there be another court opened or authorized to try such suits, or if the law is changed as to where such suits ought to be instituted, what is to be the procedure? Is the first court to try the suit or is it to return it for presentation in the new court?

Section 25.—Suppose a case is transferred on the application of a party, and after giving notice to the other party, from one court to another on the ground that the presiding Judge is biased or prejudiced against the applicant. It so happens that that Judge is afterwards transferred to the court to which the suit had been transferred.

Or suppose there are two or more connected appeals or suits filed in a court. In the ordinary course of business, some of those cases happen to be sent to one court and others to another for disposal. In any of these contingencies, suits or appeals cannot be *retransferred* on the application of a party without notice to the other parties. This is unnecessarily increasing the amount of costs. The court cannot act of its own motion, because it does not ordinarily know that there are such circumstances, and if the circumstances are made known by a party, notice to the other party is indispensable as the Judge has no power under the section to dispense with notice under any circumstances, where there is an application by a party.

It is therefore desirable that the court be authorized to dispense with notice to the opposite party when there is a proper case.

Section 32.—Why should the court's power to strike out the name of a party be restricted to "on or before the first hearing" while court has power to add parties at any stage?

In paragraph 5 of this section it is said that the proceedings against a newly added defendant shall be deemed to have been commenced *on the service of a notice on him.* Ordinarily the date of *instituting the suit in court* without regard to the date of serving notice upon a defendant, is the commencement of proceedings against a defendant. In the case of a newly added defendant, such commencement is put off until service of notice, on him. This distinction is unjust. Courts may take their own time to issue or serve a notice, or a notice issued may be returned unserved and a fresh one may have to be issued. Why should all this time count against plaintiff? By the time notice is actually served on him, the period of limitation might run out. As the date of *filing the suit in court* is the commencement of proceedings ordinarily, so the date of the application to the court to add a new defendant should be made the commencement of proceedings against the defendant if added.

Orders refusing to add parties should also be made appealable under section 588.

Section 39.—(1) It is very necessary that the Chief Ministerial officer of a court should be competent to attest a vakalatnama to be filed in that court.

(2) Just as clients are at liberty to revoke the appointment of a pleader by a writing signed by him and filed in court, so pleaders should also be allowed to withdraw from a case by a similar writing.

It is doubtful if a pleader who conducted a suit up to decree can execute the decree without a fresh vakalatnama. The recent amendment of section 647 (Act VI of 1892, section 4) would seem to authorize a pleader to execute a decree on the original appointment, as the proceedings in execution are declared to be proceedings in suit.

Section 43.—If leave to omit to sue for any of the remedies be refused, the plaintiff should be authorized to amend the plaint by including the remedy intended to be omitted. Otherwise a plaintiff who, in the hope of obtaining the court's leave, omitted to include any of the remedies to which he may be entitled, but who was afterwards refused such leave, will be without any remedy, for he cannot bring a fresh suit.

Section 44-*A.*—This section authorizes the inclusion of damages to immoveable property in suits for its recovery, only if the property be held under a contract. So, if a trespasser commits waste on the land or misappropriates moveable property found on the land, the owner in suing to recover possession of the land cannot sue for damages also in the same suit as the section now stands. This anomaly should be removed.

Section 101.—If a defendant did not appear when called, and was declared *ex parte* and the court proceeds with suit, the defendant cannot in the course of the proceedings apply to be heard in answer to the suit on proof of good cause for his previous non-appearance; for it is only when the court has *adjourned* the hearing of the suit *ex parte*, but when it is proceeding with the suit *ex parte*, that a defendant may so apply. As the sections now stand, he will have to wait until decree is passed and then apply under section 108. This distinction ought to be removed. Many a time defendants do not turn up immediately they are called. It is hard that they have no remedy, unless the hearing has been adjourned.

Section 116.—This section allows amendment of written statements only under the circumstances therein mentioned, and there is no section allowing amendment for any other reason. When under section 53 a plaintiff is allowed considerable latitude in the matter of amending plaints, it is hard that a similar indulgence should not be given to the defendant as well. As the code now stands, a defendant cannot alter or correct even a clerical error in a written statement.

Section 120.—It is very necessary that the courts should have power to direct the personal appearance of either party *at any stage of the suit*. Now, after the first hearing, courts cannot order any party to appear in person. If a party is cited by the other party as witness, he is just in the same position as a stranger (section 178). If therefore he succeeds in evading service of process and the court is satisfied of it, yet his personal appearance cannot be ordered. Party witnesses ought to be more under the control of courts.

Section 137.—The section does not provide for the placing of a certified copy of the record sent for and perused on the record of the case. Section 142-A takes in only original documents and copies substituted under section 141-A.

Section 182.—This section does not require that depositions should be signed by witnesses. Yet witnesses are called upon to sign in all courts.

Section 205.—Under this section decrees bear date the day on which judgment was pronounced. It is however a notorious fact that decrees come into existence only long after the day of judgment. It is desirable that the date on which the decree is signed should appear on the decree and be the commencement of the period of appeal. Otherwise, it often happens that the period of appealing from a decree runs out before the decree comes into existence. It is unjust that intending appellants should be required to apply for *copy* of a decree before the *original* is in existence (*vide* I.L.R. 12 All. 461. *Contra* 13 Cal. 104).

Section 206.—It is necessary to lay down which court is competent to amend a decree, when there has been an appeal or a second appeal. High Courts differ strongly on this point (*vide* I.L.R. 9 Mad. 354. *Contra* I.L.R. 11 All. 267). The Madras High Court recently called in question the correctness of their decision in I.L.R. 9 Mad. 354 (*vide* I.L.R. 15 Mad. 403). But they did not deem fit to decide the question by a reference to the full bench. The Allahabad High Court persists in its opinion that the last court is the only court competent to amend a decree (*vide* I.L.R. 14 All. 226). The Calcutta High Court falls in with the view of the Allahabad High Court (*vide* I.L.R. 21 Cal. 259). Here the question whether orders dismissing appeals for default of prosecution or appearance or for failure to furnish security or pay additional court fees or orders allowing withdrawal of appeals falls within the definition of the term *decree* (as suggested in the commencement of this memorandum) becomes important. For when any of the circumstances enumerated above has occurred, the question will be which court is competent to amend the decree, the court of first instance or the appellate court?

Section 210.—It is necessary that courts should have power to demand security before passing an instalment decree, and such security should be enforceable under section 253.

Section 223.—It requires to be decided whether a court can execute a decree for a larger amount than the limit of its pecuniary jurisdiction. High Courts differ (*vide* I.L.R. 7 M. 307. *Contra* 16 Cal. 457).

Section 228.—It is desirable to say if the latter court can only execute the decree, *i.e.*, recover money under the decree and has no other powers. The words "in executing the decree" have led to different constructions. It is said such a court cannot entertain insolvency proceedings (I.L.R. 11 Mad. 301) or transfer it to another court (I.L.R. 3 Cal. 512). It is very inconvenient that debtors or decree-holders should have to appeal to the original court for either of those purposes. The difficulty can well be conceived when a decree is transferred to another court at a distance, say from Bombay to Calcutta or from Madras to Calcutta. The words "with regard to" may be substituted for "in executing." This amendment will have the required effect.

Section 230.—The word "granted" is evidently misplaced (I.L.R. 6 Mad. 359). What is intended is that the application should be *made* within the specified period, as parties are unable to get their applications *granted* by courts within such period.

It is also necessary to lay down that the provisions of section 5 of the Indian Limitation Act apply to applications under this section (I.L.R. 18 Cal. 631) as in section 372-A added to the Code by Act VII of 1888, section 32.

Section 232.—This section requires amendment. If a decree has been transferred to another court for execution, a transferee of such decree has no court to apply to for enforcing the decree; for he can only apply to the court which passed the decree for execution under this section. But the court which passed the decree cannot execute it, as it has been transferred to another court, and the court to which it has been transferred cannot receive his petition as it is not the court *which passed the decree*. The insertion of the words "or in which execution is pending" after the words "which passed it (decree)" will remedy this flaw.

Orders refusing to recognize an assignment should be made appealable.

Section 235.—The application does not require to be *signed* by any person. This is evidently an omission. The insertion of the words "signed and" before the word "verified" will answer the purpose. Should a copy of the decree accompany the application for execution?

Section 239.—The addition of the words "upon such terms as to security or otherwise as the court thinks fit" at the end of the 2nd paragraph would be desirable. For, if property or person be restored or discharged, and the result of the application be adverse to the applicant, the court has no hold on either of them now.

Section 244.—The phrase "parties to the suit in which the decree was passed" had better be altered into "parties to the *decree*." If a person who was impleaded in suit be declared an unnecessary party to the suit and exonerated from the operation of the decree, why should he proceed or be proceeded with under this section? (*vide* 10 W.R. 191).

It also requires to be defined whether "representatives" in their character as such or in such character as well as in their individual capacity is intended by the section.

Section. 246.—It will be well to insert the words "or for the delivery of ascertained goods" after the words "payment of money" (*vide* I.L.R. 10 All. 188).

Section 257.—(*a*) If a decree has been transferred to another court for execution it is the duty of the latter to executive it; while so can a decree debt be paid into the court *which passed the decree*, and if so, what is the procedure?

(*c*) If decree directs payment on a specified day and that day is a holiday, will payment on the next court day be as good as payment on the day specified? (I.L.R. 5 Cal. 906). Some provision as to notice to decree-holder and its effect is necessary.

Section 257-*A*.—It is a vexed question whether a bond for a judgment debt without sanction of court is altogether void (*vide* I.L.R. XI. Mad. 469) or only in execution (I.L.R. 12 Mad. 61). It will be well to fix how far such agreements will be invalid as in section 258.

Section 258.—This section purports to enact that any payment without being certified will be ineffectual in the execution proceedings and that any payment if so certified will be conclusive in so far as that decree is concerned. If, however, a payment once made and certified turns out to be ineffectual, as for instance the decree-holder being obliged to refund the purchase money on the cancellation of a sale or otherwise, it requires to be provided that the decree-holder may take out execution of his decree afresh.

Section 259.—The section begins with the manner of executing decrees for any specific moveable property or share therein or for the recovery of a wife; but further on it enacts that the specific property or share therein may be seized and delivered. How is a decree for the recovery of a wife to be executed?—In view of the proposed amendment in section 260 by doing away with imprisonment for enforcing decrees for restitution of conjugal rights, it becomes all the more necessary to lay down how a decree for the recovery of a wife is to be executed.

Section 265.—How are decrees for the partition or the separate possession of a share of an undivided estate *not* paying revenue to Government to be executed?

Section 268 (*a*).—How is a debt secured by mortgage to be attached? By a prohibitory order under this section or as immoveable property? High Courts differ (*vide* I.L.R. 9 Cal. 511 *contra* 15 All. 134 and 20 Cal. 805).

In paragraph 3, the course to be followed by a debtor who does not repudiate the debt is provided, but provision is wanting as to the procedure to be adopted by alleged debtor who denies the debt; for it is said that no claim is entertainable in the case of attachment of an alleged debt (I.L.R. 4 Bom. 323).

In paragraphs 4 and 6 the words "or local authority" require to be inserted after the words "Railway Company" in view of section 626 proviso.

Section 276.—The period for which an attachment in execution of a decree shall be in force requires to be defined as has been done in the case of attachments under other circumstances, viz., sections 259 and 260. The omission to do so causes numerous complications. A decree-holder may effect an attachment and then drop further proceedings for any length of time. He may long after apply for sale of the properties. In the meanwhile, the property might be alienated by private sale or court auction. Complications arise as to the effect of the attachment originally effected (*vide* I.L.R. 10, Cal. 416; 17 Mad. 58 and 180). If the period of the efficacy of an attachment be fixed, all difficulty will be removed.

Section 278.—When decree itself directs sale of the property, it is said there is no necessity to make an attachment (I.L.R. 4, Bom. 515; 18 Bom. 98). Only a sale proclamation need be issued under section 287. In such cases, courts refuse to entertain any claim to or objection to the sale of the property as such property has not been *attached in execution of a decree* in the wording of section 278 (I.L.R. 14, Cal. 631). This practice works immense mischief sometimes. Very often purchasers find to their cost that they did not get any interest in the property which they purported to buy. As any claim that may be made would not be investigated, there is no chance of the merits of the claim being known before the sale. It is equally injurious to decree-holders and debtors. When a claim is put forward, but not investigated, property would not fetch a reasonable price. So decree-holders lose their security and the debtors their property for nominal prices and it might happen that the claim of which notice was given is altogether unfounded.

Hence this section requires amendment by the addition of the words "or proclaimed for sale" after the word "attached."

Section 283.—Whether the judgment-debtor is a party to an order in a claim case is a vexed question (*vide* 4 M.H.C. 47; *contra* I.L.R. 15, Cal. 674; 11 Bom. 114; see also I.L.R. 13 Mad. 366; 17 Cal. 57 and 711). Some definite provision on this point is necessary.

Is the right given by this section subject to the provisions of section 42 of the Specific Relief Act I of 1877? It is differently held by the High Courts at different times (*vide* I.L.R. 9 M. 206 *contra* 16 M. 140). It is hard that the privilege afforded by this section should be subject to the restriction in section 42 of the Specific Relief Act. Suppose there is a mortgage of Rs. 2,000 over ten items of property—one of such items is attached and a claim put in by the mortgagee is rejected by the court after investigation. Is it not unjust to require the mortgagee to sue for the realization of the full Rs. 2,000 from all the ten items in order to substantiate a claim to one of them? The reasoning in I.L.R. 9 Mad. 206 may be adopted and it be declared that a suit for the establishment of the right claimed may be brought notwithstanding anything contained in any law to the contrary.

Section 285.—If property which has been latterly attached by another court be sold away by the former court, what should be the procedure? Is the sale invalid if the latter court is of a superior grade? Or are the sale-proceeds to be placed at the disposal of such latter court, or is such latter court to sell the property again, discarding the sale by the first court?

Section 291.—If when a property is put up for sale in execution of a decree and there are other decree-holders applying for rateable distribution, the debtor pays up the amount due under the decree for which property is put up for sale, can the sale be stopped? If the sale cannot be stopped (I.L.R. 10 M.157) can the other decree-holders proceed with the sale on the original proclamation.

Section 295.—When can assets said to be *realized*, immediately on the sale or after the sale is confirmed (I.L.R. 18, Cal 242)? If after a property is proclaimed for sale, the debtors pay up the amount, can that amount be said to be *assets realized* under this section? In such a case, or if the decree for which the sale has been proclaimed is found to be inexecutable, or if the holder of such decree is unwilling or omits to proceed with the sale, can the applicants for rateable distribution proceed with the sale on the proclamation already promulgated?

Section 311.—This section allows sales to be set aside only when there is material irregularity causing substantial injury—not on any other ground—not even when there was *fraud* on the part of any party. If purchaser has been misled, he has no remedy under this section (I.L.R. 20, Cal. 8). The section should be amended to take in any proper case for cancelling a sale.

Further, has substantial injury to be *proved* to have resulted from the irregularity (I.L.R. 14 M. 227 P. C.) or can injury be inferred from a material irregularity (I.L.R. 20 Cal., 599)?

Section 313.—The section seems to contemplate only cases in which judgment-debtor has no saleable interest at all. If debtor is found to have had only an interest of a much smaller value than what was advertized, the purchaser, it would appear, has no remedy (*vide* I.L.R. XVII M. 228). He cannot come in under section 311 also. This inequity should be removed by making suitable amendment in this section as well as in section 315.

Section 316.—If the purchaser's title dates from the date of the sale certificate only, who is entitled to the rents and profits up to that date? Or if a purchaser who is already in possession fails to obtain a sale certificate, what would be the result? Has he obtained a title or does the sale go for nothing?

Sections 331, 332, 335.—What sort of position is contemplated requires to be specified. Courts are inclined to recognize only *actual* possession. This is hard. Owner or mortgagee may be in possession through tenant or mortgager. If a decree-holder or purchaser collude with a tenant or mortgager, he can get possession to the prejudice of the owner or mortgagee, who then will be driven to the necessity of bringing a suit at great trouble and cost. Possession must be declared to be actual or constructive.

Section 336.—It is incumbent on courts to send debtors to jail as soon as they are arrested and brought before them, unless they intimate their intention to apply for insolvency. Yet courts find it necessary, and they do so as a matter of fact, to leave the debtor in the custody of the peons in order to enable him to raise money and pay off. This is not warranted by the Code as it now stands. Suppose a respectable man is all of a sudden arrested and brought before the court. He has no intention of applying for insolvency. He can and will pay off if a short time is allowed. Now, the section requires him to be sent to jail immediately. So the power given to courts under sections 337 A (3) and 349 to leave the debtors in the custody of an officer of the court should be extended to cases in which debtors are arrested and brought before courts, a reasonable period, say a week, being fixed.

Again, paragraph 3 provides that security should be given (1) that the debtor will appear when called upon and (2) that he will within one month apply under section 344; while the next paragraph prescribes the penalty of the security being realized only if debtor fails so to apply. So that if the debtor who has been released on security does put in an insolvency petition, but fails to attend when called upon or to prosecute the petition, the security is not realizable. It cannot also be said that section 349 governs the procedure after the filing of an insolvency petition, for that section applies only when the debtor is *in custody*, but not when he has been released on security. Therefore it is necessary to insert the words " or to appear when called upon, or to prosecute the application if made " after the words " fails so to apply."

The courts should also be authorised to extend the period within which an insolvency petition may be filed, if a proper case is made out for such extension.

Section 349.—The security given under this section should be made enforceable summarily as in section 336. It is said that such security cannot be enforced summarily (I.L.R. 7 Mad. 273). This is inconsistent with the other provisions of the Code (see also section 549).

Section 351.—Experience shows that it is necessary to add the following to the last paragraph of this section:—

" Whereupon the judgment-debtor if already released, shall again be taken into the custody of the court to be dealt with under section 336 of this Code."

Section 372.—The provision contained in this section should be extended to proceedings in extension also. At present, if a judgment-debtor's interest passes to another after decree, either by assignment or by operation of law, there is no means of enforcing such decree against such transferee.

Section 380.—Security furnished under this section must be enforceable summarily (section 253) as suggested under section 349.

Section 407.—Orders under this section should be made appealable under section 588.

Section 442.—The words " if the pleader of the party or other person knew, or might reasonably have known the fact of such minority " ought to be added after the word " presented." This protection is given in section 444, and there is no reason why the same should not be introduced in section 442 as well.

Section 463.—The provisions of sections 440 to 462 apply only if one has been *adjudged* a lunatic (I.L.R. 6 Mad. 380), see however I.L.R. 16 B. 32. So if one has not been so adjudged there is no means of that one suing or being sued through a next friend or guardian. In such a case proceedings should first be taken to have the lunatic so adjudged before any suit can be field. Even this is not possible if a stranger has to bring a suit against a lunatic not so adjudged, for he is not competent under Act XXXV of 1858 to initiate proceedings in respect of one's lunacy.

This difficulty should be removed.

Sections 545, 546.—Security given under these sections should be declared to be enforceable summarily as in the case of security given under section 549.

Section 561.—Can a respondent file an objection memorandum in the case of an appeal filed under section 544 as against parties who are not represented in appeal? If so, the court would be trying a case against a person behind his back. The memorandam of objection should be limited to the appellant who is before the court actually—not constructively (see however I.L.R. XI B. 596).

It has also to be decided whether an objection memorandum can be adjudicated upon, if the appeal is withdrawn, or dismissed for default of prosecution or otherwise disposed of without going into the merits (I.L.R. 10 All. 597).

Section 584.—On the construction of this section the Privy Council has repeatedly ruled that High Courts in second appeals are bound to accept findings of fact by the lower appellate court (I.L.R. 20 Cal. 93) however erroneous such findings might appear to the High Court (I.L.R. 18 Cal. 23). This state of the law is very much to be regretted. Even the Privy Council not unfrequently looks into details of evidence and interferes with findings of fact. Why then should High Courts be debarred from interfering with findings of fact whenever such a course is found actually necessary to meet the ends of justice? In this connection the following may be aptly quoted from a recent issue of the *Madras Standard*:—" Your client, I have no doubt, is as fair as a lemon. The District Munsif saw him and pronounced him to be fair. But the District Judge who has had no opportunity of seeing your client comes to the finding, without rhyme or reason, that your client is as black as jet. And we Judges of the High Court are here to uphold the finding of the District Judge. That is law, Sir, that is law; if you wish to have that law altered, you had better go to the wiseacres of Calcutta." So said that eminent jurist, the late Mr. Justice Holloway, when a High Court Vakil was vehemently arguing against a perverse finding of a District Judge in a case of second appeal.

The High Courts would, however, get over the Privy Council rulings by remanding appeals for revised findings on question of fact. But this practice has also been condemned of late.

Hence, the powers of the High Court in second appeals should be considerably enhanced in the matter of findings on fact. In the case of appeals to Her Majesty in Council, the High Courts are at liberty to allow an appeal being filed if they think fit, even though the value of the subject-matter falls short of the prescribed limit (sec. 595 ce.). Likewise, High Courts may be invested with power to look into evidence if the ends of justice require it as in the case of non-concurrent findings.

Section 622.—The scope of this section should be considerably expanded. The High Courts interfere now, only if the court whose order is in question, has had *no* jurisdiction in the case. If the court has had jurisdiction, they refuse to interfere, however erroneous or absurd the order in question may be. This state of the law requires improvement.

Section 624.—This section sometimes works great hardship. For, under it a review cannot be admitted by a succeeding Judge, even for a patent error, unless such error be *a clerical error apparent on the face of the decree*. Even though the error, clerical or otherwise, be apparent on the face of the *record*, there is no remedy. In view, however, of the constant changes of Judges, it is very necessary that the scope of this section should be somewhat enlarged.

From the District Judge of North Malabar, dated 23rd March 1895, No. 121.

ABSTRACT.—Stating that he has no remarks to offer with reference to circular No. 614.

From M. D. BELL, Esq., Acting District Judge, South Canara, to the Chief Secretary to Government, dated Mangalore, 26th March 1895, No. 343.

ABSTRACT.—Stating that he has no remarks to offer on the proposals to amend the Codes of Criminal and Civil Procedure.

From F. H. HAMNETT, Esq., Acting District Judge of Kistna, to the Chief Secretary to Government, dated Masulipatam, 27th March 1895, No. 1027.

In reply to circular No. 614, dated 19th March 1895, I have the honour to make the following proposal for the amendment of the Civil Procedure Code, which in my opinion, if adopted, will enormously facilitate the disposal of civil suits and further the ends of justice.

2. The proposal is that a proviso should be added to sections 179 and 180, Civil Procedure Code, to the following effect :—

"Provided that the court may refuse to allow witnesses to be examined on points which in its opinion have been already sufficiently proved, or whom it considers are being examined for the purpose of vexation or delay or for defeating the ends of justice."

3. The expression "points which in its opinion have been already sufficiently proved" is taken from section 142, Indian Evidence Act, from which it is clear that the Legislature recognizes that there are points about the truth of which the court can come to a definite decision during course of the trial before the whole evidence is complete.

4. The expression "for the purpose of vexation or delay or for defeating the ends of justice," in my proposed amendment, is taken from section 257, Criminal Procedure Code, which empowers a Magistrate to refuse to summon witnesses cited by an accused person if he considers that they are not being cited *bonâ fide*. Section 253, Criminal Procedure Code, gives a Magistrate power to dismiss a complaint without examining all the complainant's witnesses if he considers the charge to be groundless. Section 216, Criminal Procedure Code, empowers a Magistrate to refuse to summon witnesses to appear for an accused person committed to sessions, when he considers that they are cited for the purpose of vexation or delay or of defeating the ends of justice.

5. When there are so many safeguards in the Criminal Procedure Code to prevent vexation, delay and the defeat of the ends of justice by the unnecessary examination of witnesses, I do not understand why no similar provisions find place in the Civil Procedure Code.

6. In the mofussil courts, pleaders notoriously waste the time of the courts in examining witnesses to prove points already sufficiently proved, or for the purpose of causing vexation and delay to the other side and of defeating the ends of justice by unnecessarily prolonging an inquiry and swelling the costs of litigation.

7. My experience is that it is impossible to effectually stop such waste of time without some modification of the Civil Procedure Code such as I have suggested. Civil suits would be disposed of in about half the time they now occupy if the amendment were adopted.

8. I enclose a letter from the District Munsif of Bezwada containing his suggestions for the amendment of the Code.

ENCLOSURE.

From M.R.Ry. C. RAMA RAO, Pantulu, District Munsif of Bezwada, to the District Judge of Kistna, dated Bezwada, 19th March 1895, No. 61.

If I may offer any suggestions relative to the recasting of the Codes of the Civil and Criminal Procedure a little after the date prescribed in G.O., No. 2795, Judicial, dated 17th November last, I respectfully beg that the undermentioned points may be considered as they cause frequent difficulties.

A defendant secures his property in a house and locking up the outer door goes abroad. There seems to be no express provision enabling the court to order the breaking open the lock although the courts, after publishing a notice by tom-tom, are getting the locks broken and realizing the property. The case law authorizing such procedure is to be found at page 189, volume V of the Madras High Court, and page 89, Bombay III, and the November number of the Indian Jurist for 1878. These reports show that section 271, Civil Procedure Code, is applicable only to the executing officers. Similarly, there must be provision to force open the lock of a premises whose delivery was directed.

2. Just at a trial of a civil suit, it is proved by affidavit or otherwise that a document or account affecting seriously the merits of the case is with a party or a third person present in the court; on being asked to show it, its existence is denied. Similarly, a party or witness, after proper summons to produce a document, denies its existence and it is proved by persons who saw the document with the person; there is no provision to order a search. If justice is the aim, there must be such power given to the Civil Courts.

3. A witness who disobeyed summons and who was brought under arrest can be fined by the court. One who disobeyed the summons and avoided warrant and who before attachment of property but on the day appointed in the proclamation appears cannot be fined by the Civil Court for the treble delay caused by his conduct. Similarly, one disobeying summons and avoiding warrant can appear on the day fixed in the warrant without being punished. These provisions are inconsistent.

It is true that the witnesses in the two latter cases might be sent to a Magistrate. But this means annoyance to the court as well as to the witness because the former cannot send the case to the nearest 2nd or 3rd class Magistrate, but it must send it to the Divisional or Sub-divisional Magistrate with 1st-class powers, and that officer in his turn will send it on to the 2nd or 3rd-class local Magistrate. I think it therefore necessary to strike off this circuitous course and empower the Civil Courts to send up such cases to the nearest local Magistrate having power to try the offences.

4. In appealable cases the omission to take the signature of a deponent on his deposition taken down by the Court and read over to him is objected to in some places. As it cannot cause great delay, it may be provided for.

From G. F. T. POWER, Esq., District Judge, Nellore, to the Chief Secretary to Government, dated 30th March 1895, No. 246.

With reference to your circular No. 614, dated the 19th instant, calling for my remarks on the proposals to amend the Codes of Criminal and Civil Procedure as required in G.O., No. 2795, dated the 17th November last, I have the honour to

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forward herewith copy of a letter addressed to me by Mr. W. Gopalacharyulu, 1st-grade District Munsif of Nellore, suggesting certain amendments to the Civil Procedure Code to which I have nothing to add.

ENCLOSURE.

From M.R.Ry. W. GOPALACHARYULU, Avargal, District Munsif, Nellore, to the District Judge, Nellore, dated 28th March 1895, No. 212.

With reference to proceedings of the District Court, No. 42, dated 25th instant, I have the honour to state that the following are some of the points in which an amendment of the Civil Procedure Code seems necessary :—

(1) According to section 3 of Transfer of Property Act IV of 1882, immoveable property does not include growing crops, but there is no definition of immoveable property in the Civil Procedure Code and therefore the definition given in the General Clauses Act I of 1868 has to be adopted. According to clause 5 of section of this Act, immoveable property "includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." It follows that growing crops have to be treated as immoveable property. Thus when decree-holders apply for attachment and sale of standing crops, the sale cannot be held until thirty

days after the sale notice has been fixed up in the court-house and the sale cannot be confirmed for sixty days and the purchaser cannot get possession until then. This procedure must take up over three months. Owing to this delay and because there is no provision for having the crops cut after attachment and before delivery to the purchaser, both the decree-holder and judgment debtor sustain substantial loss. Under section 503 a receiver may be appointed for gathering the crops, but the cost in several cases is prohibitive. It seems therefore desirable to define immoveable property in the Civil Procedure Code so as to exclude standing crops.

(2) Section 463 states that the provisions contained in sections 440–462 shall, *mutatis mutandis*, apply in the case of persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. It was held that, unless a person is so declared to be a lunatic, no guardian *ad litem* can be appointed under the Civil Procedure Code—I.L.R., 6 Mad., 380. There seems to be no provision as to the procedure to be adopted in case of persons who are lunatics, but who have not been declared to be such in the manner aforesaid. It may be true, as held in I.L.R., 7 Cal., 242, that a person not so declared to be a lunatic does not lose his civil rights; but it is not clear how a person incapable of watching his own interest will be able to conduct his own business or instruct a professional man. The procedure in Act XXXV of 1858 is not generally resorted to except in cases where the lunatic is possessed of some property, and it may be a hardship for poor people to proceed under this Act when a suit of small value has to be instituted. It will be safe therefore to make some clear provision.

(3) Section 253 states as follows—

"Whenever a person has, before the passing of a decree in an original suit, has become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him, to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant: Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety."

There is no clear provision that this course may be adopted in cases where security is given for decrees of Appellate Courts. Section 610, as amended by Act VII of 1888, reproduces the provisions of section 253, as regards security given for costs, when an appeal to Her Majesty in Council is preferred. In I.L.R., 13 Bom., 411, and in I.L.R., 13 Mad., 1, it was held, following the view of the majority of the Allahabad High Court, in I.L.R., 2 All., 604, that all the rules applicable to execution of original decrees including section 253 were made part of section 583 but in a later case reported in I.L.R., 15 Mad., 203, a different view seems to have been taken. A clear provision seems desirable on this point also.

From the Acting District and Sessions Judge of Ganjám, to the Chief Secretary to Government, dated Berhampore, 9th April 1895, No. 690.

As to the Code of Civil Procedure, Act XIV of 1882, I beg to submit that in Indian Law Report XII, Allahabad, 392, it was held that section 647 of the Code makes section 373 applicable to proceedings in execution of decree; but a contrary decision was arrived at in Indian Law Report XVIII, Calcutta, 635.

2. The opinions of two of the highest Courts of law being thus at variance on a very important point, I request that the difficulty thus arising may be removed by adding a clause to section 647.

(Signed) R. H. SHIPLEY,
Ag. District and Sessions Judge.

Regr. No.

HOME 1892 DEPT.

[ ]

From the Government of
Fort St. George.

Issued

Recd. *Encl.*

Letter, No. 2193, 30th Oct. 1895.

OCTOBER.

ode of Civil Procedure.

Ordering the despatch to the Government of India of a letter forwarding the opinions of the various officers and bodies consulted on the revision of the — with the remarks of this Government.

CURRENT No. 305

Judicial (1895) Department

From

The Actg Law Secretary Judge
to the Govt

To

The Chief Secretary,
to the Government of
Madras.

CHIEF SECRETARY
RECEIVED ON
INWARD REGISTER

Dated 21st January 1896

Despd do

Recd 25th

Regd 26th

Enclosure 1

No 103

Subject

Submitting suggestions on the proposed revision of the Code of Civil Procedure referred to in G. O dated 14th November 1894 No 2795 Judicial.

CURRENT NO. 305

Godavary District Court.

Rajahmundry 21-1-1895.

No. 103

108

From

G. T. Mackenzie, Esquire,
The District Judge,
Godavari.

To

The Honorable Mr. E. Gibson,
Ag. Chief Secretary to the Government,
Madras.

Sir,

In reply to G. O dated 17th November 1894, No. 2795, Judicial, regarding the Civil Procedure Code, I have no remarks of my own to offer but I forward in original a Memorandum by Mr. White, District Munsif of Ellore, which contains

practical suggestions.

2 The District Munsif of Tanukwada asks that the Code may decide the vexed question whether standing crops are moveable or immoveable property. He also points out that when an instalment decree is given under section 210 the judgment-debtor after judgment and before an instalment falls due can alienate his property. He therefore suggests that power be given to the Courts to attach after judgment and before the instalment is due.

I have the honor to be
Sir
Your most obedient Servant

S. MacKenzie name here
A. District Judge

Sh.

Memorandum of suggestions for amend-
-ment of the Civil Procedure Code.

Section 2- "Signed"- Marks to be made by executant himself, to point the way to avoidance in private documents of dangerous abuse (now widely prevalent) of one person marking for another. Every man can make a mark for himself.

Section 36. — Add a clause permitting an Pleader to appear for another, in the unavoidable absence of Pleader originally retained. It has now, in spite of absence of sanction in C.C.P., become the universal practice of courts to permit such appearances, without which the business of all courts would be seriously retarded. Pleader appearing for another should be required to produce a written authority.

Section 43, 44, 45 Explanation and illustration of "Same cause of action" necessary, to avoid disputes now continually arising, as to multifariousness e.g.

in case of suits for land and dama-
-ges to land or trees thereon, suits for
houses and damages to houses or for
property deposited therein, suits to
set aside widows alienations to -
different persons and suits to re-
-move attachments by different
creditors.

Advisable to make it clear
that a Plaintiff is not bound to in-
-clude claim for mesne profits in
suit for land. Claim for mesne
profits usually compromised once
title is settled. Unnecessary exc-
-pense and delay to parties caused
by compelling ejector to sue at
once for mesne profits, if he wants
them.

Section 45. Authority needed
to enable court to "split suits" as
is now frequently done without
authority. No provision for se-
-parate trials add provision for
separate numbers, judgment and
decree. Especially necessary in case
of widows alienations where half
a dozen alienations have often to
be kept pending, until disposal
of question as to one.

Section 49 --- Provision to be reversed - Plaints
to be written in English, or with -
the permission of the court, in the
language of the District. All Judges,
Pleaders and Clerks now know -
English, and vernacular pleadings
belong to a past era. Evidence (more
important than pleadings) now
taken in English. Ambiguity and
prolixity of vernacular pleadings
and commonly diglott nature of
(English expressions continually -
made use of in default of verna-
-cular) done away with.

Section 50 — Penultimate clause. No Head
Clerk can find time to compare
all copies. If he attempted to do so

he could do no other work. Useless
burden put on Head clerks which
they generally evade by perfunctory
examination.

Substitute following:—

"All copies and state-
-ments above said shall be certi-
-fied by the Plaintiff or his
Pleader and any Plaintiff who
puts in a copy or statement
disclosing a material error or
omission shall be liable to have
his suit dismissed on such error
or omission being brought to the
notice of the Court by the De-
-fendant."

Section 100 (a) for "may proceed Exparte" substitute "may pass a decree against him or make such order in relation to the suit as it thinks fit" (Section 113)

"This will obviate the use-
-less waste of time now involved
in taking evidence in Exparte cases. The number of such cases is very large and at least one witness has to be examined in each case, involving the loss of two or three hours daily before contested litigation can be taken up.

Section 138. — Amend to "The parties or their Pleader shall produce in Court at the first hearing of the suit, all the documentary evidence" etc As matters stand the Defendant is not bound to put in his documentary evidence until it is called for by the Court. The Court cannot know what docu-
-ments he has. No order is con-
-sequently made and the De-
-fendant produces his docu-
-ments when he pleases, to the disadvantage of the Plaintiff.

Re-enact here Sections 59 and 60, with reference to Defendant,

requiring him to produce all his documents with written statement, or put in list. No reason why these provisions should apply to Plaintiff and not to Defendant.

Chapter XII - Insert a provision authorizing the Court at the first or any other hearing to suggest terms of compromise to the parties or to appoint a Pleader or other person to act as a Conciliator. A large number of suits would thus be amicably adjusted.

Section 159 - Insert provision permitting services of summonses and warrants to witnesses by any Court in any other Court's jurisdiction by its own officers - necessity for transmitting summonses and warrants (latter through District Court) a useless and troublesome clog on disposal of suits.

Section 160. — For "shall" substitute "may" - Parties should be allowed option of paying witnesses batta to witnesses directly - All witnesses do not expect payment of Batta and may frequently be willing to come to Court (especially for short distances) without payment. Witnesses batta often forms a heavy item of costs of suits. No reason to insist on payment with every witness summons. An immense amount of account keeping will be avoided - Witnesses may take payment from parties as they please, or not. But tender must be proved (Section 174 Explanation) before warrant of arrest can be obtained.

Section 163. — Insert that every witness summons shall direct witness to attend the Court on all days to which the suit may be adjourned,

unless his further attendance is dispensed with by the Court or the party summoning him, by endorsement on summons. This will obviate necessity of taking out fresh summonses to witnesses for each adjournment involving useless expense and delay in case of non-service.

Chapter XIX. Insert a provision for execution of warrants of arrest of any Court within the jurisdiction of any other Court, by its own Officer without necessity of transmitting decree to such other Court. Reasons obvious. The tedious process of going from Court to Court with decrees before satisfaction can be obtained should be done away with.

Section 230.— For "Court which passed the decree or officer if any appointed on this behalf"

and "the proper officer" substitute "Chief Clerk"— Substitute "Chief Clerk" for "Court" in all provisions relating to the execution of decrees. The Head Clerks of all Courts are now men of education and ability to whom the task of executing decrees can be fully delegated, subject to a provision that in all contested matters the parties shall have the right of submitting orders made by the Chief Clerk to the Court for revision. This would relieve all Judges of an immense amount of purely ministerial work which can be performed with equal efficiency by Chief Clerks, leaving Judges free to devote twice as much time to the disposal of suits.

Particular functions (Section 278, et seq., Section 244, Sections 311, 312, 328 etc, may, if thought,

fit be reserved to Judges.

It will be a consider-
-able measure of relief to Judges
if disposal of even uncontested-
execution applications only is re-
-legated to Head Clerks.

Section 266 c. Imperfectly under-
-stood. Ryots houses are as a mat-
-ter of fact being attached and
sold up everywhere, regardless of
this provision. No benefit to ryot
to provide that his house site may
be sold under him but not tim-
-ber and stones- Better to allow
materials to be attached and not
site. Exempting materials and-
sale of house site is a positive
injury to him as he gets only a
fraction of value of house and site.
Ryots have great difficulty in
getting sites in villages. No
difficulty in procuring mud
and sticks- Sell a ryots' site

and you turn him out of the vil-
-lage and break him completely-
Sell his materials only and he
builds a new house tomorrow.

Far better to exempt both
house and site or exempt site &
and make materials liable.

Section 278 et seq. The Code contains no provision for
claim petitions in case of property
ordered to be sold under mort-
-gage decrees. Property ordered to
be sold by decree is not now
attached- consequently Section 278
not applicable and claimants
are compelled to file suits with-
-out summary remedy.

Section 278 might be -
amended by inserting the words
"or to the sale of any property
ordered to be sold in accordance
with a decree"

Chapter XIX. - Provision to be made for "striking
off" of execution application (long

standing practice for which Code contains no authority) as to effect of which there is a conflict of decisions- matters would be simplified by provision that execution application not prosecuted may be struckoff of the file and that attachments made under such application shall ensure, notwithstanding the striking off of the application and that applications struckoff may be restored on application.

Section 283.- Doubtful if claimant against whom order made has right of applying for review which right may be usefully granted.

Section 291. Provision to be made that no immoveable property shall be knocked down except in presence of Court and after Courts approval and that Court shall satisfy itself before knocking down, immoveable property that a fair price has been obtained or that it is not likely that a better price will be obtained. A Government valuation is now put on all property but it depends entirely on individual Munsiff whether sale is adjourned for better prices or not. Usually left to mercy of Amin.

Chapter XXV- Provision to be made for commissions for sale of immoveable property. It would be a great advantage if Courts in place of invariably selling immoveable property by auction had option after failure of public sale of deputing a Commissioner to negotiate private or commission sales, within a limited period. There would be some assurance in this case that every effort had been made to obtain a fair price, especially in frequent case

of minors, estates which are imper-
-fectly protected from sale in
collusion with fraudulent guardians.
Section 460 - Provision to be made
that no immoveable property of
a minor shall be sold in auction
until the Court is satisfied that
the debt cannot be discharged by
sale of any property of the minor
other than that sought to be sold,
by Commission sale or otherwise.
Chapter XXXIV - Doubtful whether
Section 276 applies to attachments
before Judgment. This should be
made clear.

Disputes often arise
whether attachment or aliena-
-tion by deed was first in point
of time and often next to im-
-possible to decide question. Ad-
-visable to make provision
that where an alienation by
deed has been made on same

day as attachment of property
alienated, presumption shall be
that attachment was first in
point of time.

District Munsiff

XXXIV -

Memo showing the amendments to be made in the Civil Procedure Code.

1985

Sections	Particulars of amendments	Remarks.
2	After the definition of decree holder add "Immoveable property includes standing crops, timber on a land or site, and window shutters of and attached to a building or house and mortgage deed mortgaging immoveable property."	See 4 bal 665 11 bal 164 9 bal 511 9 M 5 1 All 348 but 12 bal 546 and transfer of property act see 3 are in direct opposition to the above rulings in defining immoveable property.
2	In the definition of Public officer in para 4 after the words "court of justice" add the words "a commissioner appointed by a Court of justice."	
31	After para 2, add "and against different defendants."	
50	After clause (b) add "If the suit be for immoveable property land, site or	This information is necessary for Sec 207.

109.5
Judicial Dept.
Enclos. No
To
C. No. 305

or house or garden or lane or way, the area or measurements and position or boundaries of such immoveable property should be shewn and also survey or Settlement number should be entered or shewn if the immoveable property sued for be a land Jinayati or Inam registered in Collector's or Inam Commissioner's office.

201 To be struck out or expunged

This section has virtually become obsolete as none now requires a translation of a Judgment written in English owing to the overspread of the English language.

215(b) When a suit is for foreclosure or for the recovery of a debt on a mortgage deed by sale of the mortgaged immoveable property the Judgment in its decretal part and decree should be in accordance with the

See ruling of the High Court dated 24th April 1894, No. 1319.

the provisions of sections 86 and 88 respectively of the Transfer of Property Act.

215(c) When the suit is for the recovery of money on a bond mortgaging moveable property by the sale of the said mortgaged moveable property the Judgment shall direct payment of the debt within the time to be fixed by the Court not exceeding 30 days from the date of the decree according to the nature of the property mortgaged or in default the sale of the same under the decree debt.

The Judgment shall further direct the immediate production in Court of the said mortgaged moveable property if the Plaintiff apply for such an order or direction before or at the time of pronouncing judgment showing sufficient reasons for such an order.

234 para 1 After the words "legal representative of the deceased" add

add "or against the property of the deceased if he had left any and if it did not vest in his heirs by survivorship".

234 para 2 — Before para 2 add "if the decree can be executed against the legal representatives."

260 A. in lieu of the procedure laid down in the section for execution of decrees in suits for restitution of Conjugal rights.

When a decree for restitution of conjugal rights has been made, the decree shall be executed by delivering the person of the party (wife) to the decree holder at her residing place; and if the party were to be a woman who according to the custom of caste or position in life would not appear before the public, the Court officer shall assist the decree holder by doing all that is necessary for decree holder's taking possession of the person of the party against whom the decree is passed (ie) by conveying the decree-holder

If the legislature thinks that this procedure suggested also is improper or unjust it may be ruled that suits for restitution of conjugal rights are not maintainable

holder to the place at or to the room in which the wife might be, without prejudice or detriment to her privacy or ghosha.

263 — After the word property at the end of the section add "and if necessary by breaking open the lock of the house if it was locked up and by removing the things in the house or other building or garden or land to be delivered according to the decree."

266 (a) — After the word "wearing apparel" add "including mangalasutram or Tali (marriage token)" worn by a woman. — See I. L. R. 9 Bom 106

(b) — After the word "Such cattle add "unless specifically mortgaged." — See I. L. R 4 Bom 25.

(c) — At the end of the clause c add "unless they were specifically mortgaged".

274 para 4 — No property moveable or immoveable mortgaged need — See 4 Bom 515 & 529

need be attached if the decree directs the sale of the said property.

276 Add as para 2. "But the sale of the attached property by the decree debtor after attachment is valid if the sale moneys were to be paid into Court in satisfaction of the decree debt under which it was attached.

See I. L. R 3 All 698 5 All 86 6 All 33 7 All 702.

Add as para 3. "In that case other decree holders are not entitled to rateable distribution unless they all attached the property before sale."

279 The wording of this section needs to show that evidence should be taken only on the side of the claimant. If the legislature meant otherwise the following sentence or clause should be added to this section,

"And the decree holder also may adduce evidence for refuting that on claimant's side.

284 Add as para 2 "But when a property is sold in the execution of a decree it can not be sold again at the instance of another decree holder though the property was attached by him before the attachment made at the instance of the decree holder under whose decree it was actually sold."

See I. L. R 12 Bal 317

290 Add as para 2 "The time 30 days need not necessarily be allowed or entered in the proclamation of sale if the property to be sold were to be standing crops of paddy and other grain crops, sugarcane garden, Tumeric garden and the like.

Such standing crops &c are being now considered as immoveable property; and they are being attached as such. So if 30 days were to be allowed as in the case of houses and lands the said standing crops &c which require always watering and doing something for their growth or preservation would be entirely spoilt and become valueless as they would generally be left uncared for after attachment and therefore I think this clause is

is necessary. In some cases immediate sale would be necessary where crops are fit to be mowed and threshed immediately.

307 After the words "Court closes" add "or before the sunset."

271 } 336 } The words "no person shall break open any outer door of a dwelling house" in sec 271. &

The words "no outer door of a dwelling house shall be broken open" in sec 336 are to be struck out and the words "shall break open any door of a dwelling house or compound or yard of a dwelling house if necessary" should be substituted for the above wording to be struck out.

In some cases the Court officer cannot gain access to any dwelling house if he cannot break open the outer door of such dwelling house; and thus the execution of a decree can easily be frustrated.

330 } 331 } Civil Courts should have power to punish the persons who resist or obstruct the execution of a decree or order at least with fine not

not exceeding Rs 500 as in the case of a witness who disobeys Courts' summons without lawful excuse.

District Munsiff's Court, Narsapur. 18th January 1895.

E Subbarayudu
District Munsiff.

1895

Enclosure to letter
No 130 dated 26th January
1895 from the District
Judge Godavarie

Jud
369

No 130

District Court Godavarie
Rajahmundry 26th January 1895

From,

G. T. Mackenzie Esquire
The Acting District Judge,
Godavarie.

To,

The Honorable Mr E. Gibson,
Acting Chief Secretary,
to the Government of Madras,
Madras.

Sir,

I have the honour, in
Con 305 | Continuation of my letter No 103 dated the
21st instant, to forward a memorandum
by the District Munsiff of Narasapore
on the Civil Procedure Code.

I have the honour to be,
Sir,
Your most obedient Servant,

Orig signed G. T. Mackenzie
Acting District Judge.

Ltr.

369

Judicial (1895) Department

From

The District Judge
Godavery

Dated 26th January 95
Despd do 29th January 95
Rec'd 29/1

No 130

CHIEF SECRETARY
29. JAN. 1895
GOVERNMENT OF MADRAS

Enclosures (~~Nil~~)

Subject

Forwarding a Memorandum of Suggestions by the District Munsiff of Narsapur on the Civil Procedure Code

Sub Court of Ellore-
Dated 25th January 1895.
Rec'd 29/1/95

588

No 34

From

The Subordinate Judge of
Ellore

To

The District Judge of Godaveri
Rajahmundry

Sir,

With reference to the Circular Proceedings of the District Court No: 1475 of the 7th ultimo, I have the honor to submit my following suggestions.

My inability to submit the above within the specified date was due to my absence from the station during the christmas holidays for which I solicit your pardon.

Section 13. It is not clear—

(1) how far a decision operates as Resjudicata between Co-defendants

(2) whether an exparte decision operates as Resjudicata.

(3) whether the decision in a suit subject to one appeal operates as Resjudicata in a suit subject to two appeals.

Section 32. It is not clear if this section contemplates the addition of a party on his own application.

It is fair and proper that such a provision should be expressly made. The clause "All the questions involved in the suit" has to be clearly explained.

Section 43 para 2. I think that the provision in this para should be made applicable to intentional omission as it applies to intentional relinquishment.

Section 44 Rule (b) This provision may be made applicable to a partner also.

Section 57 para 2. It is not clear whether the date of return means the date of the order of return passed by the Judge or the date of the actual return to the party or pleader after the necessary entries being made in the office books. It will be quite reasonable and appropriate to insert the date on which it is ready for return to the party concerned; as the latter date is the proper time from which the period of limitation under Section 14 of the Limitation Act has to be computed.

Section 172. It is desirable that a provision should be made as follows:— viz— A witness who once appears in Court in obedience to a Summons should, if directed by the Court, take notice of any further date to which the hearing may be adjourned and

and be made amenable to the provisions of law in case of his non-appearance on the latter date, as if he had been actually summoned afresh for that date. This will avoid unnecessary resummoning and delay on that account and repeated expense for the party concerned.

Section 206. It is necessary that a clear provision should be made as to which Court is competent to amend a decree when there has been an appeal.

Section 278 A provision may be added that such claims may be made even in cases where no attachment is made, but a sale is ordered under a decree-

Section 283. A provision may be made to say in what cases a judgment-debtor is a party to the Order under this Section and where he is not.

Chapter XXXI - Clear provision has to be made as to the procedure to be followed when a person suing as a minor or a major is, on contention, found to be otherwise.

Again as to the mode in which a person not adjudged to be insane, is to sue or be sued.

Section 483 It is desirable to remove the words "from the jurisdiction of the Court in which the Suit is pending" in clause (a) and the words "within the jurisdiction of the Court" in the last para but one, so that a Defendant may

may not be able to commit fraud even with respect to property in the jurisdiction of another Court.

Section 484 When under Section 483, the Court is prima facie satisfied by affidavit or otherwise of the truth of the Plaintiff's allegations, there may be no necessity to examine the Applicant before giving a preliminary Order. Therefore, the examination of the Applicant may be made optional with the Court and need not be a necessary step as is now given in Section 484.

I have the honor to be
Sir
Your most obedient Servant.
N. Narasimhan
Subordinate to Secy.

1895

Judicial Department

From

The Subordinate Judge
Ellore—

To

The District Judge
Godaveri

Dated 25th

Desp'd 26th

Rec'd

DISTRICT COURT, GODAVERY.
28 JAN. 95
SHERISTADAR.

No: 34

Subject.

Submitting his suggestions on the amendment of the Code of Civil Procedure as called for in the District Court's Circular Proceedings No: 1475 of the 7-12-94

Judicial
Encls. No.
28 425
G. No.

Subordinate Judge

No 143

CURRENT NO. 425

District Court, Godavari

Rajahmundry 28th January 1895.

57 B

From

G. T. Mackenzie, Esquire Ag. District Judge
Godavary.

To

The Honorable Mr E. Gibson,
Ag Chief Secretary to Government,
Fort St George,
Madras.

Sir,

I have the honour to forward letter No. 34, dated 25th January 1895, from the Subordinate Judge of Ellore ~ containing suggestions for the amendment of the Code of Civil Procedure with reference to Gy. O No. 2795 dated 17th November 1894, Judicial.

I have the honor to be,
Sir,
Your most obedient servant,

G. T. Mackenzie
Ag. District Judge

Subordinate Judge

Judicial (1895) Department

425

From

The District Judge
Cuddapah

Dated 28th January 1895
Despd do
Rcd 31/1
Rcd 1/2
Enclosure one

No 143

Subject

SUB CHIEF SECRETARY
31 JAN 1895
GOVERNMENT OF MADRAS

Submitting herewith a letter No 34/25-1-96 from the Subordinate Judge of Ellore containing his suggestions on the amendment of the Code of Civil Procedure

Paid Rs 1/2

Jud

634

Jud (1895) Department

From

Ernest Barclay
Government Solicitor
Madras

SECRETARY
8 FEB 95
PUBLIC DEPTS.

To

The Chief Secretary
to Government
Madras

Dated 9th February 1895
Received 9
Rgd 1/2
Cl No 70

Paid Rs 1/2

Forwarded with reference to the Order of Government dated 17th November 1894 Cl No 2795. Judicial.

Ernest Barclay

Government Solicitor

From the Govt Solicitor, Madras
dt 7-2-95 No 70
Abstract - Forwarding the
Long opinion of the Advocate
General 27-2-95

Code of Civil Procedure

Section 54. In Shugwándas Dagla -v- Haji Abu Ahmed and others I.L.R. 16. Bom. 263. Telang, J, held that notwithstanding the imperative form of this section, the Court which fixes the time therein mentioned may extend that time. This may or may not be a correct interpretation of the section, but one must admit, I think, that cases may arise when such an extension of time would be only just.

Section 129. What is meant by the words "before the first hearing"? until the written Statement is filed and issues are settled, it may be almost impossible for the plaintiff to know whether discovery of documents is necessary. I think that the practice on this point should be similar to that under order XXXI, Rule 12 of the Rules of the Supreme Court - 1883 framed under the Judicature Acts. See Wilson's Practice of the Supreme Court of Judicature, 7th edn. p. 258. et seq.

Section 138. What is meant by the phrase "when called for by the Court"? The object of the section is to prevent forgery to meet the exigencies

exigencies of a Case. This can be effected by a direction that all such documents as are mentioned in the Section shall be produced and marked for the purposes of identification by the Judge or such other officer of the Court as may be authorised to do so, at the time the Issues are settled, or on such short date thereafter as the Court may order.

Chapter XIX. The procedure for the execution of decrees should be simplified. At present it enables a fraudulent judgment debtor to keep his creditor at arms length by moving from place to place. I think the Court which passes a decree should be empowered to send its own writ of execution to the Chief ministerial officer of the District Court within the jurisdiction of which the judgment debtor resides or has property.

Section 539 — The power of removing a trustee should be given.

Section 584. When the Court of First Instance and the Lower Appellate Court differ in their appreciation of the evidence in any case, an appeal to the High Court upon the facts of the case, as well as on the law, should be allowed —

At present there is too often a denial of Justice

Section 622. I think this opportunity should be taken to make the language of this section clearer, and thus secure, if possible, a greater uniformity of interpretation than exists at present. I may call attention to the Full Bench decision in Kristammer Naidu v. Chapu Naidu I. L. R. 17. Mad. 410.

(Signed) J. H. Spring Branson
Advocate General

Madras.
7th February
1895.

(True Copy)

Ernest Bowden
Government Solicitor.

Suggested amendment of the Civil Procedure Code

Execution of decrees.

There is frequently great delay and considerable expense caused to the judgment creditor under such circumstances as the following.

A Decree is obtained in one District and execution is required in another. Under S. 223 the decree is forwarded for execution to the District Court within whose jurisdiction the judgment debtor is or possesses property and that Court either executes it or forwards it for execution to a Court subordinate to it. Now possibly the Judgment creditor may have made a mistake as to whereabouts of his judgment debtor or the latter may be absent, the consequence is that the Court executing the decree fails to find the judgment debtor and certifies its failure to the Court passing the decree. Whereupon the judgment creditor perhaps discovers that the judgment debtor has either absconded to another district, or to another local jurisdiction in the same district. He then has to make another application to the Court passing the decree and that Court, acting again under S 223, forwards it to the fresh District named by the judgment creditor and possibly on its arrival with the same result. To take an instance, a

decree

decree passed by the Munsiffs Court of (say) Vizagapatam against a man believed to be at Pallaveram. Decree forwarded for execution to the District Court, Chingleput, and by it transferred to the Munsiff at Pallaveram. Meantime the defendant has gone to Burmah and so the Munsiffs Court Pallaveram certifies the failure to execute to the District Court Chingleput, which reports the fact to the Vizagapatam District Court. The judgment creditor thereupon has to apply afresh to the Vizagapatam District Court to forward the decree for execution to the proper Court in Burmah, all this of course entails great delay and considerable expense for the various applications to the different Courts and this is only a very simple instance, of course, if the judgment debtor as frequently happens is absconding, the process may have to be repeated almost indefinitely and with but small chance of ultimately catching him. I would suggest as a means of simplifying the procedure and rendering the position of the judgment creditor less arduous, that it should not be necessary to certify to the Court passing the decree until it be satisfied and that the first Court to which it is sent for execution should be empowered to certify on the decree that it has not been satisfied and then send it direct to any other Court within whose jurisdiction the judgment debtor is said to be, thus avoiding the delay and expense of returning it to the Court which passed it and by means of the increased celerity of the procedure, affording the judgment creditor a better chance of obtaining execution. For instance in the above supposed case the Chingleput District Court should be empowered to certify non satisfaction and forward it direct to the proper Court in Burmah, and that Court in its turn, should be empowered to forward it direct if necessary to Assam or Bombay or Bengal as the case may be and so on until the judgment debtor is run down.

2nd

The procedure above suggested would be similar to that enacted by Criminal Procedure Code S. 83 for the execution of warrants outside the local limits of the jurisdiction of the Court issuing the same.

John G Smith
Barrister

Madras
11th February
1895

(True Copy)

Ernest Bandoz
Government Solicitor

LDO 3
Jud Dept.
23
207

District Munsif's Court
Tindivanam
3rd January 1895

1895

No. 1.

From On R'Ry P. A. Lakshmana Chettiar
Avergal, District Munsif,
Tindivanam

To

The District Judge
South Arcot

Respected Sir,

With reference to the District Court's footnote to the G. O. dated 17th November 1894, No. 2795, Judicial, I beg to submit that as I understand the reported decisions upon Section 258 of the Code of Civil Procedure, it seems to be a matter of doubt whether question of Satisfaction of Decrees even if not certified as per Section 258, can be considered under Section 244 of the Code, thus it becomes necessary to add a footnote to Section 244 that such a question of Satisfaction does not fall under that Section and cannot be enquired into. Orders under Section 278 upon claim petitions are, as per Section 283, final till disturbed by a regular suit and I humbly think there must be a clause under Section 244,

that such orders don't fall under that Section.

I beg to remain,
Respected Sir,
Your most obedient Servant

R Lakshmana Rao
District Munsif

RJ
44

Enclosure 1 to letter
No 2406 15th Feb 95

1405
54

From

The District Munsif
Tindivanam

To

The District Judge
South Arcot

Dated 3d
Despatched 3d } January 1895
Received

No. 1

Encl. 1 in

Subject

Submitting his remarks upon G. O. dated 17th November 1894 as called for.

W M
7/95

No 28.

District Munsif's Court
Tirukoilur 7th February 1895.

From

M R Ry T. Varadarajulu Naidu Garu
District Munsif
Tirukoilur

To

W. F. Grahame Esquire
District Judge
South Arcot.

Sir,

As directed in the Proceedings of the District Court, nos 769 and 60 dated 5th December 1894 and 28th January 1895 — respectively, I beg to Submit the following remarks embodying the difficulties which I have experienced in the practical — administration of the Code of Civil Procedure, and suggesting certain alterations, which it may be desirable to make in the present Code.

Section 13:- This is one of the sections of the Code on which legal ingenuity has been exercised to an abnormal extent. The whole of the Law of Res-judicata

has been condensed by the framers of the Code into seven small paragraphs of a section; and added to the brevity of the section, a number of decisions more or less irreconcilable with one another has emanated from the several High Courts, with the result that Judges have often to administer the law on the subject with considerable hesitation. Explanations I, II and III of the section especially afford ample scope for legal speculation and for the display of legal ingenuity and I think it desirable that those explanations should be amplified in the light of the host of decisions bearing on the subjects covered by them.

The words "any matter which might and ought to have been made a ground of defence or attack" in Explanation II have been a fruitful source of contest; and Explanations III will, if strictly followed, cause considerable hardship in some cases. As regards the question of mesne profits subsequent to suit, claimed in the plaint and not expressly allowed in the decree, the current of decisions appears not to give full effect to Explanation III, as it now stands. The law as regards point decided between co-Defendants when the previous suit was dismissed, as well as the question whether the section is applicable to points of law previously decided between the parties, appear still to be unsettled. So also is the question whether the dismissal of a suit under Section 102 would operate as res-judicata. No doubt the Legislature cannot be expected to make express provisions for all possible cases, but I feel that something can be done by it in the way of setting at rest many of the vexed questions, which have cropped up ~~since~~ since the enactment

of the present law.

Sections 17, 26 & 43:- The expression "Cause of action" is defined in Section 17 so far as it relates to suits arising out of Contracts; but that expression appears in several other places in the Code, chiefly in Sections 26 & 43, where no definition of that expression is given. It is clear that the expression is not used in the same sense in all the places where it occurs. In section 17, the expression is not limited to mean the whole Cause of action, but includes any material portion thereof; but this Construction cannot, I think, be safely placed on the expression as used in Sections 26 & 43. It is desirable, therefore, that the expression should be defined in the places where it occurs, or in section 2 allotted for Definitions, to remove the uncertainty which now besets the subject.

Sections 20 and 21:- The power to stay Proceedings and to remit Court fees granted by these sections may, I think, be extended with advantage to suits relating to immoveable property instituted in Courts within whose jurisdiction only very small portions of the subject matter are located. It sometimes happens that a Plaintiff consults his own convenience alone in selecting a Court for his suit, where immoveable property forming the subject matter of the suit is situated within the jurisdiction of more Courts than one; but Justice may be better done in some other Court having jurisdiction, and in such Cases the Courts may be permitted to exercise a power similar to that now vested in them by these sections, with such limitations as regards the extent or proportion of property &c as may be deemed necessary.

Section 45:- There appears to be a difference of practice as to the form the decision should take when a Court of Appeal reverses a decree on the ground of misjoinder.

Sometimes the plaint is returned for amendment and sometimes the suit is dismissed. The law on the subject requires to be settled.

Sections 46 and 47:- These sections do not provide for the refund or otherwise of the Court fees paid on the excluded Cause of action. The provision in section 47 that the Court "may make such order as to Costs as may be just" cannot, I apprehend, Cover an order for refund or otherwise of Court fees.

Section 74:- It is not clear from the section whether it is the intention of the Legislature that Service of Summons on one partner is sufficient even in Cases where the partnership had been dissolved prior to the filing of the plaint. This point may be made clear.

Section 73 to 84:- I think it desirable that an obligation should be imposed upon the village officers when they are in the village to assist the Process Servers in the service of summonses &c and that, whenever practicable, the attestation of any one of the principal village officers should be obtained to the return of service. The expediency of at least a rule being framed on the subject by the High Court under the power vested in it by Sections 72 and 652 of the Code appears to have been brought to the notice of the High Court (See page 141 of the Civil Rules of practice). The Process-Servers cannot be expected to know all the persons to whom processes are issued, and in Cases where the party ~~to whom~~ at whose instance the process is issued cannot, by reason of his residence in a distant village or for other sufficient cause, accompany the process-server, the latter is actually left helpless, and his returns in such Cases are generally unsatisfactory. The serious Consequences to the

parties resulting from a finding of proper service of processes in part to the subject a gravity, which must be sufficiently met. The Process servers are low paid officials, and when an influential man happens to be the person to whom the process is issued, the scope for fraud is considerable, and the chances of detection are few. From the very nature of the case the enquiry directed by section 82 cannot always be satisfactory.

Section 111:— It is not very clear from the section itself that the written statement embodying the set-off claimed should be stamped in the same way as a plaint should be, though the decisions on the subject are to that effect. Para 3 of the section may, I think, be amended to make the point clear.

Section 171:— Parties to suit and persons named as witnesses by the parties cannot apparently be summoned and examined by the Court of its own motion. Sections 177 and 178 authorize a Court to examine a party to a suit who is present in Court as a witness, and there are other sections of the Code, such as sections 66, 120 etc, which authorize a Court to direct the personal appearance of the parties for certain purposes; but there does not appear to be any express provision authorizing a Court to summon and examine the parties as witnesses of its own motion; and the reason for the prohibition, if the Legislature did intend it, is not patent. Again, the parties may include certain names in their list of witnesses, but may not at the trial choose to examine them; and if the effect of Section 171 is to preclude the Court from examining such persons of its own accord, it seems to me that the section requires amendment in that respect. The section further does not make any provision as to the source from which the expenses of the witnesses summoned at the instance of the Court

should be met. The Courts may, I think, be given a power similar to that conferred by section 162 to direct either or both of the parties to deposit the expenses on pain of attachment and sale of his or their moveable property.

Section 174:- As the law stands at present, the Courts cannot ~~punish~~ punish a witness for disobedience to a summons except after the issue of a warrent. It not unfrequently happens that witnesses attend late, with the result that suits which had to be post-poned in the early part of the day owing to absence of witnesses have often to be taken up for trial in the latter part of the same day, at the request of parties, and the witnesses that cause the inconvenience go scot-free, unless the Court chooses to send them to a magistrate for an offence under section 174 of the Indian Penal Code, which it is generally reluctant to do, considering that the offence is not of such a grave character

as to render it desirable to adopt the circuitous procedure involved in the taking of such a step. A power to fine such witnesses for Contempt similar to that Conferred on Courts of Session by the Code of Criminal Procedure, Section 318, in respect of Jurors and Assessors, may, I think, be granted to Civil Courts.

Section 193:- This section does not permit the re-calling of a witness who has been examined and permitted to depart, except in Cases falling within Section 191. The law as at present administered permits the Court to grant time to parties for adducing additional evidence, if the ends of Justice require it, and I fail to see any satisfactory reason, ~~and I fail to see any satisfactory~~ why a witness once examined and permitted to depart, should not be re-called, when such a step is rendered necessary or desirable by any fact elicited in the evidence -

subsequent to the examination of the witness, or by reason of any oversight of the party at whose instance he was summoned. The disallowing of Costs incurred in re-summoning the witness would be a sufficient punishment to the party whose neglect or default necessitated the re-Calling of the witness. The power should be descretionary with the Courts.

Section 206:- Whether a Court of First instance Can amend its decree after it has been confirmed by a Court of Appeal, is a question which seems to be not quite settled. A proviso added to the section on the subject would settle the matter.

Section 210:- It is doubtful whether under this section Courts have power to postpone the payment of the whole decree. Applications are often made at the time of passing decrees for postponement of payment of the whole decree for some months, especially by the agriculturist who hopes to pay up the decree debt in the following harvest season; and in a number of Cases the Courts are inclined to Comply with such requests, but are met by the want of any express provision on the subject. An amendment of this section so as to Cover such Cases expressly is, I think, desirable.

Sections 257A and 258:- These sections dont provide what the effect is of agreements or adjustments sanctioned by the Court. There seems to be a difference of opinion as to whether they Could be executed as decrees, or separate suits should be instituted on such agreements and relief obtained therein. Further, the Limitation Act provides that applications for payment of the amount of a decree by instalments should be made within 6 months, and if the parties therefore, enter into an agreement for payment of the decree amount by instalments after 6 months from the date

of the decree, they will probably be debarred from applying for the Court's sanction, which would be rather hard to the parties, as such agreements not sanctioned by a Court are rendered void by section 257 A. These sections may be amended or amplified to cover these points expressly.

Section 260:- The Legislature has already taken action in the matter of making the infliction of imprisonment in execution of a decree for restitution of Conjugal rights discretionary with Courts. Such a limitation is, I think, very desirable, and will sufficiently meet the requisites of all possible Cases. The extreme section of the Reform party is no doubt for the total abolition of the remedy of imprisonment altogether; but there may be Cases of such wilful and wholly unjustifiable disobedience as to render imprisonment highly desirable. The Contract of marriage is the most solemn one in the land, and I fail to see why when the disobedience of Court's orders for specific performance of ordinary Contracts is visited with imprisonment, the breach of the most solemn obligation of marriage ought not, under certain aggravating Circumstances at least, be placed in the same Category. It is not in every Caste that marriages take place at a very early age. Except among the regenerate classes, marriages are generally celebrated after the parties attain the age of discretion.

Section 265:- In this Presidency, the uniform practice has been for Civil Courts themselves to effect partition of lands paying Revenue to Government, excepting permanently settled estates. This is being done under a peculiar Construction placed upon the word 'estate' as used in the section. Taking the Code, however, as a whole,

it is probable that the Legislature did not intend that the word 'estate' should be taken in the narrow sense of permanently settled estates. Section 396, for instance, provides that a Court may issue a Commission when partition of immoveable property other than that paying Revenue to Government may have to be made, thereby implying, as it seems to me, that partition of immoveable property paying Revenue to Government has to be made as otherwise provided. In the other Presidencies, I believe, partition of all lands paying Revenue to Government is effected by the Revenue authorities. The practice which has grown up in this Presidency and which, it is desirable, should be continued, may be given — legislative sanction by the addition of a proviso to this section.

Section 268:— It has been held that a Small Cause Court cannot issue an order of attachment under this section beyond its jurisdiction, but it is not apparent why a distinction should be made between a Small Cause Court and a Regular Court on the subject. As a matter of practice Regular Courts issue orders of attachment of salaries etc under this section, though the salaries etc have to be disbursed outside their jurisdiction.

Section 271:- The section prevents the entry into a dwelling house for purpose of attachment after sunset, but does not — expressly prohibit the stay of the attaching officer in the building after that hour, after he has gained access into the house legally. In some cases it may be desirable that the amin or the bailiff should for Completing the attachment Continue to remain in the house for some time after sunset. The intention of the law on the subject may be made clearer.

Under this section, the outer door

of a dwelling house cannot be broken open for the purpose of effecting an attachment. This prohibition operates as a hardship to the judgment-creditor in certain cases, while it affords to the judgment-debtor a loophole for evading the judgment debt successfully. When a judgment debt is about to be barred by the operation of Section 230 of the Code, judgment-debtors not unfrequently avail themselves of this prohibition, and it is generally difficult for the judgment-creditor to prove that the act is fraudulent and to claim the benefit of Section 230. The Revenue Recovery Act, Sec. 20, provides that the outer door of a dwelling house might be broken open for purposes of distraint, subject to certain conditions, and I think a provision similar to it may be introduced into the Code of Civil Procedure. The power to direct the breaking open of the outer door of a dwelling house should be made descretionary, to be exercised by the Courts in proof of fraud, and the presence of a Police officer or village officer may be made necessary for the execution of such a warrant.

Section 272:- When property in Court or in any public office is attached, it may be desirable that the person whose property is attached should be made acquainted with the attachment, and an addition to this Section requiring that a copy of the attachment order should be sent to the judgment-debtor, would, I think, be sufficient. After the attachment is made, the property, if it be money, as it generally is, is made over to the decree-holder, and there is at present no law or rule requiring that the judgment-debtor should be made acquainted with the use made of his property.

Section 273:- Similarly, when attachment of decrees of money are made under the 1st or the 2nd clause of Section 273, a copy of the attachment order should, I think, be communicated to the holder of the attached decree. This is desirable not only to

keep him informed as to how his property is being dealt with by others, but also in the interests of the public, who, in ignorance of the attachment, may be led to enter into Contracts with the Judgment-debtor in respect of the attached property. Section 276 invalidates any alienation of the attached decrees subsequent to the attachment; and it is rather hard that an order of the Court passed probably in chambers and Communicated to the Head Clerk of the Court should have the effect of invalidating, so far at least as the attaching creditor is Concerned, a transaction affecting the property entered into by both parties bonafide and in perfect ignorance of the order. Section 273 besides makes no express provision for the execution by the attaching creditor of decrees attached under the first paragraph of the section, and to such decrees also the provisions in the 2nd and 3rd paras of the section should be made expressly applicable. There is no express provision as to what further steps should be taken after the attachment of attachable decrees other than decrees for money, for the satisfaction of the judgment debt for which the attachment was effected. The execution of such decrees by the attaching Creditor Cannot of itself in a majority of Cases result in the realization of money for the satisfaction of the attaching Creditor's Judgment-debt, without Certain other steps being taken, which the law no where sanctions. It is desirable, therefore, that such of the decrees other than decrees for money as are liable to attachment should be sold, and the sale proceeds appropriated towards the satisfaction of the decree under execution.

Para 1 of section 273 may also be extended to Cases where the decree to be attached and the decree in execution of which attachment of the decree is sought are being executed by the same Court, though not passed by the same Court.

Section 295:- There seems to lee a difference of opinion as to whether a Regular Court which is also invested with small Cause Jurisdiction is to lie treated as a Court different from that on its Small Cause side for the purposes of this section. The Legislature may set at rest the doubt by the addition of a Clause or a Proviso to this section.

Sections 310 A and 311:- The words "any person whose immoveable property has been sold" have been held to include not merely the judgment-debtor but also the beneficial owner where the Judgment-debtor is only an ostensible owner (I.L.R. 20 Cal. 418); and I think these sections may lie extended to persons who are not owners in the strict sense of the term, but are interested in the property sold, such as mortgagees etc. No doubt a mortgagee who was ignorant of the sale at the time, may have other remedies such as the institution of a suit &c; but they cannot always lie effective, and I fail to see any satisfactory reason why the summary remedy of protecting the property afforded by these sections, especially the new section 310A, should not lie allowed to him.

Section 367:- In some Cases, the strict enforcement of this section operates as a hardship. The suit in which the representative Character of a person is disputed on the death of a Plaintiff may lie a trivial one, but the settlement of the question would involve an amount of labour out of all proportion to the importance of the suit, while the staying of the suit till the determination of the question in another suit might result in the extinction of necessary evidence when the suit comes to lie actually tried - probably

several years later. This is not unfrequently the case when succession to a large Zemindari estate, for instance, is in dispute. In such cases the placing of both the rival claimants on the record conditionally, and the passing of a decree contingent upon the result of the suit in which the question of heirship is to be or is being tried, might probably meet all ends.

Section 375:- The words "so far as it relates to suit" are not sufficiently clear when they are applied in practice. A man sues, for instance, for recovery of a mortgage debt, and the parties agree that the mortgaged property should be made over to the Plaintiff; or, taking a converse case, a man sues for the recovery of property, and it is agreed that the Plaintiff should take some money and give up the property to the Defendant. In such cases, there is a considerable room for doubt as to the form that the decree should take.

Again, a man sues for a declaration of his right, in respect of certain properties, and is subsequently satisfied, under an arrangement with Defendant, with possession of a portion of the property in respect of which declaration was prayed for. In some cases the relief consented to by the parties may exceed the amount for which stamp duty has been paid or the pecuniary limits of the Court's jurisdiction. As no appeals lie against decrees passed under this Section, these difficulties do not often attract the notice of the higher authorities; but it is none the less desirable that a uniform practice should govern the drawing up of decrees in such cases.

Section 397:- The Code does not make any provision for the mode in which the amount of commission has to be realized if the parties or any of them

directed to deposit the same refuse or neglect to do so. The language of section 649 does not appear to me to cover the case. That section seems rather to prescribe the mode of executing processes issued for payment of money and does not of itself specify the process or processes which may be resorted to for the collection of the amount. This is also clear from the enactment in several sections of the Code of the mode in which any payment of money ordered should be enforced (Sections 172, 293, 315 &c). There is no section in the Code, which authorizes the dismissal of the suit or the shutting off of the defence according as the recusant party is the Plaintiff or the Defendant. Section 158 merely directs that in such a case the Court may decide the suit forthwith, which would mean that the Court should go into the evidence adduced and decide the suit. I think it is highly

inexpedient that parties should be in a position to balk the Courts' order especially when the Commissions are for local investigation or for examination of accounts, in which cases trials without the issue of preliminary Commissions would involve extensive labour and ordinarily produce unsatisfactory results. I think therefore, that a provision that the amount of Commission ordered may be levied by the attachment and sale of moveable property of the person in default, may be included in the Section with advantage.

Section 411:- The Bombay High Court has held (I.L.R. 15 Bom. 77) that section 412 applies only to cases of adjudicated failure and that Government is not entitled to any stamp duty if the parties settle the matter out of Court and request the Court to dismiss

the suit; and it may be argued that Section 411 similarly applies only to cases of adjudicated success; and if this contention were to prevail, a pauper Plaintiff may by putting in a Razeenama entirely in her favor get the benefit of it without paying anything towards the costs of litigation. The Legislature may perhaps deem fit to take action in the matter.

Section 463:- The Code does not make express provision for appointment of guardians ad litem of lunatics other than those adjudged to be so under Act 35 of 1858 or other law. The Bombay High Court has held (I.L.R. 16 Bom. 132) that it is the duty of the Court to appoint guardians ad litem for even lunatics not adjudged to be so under any law, and as it is highly equitable that it should be done, the section may be amended so as to include all persons found to be lunatics on enquiry or adjudged to be such

Sections 330, 412 and 493:- In these and Certain other sections it is not clear in what sense the word 'imprisonment' is used; — whether the imprisonment is to be in the Civil Jail or in the Penetentiary. The word 'imprisonment' is defined in the General Clauses act as 'imprisonment of either description as defined in the Indian Penal Code'. In these sections it is clear that the Legislature intended that the imprisonment should be a punishment for disobedience of orders of Courts &c. The Legislature may clear the doubt on the point.

Sections 477 to 505:- These provisions, it is desirable, should be extended to applications to sue in forma pauperis before they are registered as suits. It sometimes happens that in the interval between the presentation of an application

under Section 403 and the registering of the same as a suit, the Defendants alienate their properties, and the law as it stands at present does not provide any remedy to prevent such dispositions.

I have the honor to be
Sir
Your most obedient servant

Vareda rajulu
District Munsif

Enclosure II to 154/95
letter No 24 of
15th Feb 95.

From

The district Munsiff

Tirutturaipundi

To

The district Judge
South Arcot.

Dated 9th
Desp 9th | February
95.

No 28.

Submitting his
remarks on G. O. Dated
17th November 1894
No 2795. ——— General
Revision of the Codes of
Criminal & Civil
Procedures.

[illegible] 2
W M
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O. No

No 24. District and Session Court of South Arcot

Cuddalore, 15th February 1895

From 167

W. F. Grahame Esquire,
District and Session Judge of
South Arcot.

To

The Honourable Mr. J. F. Price,
Chief Secretary to Government,
Madras.

Sir,

With reference to Government order dated 17th November 1894, No 2795, Judicial, I have the honour to state that I have no remarks to offer regarding the revision of the Codes of Civil and Criminal Procedure. I, however enclose the remarks offered by two of my District Munsifs viz, Mr. R. R. P. A. Latchmana Chettiar Avargal, District Munsif of Tindivanam, and Mr. R. R. T. Varadarajalu Naidu Garu, District Munsif of Tirukoilur, for the consideration of Government.

I have the honour to be,
Sir,
your most obedient servant

W. F. Grahame
District and Session Judge

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to C.

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Judicial Department.

From

The District & Sessions Judge,
South Arcot.

To

The Chief Secretary
to Government.

CHIEF SECRETARY'S
18 FEB 1895
GOVERNMENT OF MADRAS

Dated 15 February 1895.
Recd. 16
Regd 18

No 24.

Enclosures-2.

Forwarding the remarks regarding the revision of the Codes of Civil & Criminal Procedure offered by the District Munsifs of Tindivanam and Tirukoilur for the consideration of Government.

28

MEMORANDUM.

Now that there is a Bill to amend the Code of Civil Procedure before the Viceregal Legislative Council, the following points are suggested for consideration:—

Sec. 2. The term 'decree' requires further explanation. It is sometimes doubted whether decree means the decree of the last Court when there has been an appeal or second appeal. Whether orders dismissing suits or appeals for default of prosecution or appearance or orders allowing the withdrawal of suits or appeals are decrees.

vide I. L. R. 3 All. 382; 14 All. 361.
contra. I. L. R. 16 Bomb 23.

The term "immovable property" has not been defined. The omission causes numerous difficulties. Whether 'growing crops' are moveable or immovable property is a vexed question and requires to be decided. Different enactments define the term differently.

Cf. The General Clauses Act I of 1868 would seem to take growing crops as immoveable property, being '*things attached to the earth.*' The Transfer of Property Act IV of 1882 while defining the term 'attached to the earth,' expressly enacts that the term immoveable property does not include standing timber *growing crops* or grass. The Indian Registration Act III of 1887 says that 'moveable property' includes standing timber, growing crops and grass, fruit upon and juice in trees &c. The Indian Penal Code Sec. 22 would seem to take growing crops as immovable, being *attached to the earth.*

In the face of this conflict in the statutes themselves, the High Courts of Bombay (5 Bomb. A. C. 90) Calcutta (5 B. L. R. 124) and Madras (I. L. R. XI Madras 193) have coolly decided that growing crops ought to be treated immovable property. Evidently the mischievous result of the above decision has not been considered. For growing crops should then be atached by an order prohibiting the debtor from transfering or charging them in any way and all persons from receiving the same by purchase or otherwise. The sale can take place only 30 days after the said proclamation has been fixed up in the Court House The purchaser can get possession only by executing a sale certificate which again can be issued only after the time allowed by law (30 days) for making objections to the sale or if any had been made, only after the disposal of such objections; so that some three or four months must necessarily pass from the time of attachment to the time the crops can be harvested. What could be the state of the harvest then? Either the crops might be stolen or they might mature and fall. The attaching officer cannot take the crops into custody under Sec. 269, for they are not *movable* property. Intending purchasers know all these risks and would bid only a nominal price. The debtor already in distress, loses his crops and yet the debt remains not much diminished. Some remedy ought to be provided for this evil.

Section 13. The following questions deserve attention.—

(1) How far is a decision *res judicata* between defendants (*vide* I. L. R. XI M. 204. ~~15 M. 111~~)?

(2) Whether decisions of Small Cause Courts will operate as *res judicata* in subsequent regular suits. (I. L. R. 15 B. 104)?

(3) Whether the decision of a Court of original jurisdiction will operate as *res judicata* in a Small Cause Court?

(4) Whether a decision on a point of law afterwards declared to be erroneous, will operate as *res judicata*? (I. L. R. V. M. 304).

(5) How far the omission to urge a claim in a former Suit will be a bar to advancing that claim ina latter litigation?

Sec. 15. If after the institution of a suit or appeal in a court having jurisdiction at the itme, there be another court oper[illegible] authorized to try such suits or if the [illegible] changed as to where such suits ought to be instituted, what is to be the procedure? Is the first court to try the suit or is it to return it for presentation in the new court?

Sec. 25. Suppose a case is transferred on the application of a party and after giving notice to the other party, from one court to another on the ground that the presiding Judge is biased or prejudiced against the applicant. It so happens that that Judge is afterwards transferred to the court to which the suit had been transferred,

Or suppose there are two or more connected appeals or suits filed in a court. In the ordinary course of business, some of those cases happen to be sent to one court and others to another for disposal. In any of these contingencies, suits or appeals cannot be *retransferred* on the application of a party without notice to the other parties. This is unnecessarily increasing the amount of costs. The court cannot act of its own motion, because it does not ordinarily know that there are such circumstances, And if the circumstances are made known by a party, notice to the other party is indispensable as the Judge has no power under the section to dispense with notice under any circumstances, where there is an application by a party.

It is therefore desirable that the court be authorized to dispense with notice to the opposite party when there is a proper case.

Sec. 32. Why should the court's power to strike out the name of a party be restricted to "on or before the first hearing" while court has power to add parties at any stage?

In para 5 of this section it is said that the proceedings against a newly added deft shall be deemed to have been commenced *on the Service of a notice on him*. Ordinarily the date of *instituting the suit in court* without regard to the date of serving notice upon a deft, is the commencement of proceedings against a deft. In the case of a newly added deft, such commencement is put off until service of notice on him. This distinction is unjust. Courts may take their own time to issue or serve a notice or a notice issued may be returned unserved and a fresh one may have to be issued. Why should all this time count against plff? By the time notice is actually served on him, the period of limitation might run out. As the date of *filing the suit in court* is the commencement of proceedings ordinarily, so the date of the application to the court, to add a new defendant should be made the commencement of proceedings against the defendant if added.

Orders refusing to add parties should also be made appealable under section 588.

Sec. 39. (1) It is very necessary that the Chief Ministerial Officer of a court should be competent to attest a Vakalathrama to be filed in that court.

(2) Just as clients are at liberty to revoke the appointment of a pleader by a writing signed by him and filed in court, so Pleaders should also be allowed to withdraw from a case by a similar writing.

It is doubtful if a pleader who conducted a suit up to decree can execute the decree without a fresh Vakalatnamah. The recent amendment of section 647 (Act VI of 1892, sec 4.) would seem to authorize a pleader to execute a decree on the original appointment, as the proceedings in execution are declared to be proceedings in suit.

Sec. 43. If leave to omit to sue for any of the remedies, be refused, the Plaintiff should be authorized to amend the plaint by including the remedy, intended to be omitted. Otherwise a plaintiff who in the hope of obtaining the court's leave, omitted to include any of the remedies to which he may be entitled, but who was afterwards refused such leave, will be without any remedy, for he cannot bring a fresh suit.

Sec, 44-A. This section authorizes the inclusion of damages to immoveable property in suits for its recovery, only if the property be held under a contract. So, if a trespasser commits waste on the land or misappropriates moveable property found on the land, the owner in suing to recover possession of the land cannot sue for damages also in the same suit, as the section now stands. This anomaly should be removed.

Sec. 101. If a defendant did not appear when called, and was declared *exparte* and the court proceeds with suit, the defendant cannot in the course of the proceedings apply to be heard in answer to the suit on proof of good cause for his previous nonappearance; for it is only when the court has *adjourned* the hearing of the suit *exparte*, but when it is proceeding with the suit *exparte*, that a deft may so apply As the sections now stand, he will have to wait until decree is passed and then apply under sec. 108. This distinction ought to be removed Many a time, defendants do not turn up immediately they are called. It is hard that they have no remedy, unless the hearing has been adjourned.

Sec. 116. This section allows amendment of written statements only under the circumstances therein mentioned and there is no section allowing amendment for any other reason. When under sec. 53, a plaintiff is allowed considerable latitude in the matter of amending plaints, it is hard that a similar indulgence should not be given to the defendant as well. As the code now stands, a defendant cannot alter or correct even a clerical error in a written statement.

Sec. 120. It is very necessary that the courts should have power to direct the personal appearance of either party *at any stage of the suit*. Now, after the first hearing, courts cannot order any party to appear in person. If a party is cited by the other party as witness, he is just in the same possession as a stranger. (sec. 178). If therefore he succeeds in evading service of process and the court is satisfied of it, yet his perssnal appearance cannot be ordered. Party witnesses ought to be more under the control of courts.

Sec. 137. The section does not provide for the placing of a certified copy of the record sent for and perused, on the record of the case. Section 142 A takes in only original documents and copies sudstituted under sec. 141 A.

Sec. 182. This section does not require that depositions should be signed by witnesses. Yet witnesses are called upon to sign in all courts.

Sec. 205. Under this section decrees bear date the day on which Judgment was pronounced. It is however a notorious fact that decrees come into existence only long after the day of Judgment. It is desirable that the date on which the decree is signed should appear on the decree and be the commencement of the period of appeal. Otherwise, it often happens that the period of appealing from a decree runs out before the decree comes into existence. It is unjust that intending appellants should be required to apply for *copy* of a decree before the *original* is in existence. (*vide* I. L. R. 12 All 461. *contra* 13 C[illegible] 104.)

Sec. 203. It is necessary to lay down which court is competent to amend a decree, when there has been an appeal or a second appeal. High courts differ strongly on this point. (*vide* I. L. R. 9 Mad 354 *contra* I. L. R. 11 All 267). The Madras High Court recently called in question the correctness of their decision in

I. L. R. 9 Mad 354. (vide I. L. R. 15 Mad 403) But they did not deem fit to decide the question by a reference to the Full Bench, The Allahabad High court persists in its opinion that the last court is the only court competent to amend a decree. (*vide* I. L. R. 14 All 226). The Calcutta High Court falls in with the view of the Allahabad High Court. (*vide* I. L. R. 21 Cal 259). Here the question whether orders dismissing appeals for default of prosecution or appearance or for failure to furnish security or pay additional court fees or orders allowing withdrawal of appeals falls within the definition of the term *decree* (as suggested in the commencement of this Memorandum-becomes important. For when any of the circumstances ennmerated above has occurred, the question will be which court is competent to amend the decree, the court of first instance or the appellate court?

Sec. 210. It is necessary that courts should have power to demand security before passing an instalment decree and such security should be enforceable under sec. 253.

Sec. 223. It requires to be decided whether a court can execute a decree for a larger amount than the limit of its pecuniary jurisdiction. High courts differ (*vide* I. L. R, 7 M 307. *contra* 16 Col 457).

Sec. 228. It is desirable to say if the latter court can only execute the decree, *i. e.* recover money under the decree and has no other powers. The words "in executing the decree" have to led to different constructions. It is said such a court cannot entertain insolvency proceedings (I. L. R. 11 Mad. 301) or transfer it to another court (I. L. R. 3 Cal. 512). It is very inconvenient that debtors or decreeholders should have to appeal to the original court for either of those purposes. The difficulty can well be conceived when a decree is transferred to another court at a distance, say, from Bombay to Calient or from Madras to Calcutta. The words "with regard to" may be substituted for "in executing." This amendment will have the required effect.

Sec. 230. The word "granted" is evidently misplaced. (I. L. R. 6 Mad. 359.) What is intended is that the application should be *made* within the specified period, as parties are unable to get their applications *granted* by courts within such period.

It is also necessary to lay down that the provisions of section 5 of the Indian Limitation Act apply to applications under this section (I. L. R. 18 Cal. 631) as in section 372 A. added to the code by Act VII of 1888; Sec. 32.

Sec. 232. This section requires amendment. If a decree has been transferred to another court for execution, a transferee of such decree has no court to apply to for enforcing the decree; for he can only apply to the court which passed the decree for execution under this section. But the court which passed the decree cannot execute it, as it has been transferred to another court and the court to which it has been transferred cannot receive his petition as it is not the court *which passed the decree*. The insertion of the words "or in which execution is pending" after the words "which passed it (decree)" will remedy this flaw.

Orders refusing to recognize an assignment should be made appealable.

Sec. 235. The application does not require to be *signed* by any person. This is evidently an omission. The insertion of the words "signed and" before the word "verified" will answer the purpose. Should a copy of the decree accompany the application for execution?

Sec. 239. The addition of the words "upon such terms as to security or otherwise as the court thinks fit" at the end of the 2nd paragraph would be desirable. For, if property, or person be restored or discharged, and the result of the application be adverse to the applicant, the court has no hold on either of them now.

Sec. 244. The phrase "parties to the suit in which the decree was passed" had better be altered into "parties to the *decree*." If a preson who was impleaded in suit, be declared an unnecessary party to the suit and exonerated from the operation of the decree, why should he proceed or be proceeded with under this Section? (vide 10. W. R. 191)

It also requires to be defined whether "representatives" in their character as such or in such charactor as well as in their individual capacity is intended by the section.

Sec. 246. It will he well to insert the words "or for the delivery of ascertained goods" after the words "payment of money. (vide I. L. R. 10 All. 188)

Sec. 257. (a) If a decree has been transferred to another court for execution it is the duty of the latter to exocute it; while so can a decree debt be paid into the court *which passed the decree*, and if so what is the procedure?

(c) If decree directs payment on a specified day and that day is a holiday, will payment on the next court day be as good as payment on the day specified? (I. L. R. 5 Cal. 906) Some provision as to notice to decree holder and its effect is necessary.

Sec. 257. A. It is a vexed question whether a bond for a Judgment debt without sanction of court is altogether void, (vide I. L. R. XI. Mad. 469) or only in execution (I. L. R 12 Mad. 61). It will be well to fix how far such agreements will be invalid as in Section 258.

Sec. 258. This Section purpots to enact that any payment without being certified will be ineffectual in the execution proceedings and that any payment if so certified will be conclusive in so far as that decree is concerned. If however, a payment once made and certified, turns out to be ineffectual, as for instance the decree holder being obliged to refund the purchase money on the cancellation of a sale or otherwise, it requires to be provided that the decree holder may take out execution of his decree afresh.

Sec. 259. The Section begins with the manner of executing decrees for any specific moveable property or share therein or for the recovery of a wife; but further on it enacts that the specific property or share therein may be seized and delivered. How is a decree for the recovery of a wife to be executed? In view of the proposed amendment in Sec. 260 by doing away with imprisonment for enforcing decrees for restitution of conjugal rights, it becomes all the more necessary to lay down how a decree for the recovery of a wife is to be executed.

Sec. 265. How are decrees for the partition or the separate possession of a share of an undivided estate *not* paying revenue to Government to be executed?

Sec. 268 (a) How is a debt secured by mortgage, to be attached? By a prohibitory order under this section or as immoveable property? High Courts differ (*vide* I. L. R. 9 Cal 511. *contra* 15 all 134 and 20 Cal 805).

In paragraph 3, the course to be followed by a debtor who does not repudiate the debt, is provided, but provision is wanting as to the procedure to be adopted by alleged debtor who denies the debt; for it is said that no claim is entertainable in the case of attachment of an alleged debt (I. L. R. 4 Bom. 323).

In paragraphs 4 and 6 the words "or local authority" require to be inserted after the words "Railway Company" in view of Sec. 626 provish.

Sec. 276. The period for which an attachment in execution of a decree shall be in force requires to be defined as has been done in the

case of attachments under other circumstances viz., Sec. 259 and 260. The ommission to do so, causes numerous complications. A decree holder may effect an attachment and then drop further proceedings for any length of time. He may long after apply for sale of the properties. In the meanwhile, the property might be alienated by private sale or Court auction. Complications arise as to the effect of the attachment originally effected (*vide* I. L. R. 10 Cal 416; 17 Mad. 58 and 180). If the period of the efficacy of an attachment be fixed, all difficulty will be removed.

Sec. 278. When decree itself directs sale of the property, it is said there is no necessity to make an attachment. (I. L. R. 4 Bomb 515 18 Bomb. 98). Only a sale proclamation need be issred under Sec. 287. In such cases, Courts refuse to entertain any claim to or objection to the sale of the property as such property has not been *attached in execution of a decree* in the wording of Section 278 (I. L. R. 14 Cal 631) This practice works immense mischief sometimes. Very often purchasers find to their cost thet they did not get any interest in the property which they purpoted to buy. As any claim that may be made, would not be investigated, there is no chance of the merits of the claim being known before the sale. It is equally injurious to decree holders and debtors. When a claim is put forward, but not investigated, property would not fetch a reasonable price. So decree holders lose their security and the debtors their property for nominal prices and it might happen that the claim of which notice was given is altogether unfounded.

Hence this section requires amendment by the addition of the words "or proclaimed for sale" after the word "attached".

Sec. 283. Whether the judgment debtor is a party to an order in a claim case is a vexed question (*vide* 4 M. H. C. 47; *contra* I. L. R. 15 Cal 674, 11 Bomb. 114; See also I. L. R. 13 Mad 366; 17 Cal 57 and 711). Some definite provision on this point is necessary.

Is the right given by this section subject to the provisions of section 42 of the Specific Relief Act I of 1877? It is differently held by the High Courts at different times (vide I. L. R. 9 M. 206 *contra* 16 M 140). It is hard that the privilege afforded by this section should besubject to the restriction in Sec. 42 of the Specific Relief Act. Suppose there is a mortgage of Rs. 2000 over 10 items of property One of such items is attached and a claim put in by the mortgagee is rejected by the Court after investigation. Is it not unjust to require the mortgagee to sue for the realization of the full Rs. 2000 from all the 10 items, in order to substantiate a claim to one of them? The reasoning in I. L. R. 9 Madras 206 may be adopted and it be declared that a suit for the establishment of the right claimed may be brought notwithstanding anything contained in any law to the contrary.

Sec. 285. If property which has been latterly attached by another Court, be sold away by the former Court, what should be the procedure? Is the sale invalid if the latter Court is of a superior grade? Or are the sale proceeds to be placed at the disposal of such latter Court, or is such latter Court to sell the property again, discarding the sale by the first Court?

Sec. 291. If when a property is put up for sale in execution of a decree and there are other decree holders applying for rateable distribution, the debtor pays up the amount due under the decree for which property is put up for sale, can the sale be stopped? If the sale cannot be stopped (I. L. R. 10 M. 157) can the other decree holders proceed with th e sale on the original proclamation.

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Sec. 295, When can ...omor*lized*, immediately on the s...e or is confirmed (I. L. R. 18 Cal 242)? ... property is proclaimed for sale, the ... pay up the amount, can that amount to be *assets realised* under this sectio such a case, or if the decree for whic has been proclaimed, is found to be inex... able, or if the holder of such decree is unwi... ing or omits to proceed with the sale, can th applicants for rateable distribution proce... with the sale on the proclamation already pr... mulgated?

Sec. 311. This section allows sales to be ... aside only when there is material irregnlari... causing substantial injury—not on any oth... ground—not even when there was *fraud* ... the part of any party. If purchaser has be... misled, he has no remedy under this sectio... (I. L. R. 20 Cal 8). The section should b... amended to take in any proper case for cancelling a sale.

Further, has substantial injury to be *proved* to have resulted from the irregularity (I. L. R 14 M 227 P. C) or can injury be inferred from a material irregularity (I. L. R. 20 Cal 599)?

Sec. 313. The section seems to contemplate only cases in which judgment debter has no saleable interest at all. If debtor is found to have had only an interest of a much smaller value than what was advertized, the purchaser it would appear, has no remedy (vide I. L. R XVII M. 228). He cannot come in under section 311 also. This inequity should be removed by making suitable amendment in this section as well as in section 315.

Sec. 316. If the purchaser's title dates from the date of the sale certificate only, who is entitled to the rents and profits up to that date? Or if a purchaser who is already in possession, fails to obtain a sale certificate, what would be the result? Has he obtained a title or does the sale go for nothing?

Sec. 331. 332. 335. What sort of possession is contemplated, requires to be specified. Courts are inclined to recognize only *actual* possession. This is hard. Owner or mortgagee may be in possession or purchaser collude with a tenant or mortgagor, he can get possession to the prejudice of the owner or mortgagee who then will be driven to the necessity of bringing a suit at great trouble and cost. Possession must be declared to be actual or constructive.

Sec. 336. It is incumbent on courts to send debtors to jail as soon as they are arrested and brought before them, unless they intimate their intention to apply for insolvency. Yet courts find it necessary and they do so as a matter of fact, to leave the debtor in the custody of the peons in order to enable him to raise money and pay off. This is not warranted by the Code as it now stands. Suppose a respectable man is all of a sudden arrested and brought before the Court. He has no intention of applying for insolvency. He can and will pay off if a short time is allowed. Now, the section requires him to be sent to jail immediately. So the power given to courts under sections 337 A (3) and 349 to leave the debtors in the custody of an officer of the court, should be extended to cases in which debtors are arreste... and brought before courts, a reasonable perio... —say a week—being fixed.

Again, paragraph 3 provides that securit... should be given (1) that the debtor will appea... when called upon and (2) that he will withi... one month apply under section 344. While the next paragraph prescribes the penalty o... the security being realized, only if debtor fail... so to apply. So that if the debtor who has been released on security does put in an insolvency petition, but fails to attend when called upon or to prosecute the petition, the securit... is not realizable. It cannot also be said th...

Section 349 governs the procedure after the filing of an insolvency petition, for the order applies only when the debtor is in custody not when he has been released on attachment. Therefore it is necessary to insert the words "or to apply when called upon, or to prosecute the application" after the words "fails so to apply" if made.

The courts should also be authorized to extend the period within which the petition may be filed, if a proper case for insolvency out for such extension.

Sec. 349. The security given under this section should be made enforceable summarily as in section 336. It is said that such security cannot be enforced summarily (I. L. R. 7 Mad. 273). This is inconsistent with the other provisions of the code. (See also section 549).

Sec. 351. Experience shews that it is necessary to add the following to the last paragraph of this section:—"Whereupon the judgment debtor if already released, shall again be taken into the custody of the court to be dealt with under section 336 of this Code."

Sec. 372. The provision contained in this section should be extended to procedings in extention also. At present, if a judgment debtor's interest passes to another after decree, either by assignment or by operation of law, there is no means of enforcing such decree against such transferce.

Sec. 380. Security furnished under this section must de enforceable summarily (section 253) as suggested under section 349.

Sec. 407. Orders under this section should be made appealable under section 588.

Sec. 442. The words "if the pleader of the party or other person knew or might reasonably have known the fact of such minority" ought to be added after the word "presented." This protiction is given in section 444 and there is no reason why the same should not be introduced in section 443 as well.

Sec. 493. The provisions of Secs. 440 to 462, apply only if one has been *adjudged* a lunatic (I. L. R. [illegible] Mad 503; 17 Cal. 380) See however, or being sued through a [illegible] does not been so In such a case proceedings should be taken to have the lunatic so adjudged before any suit can be filed. Even this is not possible if a stranger has to bring a suit against a lunatic not so adjudged, for he is not competent under Act 35 of 1858 to initiate proceedings in respect of one's lunacy.

This difficulty should be removed.

Sec. 545. 546. Security given under these sections should be declared to be enforceable summarily as in the case of security given under section 549.

Sec. 561. Can a respondent file an objection Memo, in the case of an appeal filed under Sec. 544 as against parties who are not represented in appeal? If so, the court would be trying a case against a person behind his back. The memo of objection should be limited to the appellant who is before the court actually—not constructively—(See however I. L. R. XI B 596)

It has also to be decided whether an objection memo can be adjudicated upon, if the appeal is withdrawn, or dismissed for deficult of prosecution or otherwise disposed of with) out going into the merits—(I. L. R. 10 All 597-

Sec. 584. On the costruction of this section the Privey Council has repeatedly ruled that High Courts in second appeals, are bound to accept findings of fact by the lower appellate court (I. L. R. 20 cal 93) however erroneous such findings might appear to the High Court (I. L. R. 18 cal 23) This state of the law is very much to be regretted. Even the Privy Council not unfrequently looks into details of evidence and interferes with findings of fact. Why then should High Courts be debarred from interfering with findings of fact whenever such a course is found actually necessary to meet the ends of justice? In this connection the following may be aptly quoted from a recent issue of the Madras Standard. "Your "client, I have no doubt, is as fair as a lemon. "The District Munsiff saw him and pronounced "him to be fair. But the District Judge who "has had no opportunity of seeing your client "comes to the finding without rhyme or reason, "that your client is as black as jet. And we "Judges of the High Court are here to up-"hold the finding of the District Judge. That "is law, Sir, that is law; if you wish to have "that law altered, you had better go to the "wiseacres of Calcutta." So said that eminent jurist, the late Mr. Justice Holloway when a High Court Vakil was vehemently arguing against a perverse finding of a District Judge in a case of second appeal.

The High Courts would however get over the Privy Council rulings by remanding appeals for revised findings on question of fact. But this practice has also been condemned of late.

Hence, the powers of the High Court in second appeals should be considerably enhanced in the matter of findings on fact. In the case of appeals to Her Majesty in Council, the High Courts are at liberty to allow an appeal being filed if they think fit, even though the value of the subject matter falls short of the prescribed limit (Sec. 595 ce.) Likewise, High Courts may be invested with power to look into evidence if the ends of justice require it as in the case of nonconcurrent findings.

Sec. 622. The scope of this section should be considerably expanded. The High Courts interfere now, only if the Court whose order is in question, has had *no* jurisdiction in the case. If the court has had jurisdiction, they refuse to interfere, however erroneous or absurd, the order in question may be. This state of the law requires improvement.

Sec. 624. This section sometimes works great hardship. For, under it a review cannot be admitted by a succeeding Judge, even for a patent error, unless such error be *a clerical error apparent on the face of the decree.* Even though the error, clerical or otherwise, be apparent on the face of the *record*, there is no remedy. In view, however of the constant changes of Judges, it is vesy necessary that the scope of this section should be somewhat enlarged.

P. P. KARUNAKARA MENON.

No 61

Cuttack

Districk Munsiff's Court
Bezwada dated 19th March

From

The Districk Munsiff,
Bezwada.

To

H. H. Hammett Esquire,
Districk Judge,
Kistna.

DISTRICT & SESSIONS COURT KISTNA
RECEIVED

Sir,

If I may offer any suggestions relating to the recasting of the Codes of the Civil and Criminal Procedure a little after the date prescribed in G.O. no 2795 Judicial dated 17th November last, I respectfully beg that the undermentioned points may be considered as they cause frequent difficulties

1 A defendant secures his property in a house and locking up the door goes abroad. There seems to be no express provision enabling the Court to order the breaking open the lock although the Courts after publishing a notice by Tom-Tom are getting the locks broken and realizing the property. The case Law authorizing such procedure is to be found at page 189 Vol. V of the Madras High Court Reports page 89 Bombay III and the November no of the Indian Jurist for 1878. These reports show that Section 271 Civil Procedure Code is applicable only to the executing officers. Similarly there must be provision to force open the lock of

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a premises whose delivery was directed

2 Just at a trial of a civil suit, it is proved by affidavit or otherwise that a document or account affecting seriously the merits of the case is with a party or a third person present in the Court on being asked to show it its existence is denied. Similarly a party or witness after proper Summons to produce a document denies its existence and it is proved by persons who saw the document with the person, there is no provision to order a Search. If justice is the aim, there must be such power given to the Civil Courts

3. A witness who disobeyed Summons and who was brought under arrest can be fined by the Court. One who disobeyed the Summons and avoided warrant and who before attachment of property but on the day appointed in the proclamation appears cannot be fined by the Civil Court for the treble delay caused by his conduct. Similarly one disobeying Summons and avoiding warrant can appear on the day fixed in the warrant without being punished. These provisions are inconsistent.

It is true that the witnesses in the two latter cases might be sent to a magistrate But

But this means annoyance to the Court as well as to the witness because the former cannot send the case to the nearest 2? or 3? Class Magistrate but it must send it to the Divisional or Sub Divisional Magte with 1st Class powers and that Officer in his turn will send it on to the 2? or 3? Class local Magte. I think it therefore necessary to strike off this circuitous course and empower the Civil Courts to send up such cases to the nearest local Magte having power to try the offences

4 In appealable cases the omission to take the Signature of a deponent on his deposition taken down by the Court and read over to him is objected to in some places. As it cannot cause great delay, it may be provided for.

I beg to remain
Sir
Your most obedient Servant
C Ramakr
District Munff

Chd.

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R.P. 1447/22-3-95

From

The District Munsif

Bezwada

To

The District Judge,

Kistna.

Dated 19-3-95
Despd 20-3-95.
Recd

No 61.

Subject.

Offering certain suggestions relative to the procedure of the Courts of Civil and Criminal procedure for consideration.

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Jud 8.

1629 Kistna District Court.

Masulipatam.

28 27th March 95.

N. 1027/27-3-95.

From

F. A. Hammett Esquire,

A. District Judge.

To

The Chief Secretary to

Government Madras.

Sir,

In reply to Circular No. 614. dated 19th March 1895, I have the honor to make the following proposal for the amendment of the Civil Procedure Code, which in my opinion, if adopted, will enormously facilitate the disposal of civil suits, and further the ends of justice.

2. The proposal is that a proviso should be added to sections 179 and 180, Civil Procedure Code, to the ex-

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following effect..

"Provided that the Court may refuse to allow witnesses to be examined on points which in its opinion, have been already sufficiently proved, or whom it considers are being examined for the purpose of vexation or delay or for defeating the ends of justice."

3 The expression "points which in its opinion have been already sufficiently proved" is taken from Section 142, Indian Evidence Act, from which it is clear that the Legislature recognizes that there are points about the truth of which, the Court can come to a definite decision during course of the trial before the whole evidence is complete.

4. The expression "for the purpose of vexation or delay or for defeating the ends of justice," in my proposed amendment, is taken from Section 257 Criminal Procedure Code, which empowers a Magistrate to refuse to summon witnesses cited by an accused person, if he considers that they are not being cited bona fide. Section 253 Criminal Procedure Code gives a Magistrate power to dismiss a complaint without examining all the complainant's witnesses, if he considers the charge to be groundless. Section 216 Criminal Procedure Code empowers a Magistrate to refuse to summon witnesses to appear for an accused person committed to Sessions, ~~so~~ when he ~~is~~ considers that they are cited for the purpose of vexation or delay or of defeating the ends of justice

5 When there are so many safeguards in the Criminal Procedure

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code to prevent vexation, delay and the defeat of the ends of justice by the unnecessary examination of witnesses, I do not understand why no similar provisions find place in the Civil Procedure Code.

6. In the Mofussil Courts, pleaders notoriously waste the time of the Courts, in examining witnesses to prove points already sufficiently proved, or for the purpose of causing vexation and delay to the other side and of defeating the ends of justice by unnecessarily prolonging an enquiry and swelling the costs of litigation.

7. My experience is that it is impossible to effectually stop such waste of time without some modification of the Civil Procedure Code such as I have suggested. Civil suits would be disposed of in about half the time they now occupy, if the amendments were adopted.

8. I enclose a letter from the District Munsif of Bezwada containing his suggestions for the amendment of the Code.

I have the honor to be,
Sir,
Your Most Obedient Servant

Compd
H

F. H. Hammett
Ag. District Judge

1629

Judicial Department.

From

The District and Sessions Judge
Vizianagram

Dated 27th
Despd 28th } March 1895

Recd 1/4

No 1027

Enclosure 1.

CHIEF SECRETARY
GOVERNMENT OF MADRAS
1 APR. 1895

Relating proposals for the amendment of Civil and Criminal Procedure codes

Judicial Deptt

CURRENT NO.

From

R. H. Shipley Esquire,

Agt District & Sessions Judge of Ganjam,

Berhampore.

CHIEF SECRETARY
GOVERNMENT OF MADRAS
17 APR. 1895

To

The Chief Secretary to Government, Judicial Department, Madras

Dated 9th
Despatched 10th } April 1895.
Received 17

No. 690

Enclosure: a

Subject.

Requesting that a certain addition may be made to Section 647 of the Civil Procedure Code.

Civil Procedure Code

Civil Procedure Code

CURRENT NO. 1904

G.C.P. 15-8-94, 300.

No. 690

GANJAM Distt + Sessions COURT.

Dated Berhampore, 9th April 1895

From R. H. Shipley Esqr;
the Ag Distt Sessn Judge of Ganjam,
Berhampore,

To The Chief Secretary to Government,
Judicial Department
Madras,

Sir,

As to the Code of Civil Procedure Act XIV of 1882, I beg to submit that in I. L. R XII Allahabad 392 it was held that Sec: 647 of the Code makes Sec: 373 applicable to proceedings in execution of decree, but a contrary decision was arrived at in I. L. R XVIII Calcutta 635.

2. The opinions of two of the highest courts of law being thus at variance on a very important point, I request that the difficulty thus arising may be removed by adding a clause to Sec: 647.

I have the honor to be,
Sir,
Your most Obedt Servt

(Sd) R. H. Shipley

Ag Distt + Sess Judge

RR
HC

From

R. H. Shipley Esquire

My District & Sessions Judge of Ganjam,

Berhampore,

To

The Chief Secretary to
Government,
Judicial Department,
Madras.

Dated 9/15

Despatched 16th April 1895.

Received

No. 690

Enclosure: —

Subject:

Requesting the difficulty
thus arising may be removed
by adding a clause to Sec. 647,
as the two of the highest
Courts of Law being at
variance on a very im-
portant point.

No 212

Ganjam.

1/

District Munsiff's Court

Nellore

8.

Dated 28th March 1895.

Despatched to ——.

From.

M. R. R.

V. Gopalachariar Avergal

District Munsiff

To.

The District Judge.

Nellore.

Sir,

With reference to Proceedings of the District Court, in No. 42 dated 25th Instant, I have the honor to state that the following are some of the points in which an amendment of the Civil Procedure Code seems necessary.

1. According to Section 3 of Transfer of Property Act 4 of 1882, immovable property does not include growing crops, but there is no definition of immovable property in the Civil Procedure Code, and therefore the definition given in the General Clauses Act 1 of 1868, has been adopted. According to Clause 5 of Section 3 of this Act, immovable property "includes lands, benefits to arise out of land, and things attached to the Earth or permanently fastened to anything

75-10

attached to the Earth." It follows that growing Crops have to be treated as immoveable property. Thus when decree holders apply for attachment and sale of standing Crops, the sale Cannot be held until 30 days after the sale notice has been fixed up in the Court House and the sale Cannot be Confirmed for 60 days and the purchaser Cannot get possession until then. This procedure must take up over 3 months. Owing to this delay, and because there is no provision for having the crops cut, after attachment and before delivery to the purchaser both the Decree Holder and Judgment debtor sustain substantial loss. Under Section 503 a receiver may be appointed for gathering the Crops, but the Cost in Revenue Cases is prohibitive. It seems therefore desirable to define immoveable property in the Civil Procedure Code so as to exclude standing Crops.

2. Section 463 states that the provisions Contained in Section 440-462 shall mutatis mutandis apply in the Case of persons of unsound mind, adjudged to be so under Act XXXV of 1858, or under any other law for the time being in force. It was held that, unless a person is so declared to be a lunatic, no guardian ad litem Can be appointed under the Civil procedure Code I.L.R. 6 Madras., 380. There seems to be no provision as to the procedure to be adopted in Case of persons who are lunatics but who have not been declared to be such in the manner aforesaid. It may be true, as held in I.L.R 7 Calcutta., 242, that a person not so declared to be a lunatic, does not lose his Civil rights; but it is not clear how a person incapable of watching his own interest, will be able to Conduct his own business or instruct a professional man. The procedure in Act XXXV of 1858 is not generally resorted to, except in Cases where the lunatic is possessed of some property, and it may be a hardship for poor people to proceed under this Act, when a suit of small value has to be instituted. It will be wise therefore to make some Clear provisions.

3. Section 253 states as follows:

"Whenever a person has, before the passing of a decree "in an original suit, has become liable as Surety for "the performance of the same, or of any part thereof, the

"decree may be executed against him, to the extent to which
"he has rendered himself liable, in the same manner as
"a decree may be executed against a defendant:
"Provided that such notice in writing, as the Court
"in each case thinks sufficient, has been given to the surety".

There is no clear provision that this course may be adopted in Cases where security is given for decrees of Appellate Courts. Section 610, as amended by Act VII of 1888, reproduces the provisions of Section 253, as regards security given for Costs, when an appeal to Her Majesty in Council is preferred. In I.L.R. 13 Bombay 411, and in I.L.R. 13 Madras 1, it was held, following the view of the Majority of the Allahabad High Court, in I.L.R. 2 Allahabad, 604, that all the rules applicable to execution of Original decrees including Section 253, were made part of Section 583, but in a later Case reported in I.L.R. 18 Madras 203 a different view seems to have been taken. A clear provision seems desirable on this point also.

I have the honor to be
Sir
Your most obedient Servant
(Signed). V. Rajagopalachary
District Munsiff.

(True Copy).

District Judge.

1444 District Court, Bellary

No. 819 Dated 22nd March 1895

From,

Lewis Moore Esquire,
District Judge, Bellary.

To,

The Chief Secretary
to Government,
Madras.

Sir,

In reply to your Circular No. 614 of the 19th Instant I regret to state that pressure of work prevents my offering any remarks at present on the proposals to amend the Code of Criminal and Civil Procedure.

I have the honor to be
Sir,
Your most Obedt. Servant,

Lewis Moore

District Judge.

Jud

CURRENT No. 1477

Jud

From,

The District Judge,
Bellary.

To,

The Chief Secretary
to Government,
Madras

Station - Bellary

Dated 22nd March 1895.
Despatched —do—
Received 24
Rpd 25

UNDER SECY TO GOVT 24 MAR 95

No. 819

Reporting that pressure of work prevents his offering any remarks at present on the proposals to amend the Code of Criminal and Civil Procedure.

CURRENT No. 1644

Jud.

Revenue {1895} Department.

From

The ~~Collector~~, Dt magistrate
Godavari District.

Dis No. 221
~~Enc.~~ mag 795

Dated 28
Despatched 28 — 3 — 1895.
Received 1
Rcpd 2/4

CHIEF SECRETARY GOVERNMENT OF MADRAS -1 APR. 1895

SUBJECT.

Informing that there are no remarks to be made on the proposals to amend the codes of criminal and civil Procedure

Info

CURRENT No. 1644

Dis No. 221
~~Encl.~~ mail 795

GODAVARI DISTRICT,
COLLECTOR'S OFFICE,
Cocanada, 28-3- 1895

FROM

W. J. A. Le Fanu Esquire,
~~Collector~~, Dt magistrate
Godavari District.

To

The Chief secretary to Government
Judicial Department

SIR,

In reference to Gr. No. 2795 dy 11-11-94
I have the honor to state that I
have no remarks to offer on the
proposals to amend the codes of
Criminal and civil Procedure

I have the honorable
sir
Your most obedient servant
(sd) W. J. A. Le Fanu
Dt magistrate

Forwarded.
For Dt magistrate

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

READ—the following papers :—

From the District Judge, Gódávari, to the Chief Secretary to Government, dated Rajahmundry, 21st January 1895, No. 103.

In reply to G.O , dated 17th November 1894, No. 2795, Judicial, regarding the Civil Procedure Code, I have no remarks of my own to offer, but I forward in original a memorandum by Mr. White, District Munsif of Ellore, which contains practical suggestions.

2. The District Munsif of Tanuku asks that the code may decide the vexed question whether standing crops are moveable or immoveable property. He also points out that when an instalment decree is given under section 210, the judgment-debtor after judgment and before an instalment falls due can alienate his property. He therefore suggests that power be given to the courts to attach after judgment and before the instalment is due.

(Signed) G. T. MACKENZIE,
Ag. District Judge.

ENCLOSURE.

MEMORANDUM of Suggestions for amendment of the Civil Procedure Code.

Section 2, "*Signed*".—Marks to be made by executant himself, to point the way to avoidance in private documents of dangerous abuse (now widely prevalent) of one person marking for another. Every man can make a mark for himself.

Section 36.—Add a clause permitting one pleader to appear for another in the unavoidable absence of pleader originally retained. It has now, in spite of absence of sanction in Code of Civil Procedure become the universal practice of courts to permit such appearances, without which the business of all courts would be seriously retarded. Pleader appearing for another should be required to produce a written authority.

Sections 43, 44, 45.—Explanation and illustration of "same cause of action" necessary, to avoid disputes now continually arising, as to multifariousness, *e.g.*, in case of suits for land and damages to land or trees thereon, suits for houses and damages to houses or for property deposited therein, suits to set aside widows' alienations to different persons and suits to remove attachments by different creditors.

Advisable to make it clear that a plaintiff is not bound to include claim for mesne profits in suit for land. Claim for mesne profits usually compromised once title is settled. Unnecessary expense and delay to parties caused by compelling ejector to sue at once for mesne profits, if he wants them.

Section 45.—Authority needed to enable court to "split suits" as is now frequently done without authority. To provisions for separate trials add provision for separate numbers, judgment and decree. Especially necessary in case of widows' alienations where half-a-dozen alienations have often to be kept pending until disposal of question as to one.

Section 49.—Provision to be reversed. Plaints to be written in English, or with the permission of the court, in the language of the district. All judges, pleaders and clerks now know English, and vernacular pleadings belong to a past age. Evidence (more important than pleadings) now taken in English. Ambiguity and prolixity of vernacular pleadings and commonly diglott nature (English expressions continually made use of in default of vernacular) done away with.

Section 58, *Penultimate clause.*—No head clerk can find time to compare all copies. If he attempted to do so he could do no other work. Useless burden put on head clerks which they generally evade by perfunctory examination.

Substitute following:—

"All copies and statements above said shall be certified by the plaintiff or his pleader and any plaintiff who puts in a copy or statement disclosing a material error or omission shall be liable to have his suit dismissed on such error or omission being brought to the notice of the court by the defendant."

Section 100 (*a*).—For "may proceed *ex-parte*" substitute "may pass a decree against him or make such order in relation to the suit as it thinks fit" (section 113).

This will obviate the useless waste of time now involved in taking evidence in *ex parte* cases. The number of such cases is very large and at least one witness has to be examined in each case, involving the loss of two or three hours daily before contested litigation can be taken up.

Section 138.—Amend to "the parties or their pleader shall produce in court at the first hearing of the suit all the documentary evidence", &c. As matters stand, the defendant is not bound to put in his documentary evidence until it is called for by the court. The court cannot know what documents he has. No order is consequently made and the defendant produces his documents when he pleases, to the disadvantage of the plaintiff.

Re-enact here sections 59 and 60, with reference to defendant, requiring him to produce all his documents with written statement, or put in list. No reason why these provisions should apply to plaintiff and not to defendant.

Chapter XII.—Insert a provision authorizing the court at the first or any other hearing to suggest terms of compromise to the parties or to appoint a pleader or other person to act as a conciliator. A large number of suits would thus be amicably adjusted.

Section 159.—Insert provision permitting services of summonses and warrants to witnesses by any court in any other court's jurisdiction by its own officers; necessity for transmitting summonses and warrants (latter through District Court) a useless and troublesome clog on disposal of suits.

Section 160.—For "shall" substitute "may." Parties should be allowed option of paying witnesses' *batta* to witnesses directly. All witnesses do not expect payment of batta and may frequently be willing to come to court (especially for short distances) without payment. Witnesses' batta often forms a heavy item of costs of suits. No reason to insist on payment with every witness summons. An immense amount of account keeping will be avoided. Witnesses may take payment from parties as they please, or not. But tender must be proved (section 174 explanation) before warrant of arrest can be obtained.

Section 163.—Insert that every witness summons shall direct witness to attend the court on all days to which the suit may be adjourned, unless his further attendance is dispensed with by the court or the party summoning him, by endorsement on summons. This will obviate necessity of taking out fresh summonses to witnesses for each adjournment involving useless expense and delay in case of non-service.

Chapter XIX.—Insert a provision for execution of warrants of arrest of any court within the jurisdiction of any other court, by its own officer without necessity of transmitting decree to such other court. Reasons obvious. The tedious process of going from court to court with decrees before satisfaction can be obtained should be done away with.

Section 230.—For "Court which passed the decree or officer if any appointed on this behalf" and "the proper officer" substitute "chief clerk." Substitute "chief clerk" for "court" in all provisions relating to the execution of decrees. The head clerks of all courts are now men of education and ability to whom the task of executing decrees can be fully delegated, subject to a provision that in all contested matters the parties shall have the right of submitting orders made by the chief clerk to the court for revision. This would relieve all judges of an immense amount of purely ministerial work which can be performed with equal efficiency by chief clerks, leaving judges free to devote twice as much time to the disposal of suits.

Particular functions (section 278 *et seq.*, section 244, sections 311, 312, 328, &c.,) may, if thought fit, be reserved to judges.

It will be a considerable measure of relief to judges if disposal of even uncontested execution applications only is relegated to head clerks.

Section 266 (*c*).—Imperfectly understood. Ryots' houses are as a matter of fact being attached and sold everywhere, regardless of this provision. No benefit to ryot to provide that his house site may be sold under him but not timber and stones. Better to allow materials to be attached and not site. Exempting materials and sale of house site is a positive injury to him as he gets only a fraction of value of house and site. Ryots have great difficulty in getting sites in villages. No difficulty in procuring mud and sticks. Sell a ryot's site and you turn him out of the village and break him completely; sell his materials only and he builds a new house to-morrow.

Far better to exempt both house and site or exempt site and make materials liable.

Section 278 *et seq.*—The code contains no provision for claim petitions in case of property ordered to be sold under mortgage decrees. Property ordered to be sold by decree is not now attached; consequently, section 278 not applicable and claimants are compelled to file suits without summary remedy.

Section 278 might be amended by inserting the words "or to the sale of any property ordered to be sold in accordance with a decree."

Chapter XIX.—Provision to be made for "striking off" of execution application (long-standing practice for which code contains no authority) as to effect of which there is a conflict of decisions. Matters would be simplified by provision that execution application not prosecuted may be struck off the file and that attachments made under such application shall enure, notwithstanding the striking off of the application, and that applications struck off may be restored on application.

Section 283.—Doubtful if claimant against whom order made has right of applying for review, which right may be usefully granted.

Section 291.—Provision to be made that no immoveable property shall be knocked down except in presence of court and after court's approval and that court shall satisfy itself before knocking down immoveable property that a fair price has been obtained or that it is not likely that a better price will be obtained. A Government valuation is now put on all property, but it depends entirely on individual Munsif whether sale is adjourned for better prices or not. Usually left to mercy of Amin.

Chapter XXV.—Provision to be made for commissions for sale of immoveable property. It would be a great advantage if courts, in place of invariably selling immoveable property by auction, had option, after failure of public sale, of deputing a commissioner to negotiate private or commission sales, within a limited period. There would be some assurance in this case that every effort had been made to obtain a fair price, especially in frequent case of minors' estates which are imperfectly protected from sale in collusion with fraudulent guardians.

Section 460.—Provision to be made that no immoveable property of a minor shall be sold in auction until the court is satisfied that the debt cannot be discharged by sale of any property of the minor other than that sought to be sold, by commission sale or otherwise.

Chapter XXXIV.—Doubtful whether section 276 applies to attachments before judgment. This should be made clear.

Disputes often arise whether attachment or alienation by deed was first in point of time and often next to impossible to decide question. Advisable to make provision that where an alienation by deed has been made on same day as attachment of property alienated, presumption shall be that attachment was first in point of time.

(Signed) E. J. S. WHITE,
District Munsif.

From the Acting District Judge, Gódávari, to the Chief Secretary to Government, dated Rajahmundry, 26th January 1895, No. 130.

I have the honour, in continuation of my letter No. 103, dated the 21st instant, to forward a memorandum by the District Munsif of Narasapur on the Civil Procedure Code.

(Signed) G. T. MACKENZIE,
Acting District Judge.

ENCLOSURE.

MEMORANDUM showing the amendments to be made in the Civil Procedure Code.

Sections.	Particulars of amendments.	Remarks.
2	After the definition of decree-holder add "Immoveable property includes standing crops, timber on a land or sight, and window shutters of and attached to a building or house and mortgage deed mortgaging immoveable property."	See 4 Cal., 665. " 11 " 164. " 9 " 511. " 9 M. 5. " 1 All., 348, but 12 Cal., 546, and transfer of Property Act, section 3, are in direct opposition to the above rulings in defining immoveable property.
2	In the definition of Public officer in paragraph 4 after the words "Court of Justice" add the words "a Commissioner appointed by a Court of Justice."	
31	After paragraph 2 add "and against different defendants."	
50	After clause (*b*) add "If the suit be for immoveable property land, site or house or garden or lane or way, the area or measurements and position or boundaries of such immoveable property should be shown and also survey or settlement number should be entered or shown if the immoveable property sued for be a land jirayati or inam registered in Collector's or Inam Commissioner's office.	This information is necessary for section 207.
201	To be struck out or expunged	This section has virtually become absolete as none now requires a translation of a judgment written in English owing to the overspread of the English language.
215 (*b*)	When a suit is for foreclosure or for the recovery of a debt on a mortgage-deed by sale of the mortgaged immoveable property the judgment in its decretal part and decree should be in accordance with the provisions of sections 86 and 88 respectively of the transfer of Property Act.	See ruling of the High Court, dated 24th April 1894, No. 1319.
215 (*c*)	When the suit is for the recovery of money on a bond mortgaging moveable property by the sale of the said mortgaged moveable property, the judgment shall direct payment of the debt within the time to be fixed by the Court not exceeding 30 days from the date of the decree according to the nature of the property mortgaged or in default the sale of the same under the decree debt. The judgment shall further direct the immediate production in Court of the said mortgaged moveable property if the plaintiff apply for such an order or direction before or at the time of pronouncing judgment showing sufficient reasons for such an order.	
234, para. 1	After the words "legal representative of the deceased" add "or against the property of the deceased if he had left any and if it did not vest in his heirs by survivorship."	
234, para 2.	Before paragraph 2 add "if the decree can be executed against the legal representatives."	

Memorandum showing the amendments to be made in the Civil Procedure Code—*cont.*

Sections.	Particulars of amendments.	Remarks.
260 A in lieu of the procedure laid down in the section for execution of decrees in suits for restitution of conjugal rights.	When a decree for restitution of conjugal rights has been made, the decree shall be executed by delivering the person of the party (wife) to the decree-holder at her residing place; and if the party were to be a woman who according to the custom of caste or position in life would not appear before the public, the Court officer shall assist the decree-holder by doing all that is necessary for decree-holders' taking possession of the person of the party against whom the decree is passed (*i.e.*) by conveying the decree-holder to the place at or to the room in which the wife might be, without prejudice or detriment to her privacy or ghosha.	If the Legislature thinks that this procedure suggested also is improper or unjust it may be ruled that suits for restitution of conjugal rights are not maintainable.
263	After the word property at the end of the section add "and if necessary by breaking open the lock of the house if it was locked up and by removing the things in the house, or other building or garden or land to be delivered according to the decree."	
266 (*a*)	After the word "wearing apparel" add "including Mangalasutram or Tali (marriage token)" worn by a woman.	See I.L.R., 9 Bom., 106.
266 (*b*)	After the word "such cattle" add "unless specifically mortgaged."	
266 (*c*)	At the end of the clause C add "unless they were specifically mortgaged."	See I.L.R., 4 Bom., 25.
274, para. 4.	No property, moveable or immoveable mortgaged, need be attached if the decree directs the sale of the said property.	See 4 Bom., 515 and 529.
276	Add as paragraph 2. "But the sale of the attached property by the decree-debtor after attachment is valid if the sale money were to be paid into Court in satisfaction of the decree debt under which it was attached." Add as paragraph 3. "In that case other decree-holders are not entitled to rateable distribution unless they all attached the property before sale."	See I.L.R., 3 All., 698; 5 All., 86; 6 All., 33; 7 All., 702.
279	The wording of this section tends to show that evidence should be taken only on the side of the claimant. If the legislature meant otherwise, the following sentence or clause should be added to this section:— "And the decree-holder also may adduce evidence for refuting that on claimant's side."	
284	Add as paragraph 2. "But when a property is sold in the execution of a decree it cannot be sold again at the instance of another decree-holder though the property was attached by him before the attachment made at the instance of the decree-holder under whose decree it was actually sold."	See I.L.R., 12 Cal., 317.
290	Add as paragraph 2. "The time 30 days need not necessarily be allowed or entered in the proclamation of sale if the property to be sold were to be standing crops of paddy and other grain crops, sugar-cane garden, turmeric garden and the like.	Such standing crops, &c., are being now considered as immoveable property; and they are being attached as such. So if 30 days were to be allowed as in the case of houses and lands, the said standing crops, &c., which require always watering and doing something for their growth or preservation would be entirely spoilt and become valueless as they would generally be left uncared for after attachment, and therefore I think this clause is necessary. In some cases immediate sale would be necessary where crops are fit to be mowed and threshed immediately.
307	After the words "Court closes" add or "before the sunset."	
271 336	The words "no person shall break open any outer door of a dwelling house" in section 271. The words "no outer door of a dwelling house shall be broken open" in section 336 are to be struck out, and the words "shall break open any door of a dwelling house or compound or yard of a dwelling house if necessary" should be substituted for the above wording to be struck out.	In some cases the Court officer cannot gain access to any dwelling house if he cannot break open the outer door of such dwelling house; and thus the execution of a decree can easily be frustrated.
330 331	Civil Courts should have power to punish the persons who resist or obstruct the execution of a decree or order at least with fine not exceeding Rs. 500 as in the case of a witness who disobeys Court's summons without lawful excuse.	

10

From the Acting District Judge, Gódávari, to the Chief Secretary to Government, dated Rajahmundry, 28th January 1895, No. 143.

I have the honour to forward letter No. 34, dated 25th January 1895, from the Subordinate Judge of Ellore containing suggestions for the amendment of the Code of Civil Procedure with reference to G.O., dated 17th November 1894, No. 2795, Judicial.

(Signed) G. T. MACKENZIE,
Ag. District Judge.

ENCLOSURE.

From the Subordinate Judge, Ellore, to the District Judge of Gódávari, dated Ellore, 25th January 1895, No. 34.

With reference to the Circular Proceedings of the District Court, No. 1475, of the 7th ultimo, I have the honour to submit my following suggestions.

My inability to submit the above within the specified date was due to my absence from the station during the Christmas holidays for which I solicit your pardon.

Section 13.—It is not clear—

(1) how far a decision operates as *res judicata* between co-defendants;
(2) whether an *ex parte* decision operates as *res judicata*;
(3) wheher the decision in a suit subject to one appeal operates as *res judicata* in a suit subject to two appeals.

Section 32.—It is not clear if this section contemplates the addition of a party on his own application. It is fair and proper that such a provision should be expressly made.

The clause "All the questions involved in the suit" has to be clearly explained.

Section 43, *paragraph* 2.—I think that the provision in this paragraph should be made applicable to intentional omission as it applies to intentional relinquishment.

Section 44, *Rule* (*b*).—This provision may be made applicable to a partner also.

Section 57, *paragraph* 2.—It is not clear whether *the date of return* means the date of the order of return passed by the Judge or the date of the actual return to the party or pleader after the necessary entries being made in the office books. It will be quite reasonable and appropriate to insert the date on which it is ready for return to the party concerned, as the latter date is the proper time from which the period of limitation under section 14 of the Limitation Act has to be computed.

Section 172.—It is desirable that a provision should be made as follows, namely:—

A witness who once appears in court in obedience to a summons should, if directed by the court, take notice of any further date to which the hearing may be adjourned and be made answerable to the provisions of law in case of his non-appearance on the latter date, as if he had been actually summoned afresh for that date. This will avoid unnecessary resummoning and delay on that account and repeated expense for the party concerned.

Section 206.—It is necessary that a clear provision should be made as to which court is competent to amend a decree when there has been an appeal.

Section 278.—A provision may be added that such claims may be made even in cases where no attachment is made, but a sale is ordered under a decree.

Section 283.—A provision may be made to say in what cases a judgment-debtor is a party to the order under this section and where he is not.

Chapter XXXI.—Clear provision has to be made as to the procedure to be followed when a person suing as a minor or a major is, on contention, found to be otherwise.

Again, as to the mode in which a person not adjudged to be insane is to sue or be sued.

Section 483.—It is desirable to remove the words "*from the jurisdiction of the court in which the suit is pending*" in clause (*a*) and the words "*within the jurisdiction of the court*" in the last paragraph but one, so that a defendant may not be able to commit fraud even with respect to property in the jurisdiction of another court.

Section 484.—When under section 483, the court is *primâ facie* satisfied by affidavit or otherwise of the truth of the plaintiff's allegations, there may be no necessity to examine the applicant before giving a preliminary order. Therefore, the examination of the applicant may be made optional with the court and need not be a necessary step as is now given in section 484.

(Signed) N. SRINIVASSA AYER,
Subordinate Judge.

11

From the Collector and District Magistrate of Nellore, dated Nellore, 29th January 1895, No. 112-Mag.

ABSTRACT.—Stating that he has no remarks to offer on G.O., No. 2795, dated 17th November 1894.

From the Inspector-General of Prisons, to the Chief Secretary to Government, dated Ootacamund, 30th January 1895, No. 547.

I have the honour to submit the following reply to G.O., dated 17th November 1894, No. 2795, Judicial, regarding suggested amendments in the Codes of Civil and Criminal Procedure.

A.—CIVIL PROCEDURE CODE.

Section 339.—Words should be added to this section requiring payments of monthly subsistence to be made to officers in charge of jails *during ordinary business hours*. As the section at present stands, such monies can be tendered at any hour or on Sundays or holidays. Refusal to receive them may result in the debtor's release, which may afterwards be held to have been illegal.

Section 340.—The words "while in intermediate custody or" should be inserted before the words "in jail." There is no reason why the sums disbursed for the debtor's maintenance before he reaches the jail should not also be recoverable as costs.

* * * * * *

(Signed) A. G. CARDEW,
Inspector-General of Prisons.

From the Acting District Judge of Trichinopoly, to the Chief Secretary to Government, dated 30th January 1895, No. 208.

With reference to the order of Government conveyed in G.O., No. 2795, Judicial, dated 17th November last, inviting proposals for the amendments of the Codes of Criminal and Civil Procedure, I have the honour to submit that I regret I have not had time to go into the subject thoroughly, but that I offer a few suggestions.

* * * * *

II. (*a*) It is very often, especially in appeals, of great importance to know whether certain evidence was objected to or not before the lower court. As the practice at present stands, if it is any one's business to note such an objection, it is the business of the court. Lower-class pleaders take advantage of this. They raise all sorts of frivolous objections. If the court denudes the objection of its verbiage and makes a note showing the foolishness of the objection clearly, the pleader charges the court with misrepresenting him and an unseemly dispute may follow, which may influence jurors or assessors, of any, or indeed a weak judge. Many men who will freely talk nonsense, hesitate to write it and affix their names thereto.

I would therefore suggest that the court shall not be bound to take a note of any objection which it over-rules, unless the pleader presents his objections in writing. The paper so presented should then become part of the record, with the Judge's written order rejecting or admitting the evidence with brief reasons. The present state of matters practically places the court at the mercy of unscrupulous pleaders, and compels the court to write down any nonsense the pleader chooses to say. I do not feel this difficulty much myself owing to the accident that I happen to be a Barrister; but in framing the Code, it must be remembered that Sub-Magistrates, and possibly to some extent junior District Munsifs, are apt to get nervous if they are bullied by an Advocate or a Vakil of the High Court imported from Madras for a case of some local importance.

(*b*) Where a case has been dealt with by a civil court in a perfunctory manner, the appellate court has at present no power to order a retrial. (The Criminal Procedure Code gives authority.) I think that the Civil Procedure Code should be made to grant an authority similar to that which the Criminal Code gives to the appellate court in such a case.

(*c*) In certain cases—chiefly civil cases—the burden of proving some points is on plaintiff and of proving others is on defendant. In such a case, of course, plaintiff begins. Suppose he confines his evidence to the points on which the burden is on him. Defendant in reply makes out a strong case on the issues left untouched by plaintiff. Plaintiff then claims to put in further evidence to rebut defendant's case. The proper procedure in a case of this kind should be clearly laid down.

(*d*) In civil pleadings, I think the statement of defence should not be, as at present, the final pleading, but that it should be served on plaintiff, and that then he should either file a reply or take and join issue on the statement of defendant.

(Signed) R. D. BROADFOOT,
Ag. District Judge.

RE-PROPOSED amendment of the Codes of Civil and Criminal Procedure.

OPINION.

I have the honour to submit the following remarks on the proposed amendments of the two Codes of Procedure, and take the opportunity of pointing out that the time allowed for consideration was very short.

* * * * *

CODE OF CIVIL PROCEDURE.

Section 54.—In Bhugwándás Bagla *v.* Haji Abu Ahmed and others (I.L.R., 16 Bom, 263, Telang), I held that notwithstanding the imperative form of this section, the Court which fixes the time therein mentioned may extend that time. This may or may not be a correct interpretation of the section, but one must admit, I think, that cases may arise when such an extension of time would be only just.

Section 129.—What is meant by the words "before the first hearing?" Until the written statement is filed and issues are settled, it may be almost impossible for the plaintiff to know whether discovery of documents is necessary. I think that the practice on this point should be similar to that under Order XXXI, Rule 12 of the Rules of the Supreme Court, 1883, framed under the Judicature Acts—see Wilson's Practice of the Supreme Court of Judicature, 7th edition, page 258, *et seq.*

Section 138.—What is meant by the phrase "when called for by the Court?" The object of the section is to prevent forgery to meet the exigencies of a case. This can be effected by a direction that all such documents as are mentioned in the section shall be produced and marked for the purposes of identification by the Judge or such other officer of the Court as may be authorized so to do at the time the issues are settled, or on such short date thereafter as the Court may order.

Chapter XIX.—The procedure for the execution of decrees should be simplified. At present it enables a fraudulent judgment-debtor to keep his creditor at arms-length by moving from place to place. I think the Court which passes a decree should be empowered to send its own writ of execution to the chief ministerial officer of the District Court within the jurisdiction of which the judgment-debtor resides or has property.

Section 539.—The power of removing a trustee should be given.

Section 584.—When the Court of First Instance and the Lower Appellate Court differ in their appreciation of the evidence in any case, an appeal to the High Court upon the facts of the case, as well as on the law, should be allowed.

At present there is too often a denial of justice.

Section 622.—I think this opportunity should be taken to make the language of this section clearer, and thus secure, if possible, a greater uniformity of interpretation than exists at present. I may call attention to the Full Bench decision in Kristamma Naidu *v.* Chapu Naidu (I.L.R., 17 Mad., 410).

MADRAS,
7th February 1895.

(Signed) J. H. SPRING BRANSON,
Advocate-General.

From F. A. NICHOLSON, Esq., Collector and District Magistrate of Anantapur, to the Chief Secretary to Government, dated 8th February 1895, R. C. No. 1140.

ABSTRACT.—Stating that he has no remarks to offer on the proposed amendment of Civil and Criminal Procedure Codes.

From E. BARCLAY, Esq., Government Solicitor, Madras, to the Chief Secretary to Government, dated Madras, 12th February 1895, No. 80.

With reference to my endorsement, No. 70, dated 9th instant, relating to G.O., No. 2795, Judicial, of the 17th November 1894, I have the honour to forward herewith copy of memorandum, dated 11th instant, I have received from the Advocate-General on the subject and of its enclosure.

ENCLOSURES.

[*Re* amendment of the Codes of Civil and Criminal Procedure.]

With reference to my opinion, dated the 7th instant, I have the honour to enclose a suggestion by Mr. J. G. Smith, of the Madras Bar, for the amendment of the provisions of the Code of Civil Procedure relating to the execution of decrees.

* * * * *

MADRAS,
11th February 1895.

(Signed) J. H. SPRING-BRANSON,
Advocate-General.

Suggested Amendment of the Civil Procedure Code—Execution of Decrees.

There is frequently great delay and considerable expense caused to the judgment creditor under such circumstances as the following:—

A decree is obtained in one district and execution is required in another. Under section 223 the decree is forwarded for execution to the District Court within whose jurisdiction the judgment-debtor is or possesses property and that court either executes it or forwards it for execution to a court subordinate to it. Now possibly the judgment-creditor may have made a mistake as to whereabouts of his judgment-debtor or the latter may be absent; the consequence is that the court executing the decree fails to find the judgment-debtor and certifies its failure to the court passing the decree. Whereupon the judgment-creditor perhaps discovers that the judgment-debtor has either absconded to another district or to another local jurisdiction in the same district. He then has to make another application to the court passing the decree, and that court, acting again under section 223, forwards it to the first district named by the judgment-creditor and possibly on its arrival with the same result. To take an instance, a decree passed by the Munsif's Court of (say) Vizagapatam against a man believed to be at Pallávaram. Decree forwarded for execution to the District Court, Chingleput, and by it transferred to the Munsif at Pallávaram. Meantime the defendant has gone to Burma and so the Munsif's Court, Pallávaram, certifies the failure to execute to the District Court, Chingleput, which reports the fact to the Vizagapatam District Court. The judgment-creditor thereupon has to apply afresh to the Vizagapatam District Court to forward the decree for execution to the proper court in Burma. All this, of course, entails great delay and considerable expense for the various applications to the different courts, and this is only a very simple instance. Of course, if the judgment-debtor, as frequently happens, is absconding, the process may have to be repeated almost indefinitely and with but small chance of ultimately catching him. I would suggest, as a means of simplifying the procedure and rendering the position

of the judgment-creditor less arduous, that it should not be necessary to certify to the court passing the decree until it be satisfied, and that the first court to which it is sent for execution should be empowered to certify on the decree that it has not been satisfied and then send it direct to any other court within whose jurisdiction the judgment-debtor is said to be, thus avoiding the delay and expense of returning it to the court which passed it, and, by means of the increased celerity of the proceeding, affording the judgment-creditor a better chance of obtaining execution. For instance, in the above supposed case the Chingleput District Court should be empowered to certify non-satisfaction and forward it direct to the proper court in Burma, and that court in its time should be empowered to forward it direct, if necessary, to Assam or Bombay or Bengal, as the case may be, and so on until the judgment-debtor is run down.

The procedure above suggested would be similar to that enacted by Criminal Procedure Code, section 83, for the execution of warrants outside the local limits of the jurisdiction of the court issuing the same.

MADRAS,
11*th February* 1895.

(Signed) J. G. SMITH,
Barrister.

From the Government Solicitor, Madras, to the Chief Secretary to Government, dated Madras, 12th February 1895, No. 77.

With reference to the Order of Government, Judicial, dated 17th November 1894, No. 2795, I beg to inform you that the Attorneys Association of Madras, on receipt of the order, held a meeting and appointed a committee to consider what amendments are necessary to the Codes of Criminal and Civil Procedure and that I was appointed a member of such committee. The committee sent in to the Association its report on such amendments and, yesterday the Association met to consider and pass such report. The report will be forwarded to Government in a few days. Under the above circumstances I have not thought it necessary to make any separate remarks as to amending the Codes.

(Signed) E. BARCLAY,
Government Solicitor.

From H. W. FOSTER, Esq., Registrar of the High Court of Judicature, Appellate Side, to the Chief Secretary to Government, dated Madras, 14th February 1895, No. 424.

* * * * *

2. In this connection I am to bring to notice what appears to be a defect in the new section 310-A of the Civil Procedure Code, introduced by Act V of 1894. In this presidency, a fee in the shape of poundage is levied on the amount realized in all sales in execution. As the amount of the poundage cannot, however, be calculated before the sale, it cannot be specified in the sale proclamation, and the result is that when a sale is set aside under the section quoted, the poundage is lost, for neither the purchaser nor the decree-holder can justly be held liable, and under the terms of the section, the judgment-debtor is required to pay only charges specified in the sale proclamation. In the opinion of the High Court, he should be made liable for all expenses of the sale.

From the District and Session Judge of South Arcot, to the Chief Secretary to Government, dated Cuddalore, 15th February 1895, No. 24.

With reference to G.O., dated 17th November 1894, No. 2795, Judicial, I have the honour to state that I have no remarks to offer regarding the revision of the Codes of Civil and Criminal Procedure. I, however, enclose the remarks offered by two of

my District Munsifs, viz., M.R.Ry. P. A. Lakshman Chettiar Avargal, District Munsif of Tindivanam, and M.R.Ry. T. Varadarajulu Naidu Garu, District Munsif of Tirukkóyilúr, for the consideration of Government.

(Signed) W. F. GRAHAME,
District and Session Judge.

ENCLOSURES.

From the District Munsif, Tindivanam, to the District Judge, South Arcot, dated Tindivanam 3rd January 1895, No. 1.

With reference to the District Court's footnote to the G.O., dated 17th November 1894, No. 2795, Judicial, I beg to submit that as I understand the reported decisions upon section 258 of the Code of Civil Procedure, it seems to be a matter of doubt whether question of satisfaction of decrees, even if not certified as per section 258, can be considered under section 244 of the Code: thus it becomes necessary to add a footnote to section 244 that such a question of satisfaction does not fall under that section and cannot be inquired into. Orders under section 278 upon claim petitions are, as per section 283, final till disturbed by a regular suit, and I humbly think there must be a clause under section 244 that such orders don't fall under that section.

(Signed) P. A. LAKSHMAN CHETTIAR,
District Munsif.

From the District Munsif, Tirukkóyilúr, to the District Judge, South Arcot, dated Tirukkóyilúr, 9th February 1895, No. 28.

As directed in the Proceedings of the District Court, Nos. 769 and 60, dated 5th December 1894 and 28th January 1895, respectively, I beg to submit the following remarks embodying the difficulties which I have experienced in the practical administration of the Code of Civil Procedure, and suggesting certain alterations which it may be desirable to make in the present Code.

Section 13.—This is one of the sections of the Code on which legal ingenuity has been exercised to an abnormal extent. The whole of the law of *res judicata* has been condensed by the framers of the Code into seven small paragraphs of a section; and added to the brevity of the section, a number of decisions more or less irreconcilable with one another has emanated from the several High Courts, with the result that Judges have often to administer the law on the subject with considerable hesitation. Explanations I, II and III of the section especially afford ample scope for legal speculation and for the display of legal ingenuity, and I think it desirable that those explanations should be amplified in the light of the host of decisions bearing on the subjects covered by them. The words "any matter which *might* and *ought* to have been made a ground of defence or attack" in explanation II have been a fruitful source of contest; and explanation III will, if strictly followed, cause considerable hardship in some cases. As regards the question of mesne profits subsequent to suit, claimed in the plaint and not expresly allowed in the decree, the current of decisions appears not to give full effect to explanation III as it now stands. The law as regards points decided between co-defendants when the previous suit was dismissed, as well as the question whether the section is applicable to points of law previously decided between the parties, appear still to be unsettled. So also is the question whether the dismissal of a suit under section 102 would operate as *res judicata*. No doubt the legislature cannot be expected to make express provisions for all possible cases, but I feel that something can be done by it in the way of setting at rest many of the vexed questions which have cropped up since the enactment of the present law.

Sections 17, 26 *and* 43.—The expression "cause of action" is defined in section 17 so far as it relates to suits arising out of contracts; but that expression appears in several other places in the Code, chiefly in sections 26 and 43, where no definition of that expression is given. It is clear that the expression is not used in the same sense in all the places where it occurs. In sections 17, the expression is not limited to mean the whole cause of action, but includes any material portion thereof; but this construction cannot, I think, be safely placed on the expression as used in sections 26 and 43. It is desirable, therefore, that the expression should be defined in the places where it occurs, or in section 2 allotted for definitions, to remove the uncertainty which now besets the subject.

Sections 20 *and* 21.—The power to stay proceedings and to remit court-fees granted by these sections may, I think, be extended with advantage to suits relating to immovable property instituted in courts within whose jurisdiction only very small portions of the subject-matter are located. It sometimes happens that a plaintiff consults his own convenience alone in selecting a court for his suit where immovable property forming the subject-matter of the suit is situated

within the jurisdiction of more courts than one; but justice may be better done in some other court having jurisdiction, and in such cases the courts may be permitted to exercise a power similar to that now vested in them by these sections, with such limitations as regards the extent or proportion of property, &c., as may be deemed necessary.

Section 45.—There appears to be a difference of practice as to the form the decision should take when a court of appeal reverses a decree on the ground of misjoinder. Sometimes the plaint is returned for amendment and sometimes the suit is dismissed. The law on the subject requires to be settled.

Sections 46 *and* 47.—These sections do not provide for the refund or otherwise of the court-fees paid on the excluded cause of action. The provision in section 47 that the court "may make such order as to costs as may be just" cannot, I apprehend, cover an order for refund or otherwise of court-fees.

Section 74.—It is not clear from the section whether it is the intention of the legislature that service of summons on one partner is sufficient even in cases where the partnership had been dissolved prior to filing of the plaint. This point may be made clear.

Sections 73 *to* 84.—I think it desirable that an obligation should be imposed upon the village officers when they are in the village to assist the process-servers in the service of summonses, &c., and that, whenever practicable, the attestation of any one of the principal village officers should be obtained to the return of service. The expediency of at least a rule being framed on the subject by the High Court under the power vested in it by sections 72 and 652 of the Code appears to have been brought to the notice of the High Court (see page 141 of the Civil Rules of Practice). The process-servers cannot be expected to know all the persons to whom processes are issued, and in cases where the party at whose instance the process is issued cannot, by reason of his residence in a distant village or for other sufficient cause, accompany the process-server; the latter is actually left helpless, and his returns in such cases are generally unsatisfactory. The serious consequences to the parties resulting from a finding of proper service of processes impart to the subject a gravity which must be sufficiently met. The process-servers are low-paid officials, and when an influential man happens to be the person to whom the process is issued, the scope for fraud is considerable and the chances of detection are few. From the very nature of the case the enquiry directed by section 82 cannot always be satisfactory.

Section 111.—It is not very clear from the section itself that the written statement embodying the set-off claimed should be stamped in the same way as a plaint should be, though the decisions on the subject are to that effect. Paragraph 3 of the section may, I think, be amended to make the point clear.

Section 171.—Parties to suits and persons named as witnesses by the parties cannot apparently be summoned and examined by the court of its own motion. Sections 177 and 178 authorize a court to examine a party to a suit who is present in court as a witness, and there are other sections of the Code, such as sections 66, 120, &c., which authorize a court to direct the personal appearance of the parties for certain purposes; but there does not appear to be any express provision authorizing a court to summon and examine the parties as witnesses of its own motion; and the reason for the prohibition, if the legislature did intend it, is not patent. Again, the parties may include certain names in their list of witnesses, but may not at the trial choose to examine them; and if the effect of section 171 is to preclude the court from examining such persons of its own accord, it seems to me that the section requires amendment in that respect. The section further does not make any provision as to the source from which the expenses of the witnesses summoned at the instance of the court should be met. The courts may, I think, be given a power similar to that conferred by section 162 to direct either or both of the parties to deposit the expenses on pain of attachment and sale of his or their movable property.

Section 174.—As the law stands at present, the courts cannot punish a witness for disobedience to a summons except after the issue of a warrant. It not unfrequently happens that witnesses attend late, with the result that suits which had to be postponed in the early part of the day owing to absence of witnesses have often to be taken up for trial in the latter part of the same day, at the request of parties, and the witnesses that cause the inconvenience go scot-free, unless the court chooses to send them to a magistrate for an offence under section 174 of the Indian Penal Code, which it is generally reluctant to do, considering that the offence is not of such a grave character as to render it desirable to adopt the circuitous procedure involved in the taking of such a step. A power to fine such witnesses for contempt, similar to that conferred on courts of session by the Code of Criminal Procedure, section 318, in respect of jurors and assessors, may, I think, be granted to civil courts.

Section 193.—This section does not permit the re-calling of a witness who has been examined and permitted to depart, except in cases falling within section 191. The law as at present administered permits the court to grant time to parties for adducing additional evidence, if the ends of justice require it, and I fail to see any satisfactory reason why a witness once examined and permitted to depart should not be re-called, when such a step is rendered

necessary or desirable by any fact elicited in the evidence subsequent to the examination of the witness, or by reason of any oversight of the party at whose instance he was summoned. The disallowing of costs incurred in re-summoning the witness would be a sufficient punishment to the party whose neglect or default necessitated the re-calling of the witness. The power should be discretionary with the courts.

Section 206.—Whether a court of first instance can amend its decree after it has been confirmed by a court of appeal, is a question which seems to be not quite settled. A proviso added to the section on the subject would settle the matter.

Section 210.—It is doubtful whether under this section courts have power to postpone the payment of the whole decree. Applications are often made at the time of passing decrees for postponement of payment of the whole decree for some months, especially by the agriculturist who hopes to pay up the decree debt in the following harvest season; and in a number of cases the courts are inclined to comply with such requests, but are met by the want of any express provision on the subject. An amendment of this section so as to cover such cases expressly is, I think, desirable.

Sections 257 *A and* 258.—These sections do not provide what the effect is of agreements or adjustments sanctioned by the court. There seems to be a difference of opinion as to whether they could be executed as decrees, or separate suits should be instituted on such agreements and relief obtained therein. Further, the Limitation Act provides that applications for payment of the amount of a decree by instalments should be made within six months, and if the parties, therefore, enter into an agreement for payment of the decree amount by instalments after six months from the date of the decree, they will probably be debarred from applying for the court's sanction, which would be rather hard to the parties, as such agreements not sanctioned by a court are rendered void by section 257A. These sections may be amended or amplified to cover these points expressly.

Section 260.—The legislature has already taken action in the matter of making the infliction of imprisonment in execution of a decree for restitution of conjugal rights discretionary with courts. Such a limitation is, I think, very desirable, and will sufficiently meet the requisites of all possible cases. The extreme section of the reform party is no doubt for the total abolition of the remedy of imprisonment altogether; but there may be cases of such wilful and wholly unjustifiable disobedience as to render imprisonment highly desirable. The contract of marriage is the most solemn one in the land, and I fail to see why when the disobedience of court's orders for specific performance of ordinary contracts is visited with imprisonment, the breach of the most solemn obligation of marriage ought not, under certain aggravating circumstances at least, be placed in the same category. It is not in every caste that marriages take place at a very early age. Except among the regenerate classes, marriages are generally celebrated after the parties attain the age of discretion.

Section 265.—In this presidency the uniform practice has been for civil courts themselves to effect partition of lands paying revenue to Government, excepting permanently-settled estates. This is being done under a peculiar construction placed upon the word "estate" as used in the section. Taking the Code, however, as a whole, it is probable that the legislature did not intend that the word "estate" should be taken in the narrow sense of permanently-settled estates. Section 396, for instance, provides that a court may issue a commission when partition of immovable property other than that paying revenue to Government may have to be made, thereby implying, as it seems to me, that partition of immovable property paying revenue to Government has to be made as otherwise provided. In the other presidencies, I believe, partition of all lands paying revenue to Government is effected by the Revenue authorities. The practice which has grown up in this presidency and which, it is desirable, should be continued, may be given legislative sanction by the addition of a proviso to this section.

Section 268.—It has been held that a small cause court cannot issue an order of attachment under this section beyond its jurisdiction, but it is not apparent why a distinction should be made between a small cause court and a regular court on the subject. As a matter of practice, regular courts issue orders of attachment of salaries, &c., under this section, though the salaries, &c., have to be disbursed outside their jurisdiction.

Section 271.—The section prevents the entry into a dwelling-house for purpose of attachment after sunset, but does not expressly prohibit the stay of the attaching officer in the building after that hour, after he has gained access into the house legally. In some cases it may be desirable that the amin or the bailiff should, for completing the attachment, continue to remain in the house for some time after sunset. The intention of the law on the subject may be made clearer.

Under this section, the outer door of a dwelling-house cannot be broken open for the purpose of effecting an attachment. This prohibition operates as a hardship to the judgment-creditor in certain cases, while it affords to the judgment-debtor a loophole for evading the judgment-debt successfully. When a judgment-debt is about to be barred by the operation of section 230 of the Code, judgment-debtors not unfrequently avail themselves of this prohibition,

and it is generally difficult for the judgment-creditor to prove that the Act is fraudulent and to claim the benefit of section 230. The Revenue Recovery Act, section 20, provides that the outer door of a dwelling-house might be broken open for purposes of distraint, subject to certain conditions, and I think a provision similar to it may be introduced into the Code of Civil Procedure. The power to direct the breaking open of the outer door of a dwelling-house should be made discretionary, to be exercised by the courts on proof of fraud, and the presence of a police officer or village officer may be made necessary for the execution of such a warrant.

Section 272.—When property in court or in any public office is attached, it may be desirable that the person whose property is attached should be made acquainted with the attachment, and an addition to this section requiring that a copy of the attachment order should be sent to the judgment-debtor would, I think, be sufficient. After the attachment is made, the property, if it be money, as it generally is, is made over to the decree-holder, and there is at present no law or rule requiring that the judgment-debtor should be made acquainted with the use made of his property.

Section 273.—Similarly, when attachment of decrees of money are made under the first or the second clause of section 273, a copy of the attachment order should, I think, be communicated to the holder of the attached decree. This is desirable not only to keep him informed as to how his property is being dealt with by others, but also in the interests of the public who, in ignorance of the attachment, may be led to enter into contracts with the judgment-debtor in respect of the attached property. Section 276 invalidates any alienation of the attached decrees subsequent to the attachment; and it is rather hard that an order of the court passed probably in chambers and communicated to the head clerk of the court should have the effect of invalidating, so far at least as the attaching creditor is concerned, a transaction affecting the property entered into by both parties *bonâ fide* and in perfect ignorance of the order. Section 273 besides makes no express provision for the execution by the attaching creditor of decrees attached under the first paragraph of the section, and to such decrees also the provisions in the 2nd and 3rd paragraphs of the section should be made expressly applicable. There is no express provision as to what further steps should be taken after the attachment of attachable decrees other than decrees for money, for the satisfaction of the judgment-debts for which the attachment was effected. The execution of such decrees by the attaching creditor cannot of itself in a majority of cases result in the realization of money for the satisfaction of the attaching creditor's judgment-debt, without certain other steps being taken, which the law nowhere sanctions. It is desirable, therefore, that such of the decrees other than decrees for money as are liable to attachment should be sold, and the sale-proceeds appropriated towards the satisfaction of the decree under execution. Paragraph 1 of section 273 may also be extended to cases where the decree to be attached and the decree in execution of which attachment of the decree is sought are being executed by the same court, though not passed by the same court.

Section 295.—There seems to be a difference of opinion as to whether a regular court which is also invested with small cause jurisdiction is to be treated as a court different from that on its small cause side for the purposes of this section. The legislature may set at rest the doubt by the addition of a clause or a proviso to this section.

Sections 310 *A and* 311.—The words "any person whose immovable property has been sold" have been held to include not merely the judgment-debtor but also the beneficial owner where the judgment-debtor is only an ostensible owner (I.L.R., 20 Cal., 418); and I think these sections may be extended to persons who are not owners in the strict sense of the term, but are interested in the property sold, such as mortgagees, &c. No doubt a mortgagee who was ignorant of the sale at the time may have other remedies such as the institution of a suit, &c; but they cannot always be effective, and I fail to see any satisfactory reason why the summary remedy of protecting the property afforded by these sections, especially the new section 310 A, should not be allowed to him.

Section 367.—In some cases the strict enforcement of this section operates as a hardship. The suit in which the representative character of a person is disputed on the death of a plaintiff may be a trivial one, but the settlement of the question would involve an amount of labour out of all proportion to the importance of the suit, while the staying of the suit till the determination of the question in another suit might result in the extinction of necessary evidence when the suit comes to be actually tried--probably several years later. This is not unfrequently the case when succession to a large zemindari estate, for instance, is in dispute. In such cases the placing of both the rival claimants on the record conditionally, and the passing of a decree contingent upon the result of the suit in which the question of heirship is to be or is being tried, might probably meet all ends.

Section 375.—The words "so far as it relates to suit" are not sufficiently clear when they are applied in practice. A man sues, for instance, for recovery of a mortgage debt, and the parties agree that the mortgaged property should be made over to the plaintiff; or, taking a converse case, a man sues for the recovery of property, and it is agreed that the plaintiff should take some money and give up the property to the defendant. In such cases, there is a considerable room for doubt as to the form that the decree should take. Again, a man sues for a declaration

of his right, in respect of certain properties, and is subsequently satisfied, under an arrangement with defendant, with possession of a portion of the property in respect of which declaration was prayed for. In some cases the relief consented to by the parties may exceed the amount for which stamp-duty has been paid or the pecuniary limits of the court's jurisdiction. As no appeals lie against decrees passed under this section, these difficulties do not often attract the notice of the higher authorities; but it is none the less desirable that a uniform practice should govern the drawing up of decrees in such cases.

Section 397.—The Code does not make any provision for the mode in which the amount of commission has to be realized if the parties or any of them directed to deposit the same refuse or neglect to do so. The language of section 649 does not appear to me to cover the case. That section seems rather to prescribe the mode of executing processes issued for payment of money and does not of itself specify the process or processes which may be resorted to for the collection of the amount. This is also clear from the enactment in several sections of the Code of the mode in which any payment of money ordered should be enforced (sections 172, 293, 315, &c.). There is no section in the Code, which authorizes the dismissal of the suit or the shirking off of the defence according as the recusant party is the plaintiff or the defendant. Section 158 merely directs that in such a case the court may decide the suit forthwith, which would mean that the court should go into the evidence adduced and decide the suit. I think it is highly inexpedient that parties should be in a position to balk the court's order especially when the commissions are for local investigation or for examination of accounts, in which cases trials without the issue of preliminary commissions would involve extensive labour and ordinarily produce unsatisfactory results. I think, therefore, that a provision that the amount of commission ordered may be levied by the attachment and sale of movable property of the person in default may be included in the section with advantage.

Section 411.—The Bombay High Court has held (I.L.R. 15 Bom., 77) that section 412 applies only to cases of adjudicated failure, and that Government is not entitled to any stamp-duty if the parties settle the matter out of court and request the court to dismiss the suit; and it may be argued that section 411 similarly applies only to cases of adjudicated success; and if this contention were to prevail, a pauper plaintiff may, by putting in a razinama entirely in her favour, get the benefit of it without paying anything towards the costs of litigation. The legislature may perhaps deem fit to take action in the matter.

Section 463.—The Code does not make express provision for appointment of guardians *ad litem* of lunatics other than those adjudged to be so under Act XXXV of 1858 or other law. The Bombay High Court has held (I.L.R. 16 Bom., 132) that it is the duty of the Court to appoint guardians *ad litem* for even lunatics not adjudged to be so under any law, and as it is highly equitable that it should be done, the section may be amended so as to include all persons found to be lunatics on inquiry or adjudged to be such.

Sections 330, 412 *and* 493.—In these and certain other sections it is not clear in what sense the word "imprisonment" is used—whether the imprisonment is to be in the civil jail or in the penitentiary. The word "imprisonment" is defined in the General Clauses Act as "imprisonment of either description as defined in the Indian Penal Code." In these sections it is clear that the legislature intended that the imprisonment should be a punishment for disobedience of orders of courts, &c. The legislature may clear the doubt on the point.

Sections 477 *to* 505.—These provisions, it is desirable, should be extended to applications to sue *in forma pauperis* before they are registered as suits. It sometimes happens that in the interval between the presentation of an application under section 403 and the registering of the same as a suit, the defendants alienate their properties, and the law as it stands at present does not provide any remedy to prevent such dispositions.

(Signed) T. VARADARAJULU,
District Munsif.

From the Acting District Judge, Chingleput, to the Chief Secretary to Government, dated Chingleput, 20th February 1895, No. 283.

In reference to G.O., of the 17th November 1894, No. 2795, on the subject of the revision of the Codes of Civil and Criminal Procedure, I have the honour to state that I regret my answer has not been sent by the 1st February 1895. It was only about that date, however, that I noticed a reply to the Government Order was pending from this office.

2. I find the permanent Judge, Mr. Russell, has referred the paper to the vakils here, and the Public Prosecutor informs me that their answer will shortly be sent.

He says that as the subject is not now going to be considered by the Legislative assembly at Calcutta this session, there was some delay in making a reply. I observe, however, that the Government of India wish for the replies before the end of this month.

3. In regard to the Civil Procedure Code, I have not had sufficient experience of its practical working to enable me to make any suggestions.

* * * * *

(Signed) C. H. MOUNSEY,
Ag. District Judge.

From J. SHORT, Esq., Honorary Secretary, Attorneys' Association, Madras, to the Chief Secretary to Government, dated Madras, 26th February 1895.

With reference to G.O., dated 17th November 1894, No. 2795, I now have the honour to forward the remarks and suggestions of the Association as to amendments in the Criminal and Civil Procedure Codes, and regret the delay in not sending in same earlier.

* * * * *

As to the Civil Procedure Code the Association observe, from paragraph 2 of such letter, that the Government understand that the local Governments and "Administrations and the High Courts have been registering the difficulties and obscurities, which practice has brought to light in the Codes" and in this view the Association have omitted, in their remarks, to refer to the reported cases in which the various High Courts are in conflict or have experienced any difficulty in arriving at an interpretation of the Code and the Association have therefore confined their suggestions mainly to the various instances in which difficulties have come to their notice in the course of practice.

ENCLOSURE.

* * * * *

Section.	Amendment suggested.	Remarks.
2	To insert in the definition of a decree after the words "not specified in section 588" the words "and an order passed under section 373."	It is not clear whether the definition of "decree" does, or does not, include an order passed under section 373 allowing an appellant to withdraw from his appeal or to abandon part thereof. There have been contrary decisions on this point.
13	To add an explanation VII this section is applicable to appeals.	It has been held that, although section 13 does not apply to appeals, the principle of *res judicata* does.
30	Omit the words "at the plaintiff's expense" and add at the end of the paragraph "and the Court shall direct by whom the costs of and incident to such notice shall be borne."	....
32	Insert after the word "added" in paragraphs 2 and 3 the words "or substituted." To add paragraph 4 to section 30.	....
33	Omit the words "if previously filed."	....
37	Omit the words between "powers-of-attorney" and the word "authorizing."	Cases have repeatedly arisen in which persons holding powers-of-attorney have claimed the right of audience, &c., in Court thereunder, their principals being resident within the jurisdiction of such Court. Some Judges have held them entitled to appear, others have held the contrary. There does not appear to be any valid reason why persons who are prevented from press of business or other reasons should not appoint an attorney to act for them.
39	It should be specified whether the appointment in writing requires signing before an official or not.	Vakaulats both in the Appellate Court in Madras and in the Mofussil Courts have often been rejected because they are not signed in the presence of some official though the Code does not appear warrant their rejection.

Section.	Amendment suggested.	Remarks.
43	To insert in paragraph 1 and paragraph 3 after the word "cause" the words "or causes."	....
51	That the section read as follows: "The plaint shall be signed by the plaintiff or by one of the plaintiffs and his or their pleader and shall be verified at the foot by the plaintiff or one of the plaintiffs or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case. Provided that if the plaintiff is, or all the plaintiffs are, by reason of absence or for other good cause, unable to sign the plaint, it may be signed by any person duly authorized by him or them to sue on his behalf."	This section as at present framed makes it necessary to obtain orders at some expense, enabling one partner to sign and verify the plaint on behalf of his partners if from absence or other cause they are unable to do so. It also enables the person duly authorised to sign and verify "if authorised on that behalf." If a person is authorised to sue that should, it is submitted, be sufficient authority to him to sign and verify.
53	Omit (*a*).	....
54	Add a proviso "Provided that the Court may from time to time extend the time so fixed."	The section at present is imperative and cases have arisen and may arise where it was and is desirable that the Court should have discretionary power to extend the time.
72 73	....	The system in practice in England by which the summons is served by the parties themselves is preferable to the one which exists under these sections. The summonswould be served more expeditiously, especially where the party to be served is resident outside the jurisdiction of the Court which issues the summons.
89	....	It is suggested that service on a defendant residing out of British India should be effected in the same way as writs issued by the High Court of Justice in England are served in India.
102	For the words "the Court shall dismiss" substitute the words "the Court may dismiss."	It seems desirable to make this clause permissive and not mandatory.
106	....	If some defendants who have been served do not appear, it is suggested that instead of waiting until the time of passing the judgment against all the defendants, the Court may at once pronounce judgment and issue a decree against such of them as do not appear without prejudice to the plaintiff's right to proceed with the suit against the other defendants.
111	....	Regard being had to the numerous conflicting decisions on this section, it is suggested that the rights of set-off should be more clearly defined.
129	Omit the words "at any time before the first hearing."	The omission of the words suggested will assimilate this section to order XXXI of the Judicature Acts. At present the usefulness of the section is to a great extent impaired, at any rate in Madras, by reason of the day of settlement of issues, which takes place long previous to trial, being considered "the first hearing." If the amendment suggested is considered undesirable, then it is suggested that "the first hearing" be defined.
131	Insert after the word "produce" the words "or consent to the same being produced in Court."	At present section 131 seems somewhat inconsistent with section 140 which directs the Court to receive documents produced by the parties at the first hearing. If the documents are filed in Court the party cannot produce them. It is also desirable to define "first hearing."
137	Insert the word "any" instead of the first word "the."	Questions have arisen as to the power of a subordinate Court to send for the records of a superior Court.
138	....	Questions have arisen as to whether documents which the parties have had in readiness at the first hearing but have not been called for by the Court are admissible, and it is suggested that in this respect the section might be made more distinct. "First hearing" should be defined.
139	After the number "138" insert the words "or mentioned in the list added or annexed to the plaint."	....
153 157	....	*Vide* remarks on section 106. Questions have arisen as to whether a decree can be at once issued against the defendants against whom judgment has been pronounced. It is suggested that specific provision should be made enabling this to be done—*vide* order 14, rule 5, under the English Judicature Acts.
160 161	....	No provision is made for the payment of any special allowance to persons summoned to give evidence as experts, and it is suggested that a provision to that effect is desirable.

Section.	Amendment suggested.	Remarks.
168 169 170	....	In many cases the issue of a warrant would enable the suitor to obtain the attendance of the witness required which he is unable to obtain under the present cumbersome procedure, and many cases must arise where the witness has no property to speak of. It is desirable that the Court should have the power to issue a warrant of arrest.
180	....	Provision should be made for allowing the defendant the right to address the Court on his own evidence and on the case generally.
218	Add a proviso as follows: "Provided that if the Court shall make no order as to such costs the same shall be costs in the cause."	....
Chap. XIX.	....	It is suggested that the procedure to be followed in executing decrees should be assimilated to the practice existing in the High Court of Justice and the County Courts in England and that the Court which passes the decree should itself issue the required writ of execution and transmit it to the Chief Ministerial Officer of the Court within whose jurisdiction the judgment-debtor is living or his property is situated. The complaints of the public against the present procedure are numerous and in the opinion of this Association well founded; it is cumbersome, costly and lengthy; by it the judgment-debtor is enabled to avoid arrest by moving from one district to another and to dispose of his property before the judgment-creditor is in a position to attach it, in fact every facility is given to a dishonest debtor to hinder and defeat the execution of a decree obtained against him. At present there is an anomaly, as under section 648 a Court can send a warrant to another Court for execution before decree, but after decree has been passed it has no power to do so.
234	Insert at the end of this section the words "and examine him in relation thereto or as to the property of the deceased."	....
236	Omit.	In the case of moveable property it is in the majority of cases impossible to file an inventory.
238	Omit, or if the section is considered absolutely necessary, omit the word "attachment" and substitute therefor the word "sale" and make it an additional clause to section 284.	This section throws great and unnecessary impediments in the way of the execution-creditor, and the delay which necessarily arises in obtaining the extracts in most cases affords the judgment-debtor time to dispose of his property before attachment.
244	....	Having regard to the numerous conflicting decisions, this section will doubtless have the attention of the Legislature, especially as to the interpretation to be placed on the words "parties to the suit," "representatives."
245	...	*Vide* remarks on section 238.
248	Omit (*a*) and the first paragraph of the proviso and if the procedure regarding the execution of decrees be adopted, omit explanation.	It is not clear why the provision (*a*) is inserted unless it be to give notice to the judgment-debtor that his creditor is on the alert and to enable him to dispose of his property.
256	Omit the words from the word "only" to the word "Rupees" and omit from the word "judgment-debtor" to the end of the section adding after the word "judgment-debtor" the words "or his property."	It is not clear why the operation of this section should be limited either in amount or extent.
266	Omit K.	Though it might be impossible to actually attach the right and interest referred to still the Court should be empowered to issue a prohibitory order to the judgment-debtor restraining him from dealing with such right or interest.
268	In paragraph 6, omit the word "may" after the words "of this section" and substitute the word "shall". Add a provisio: "If the debtor does not pay the amount of his debt into Court, the Court shall issue a notice to him calling upon him to show cause, within a time fixed by such notice, why he should not pay the same into Court. If the debtor does not show cause, then the Court shall issue execution as in an ordinary suit."	It is suggested that the provisions of the Code relating to the attachment and realisation of debts due to a judgment-debtor should be entirely recast so as to assimilate the Indian to the English practice. The present procedure of putting up a debt for sale is costly and tedious and against the interests of the judgment-debtor as the debt may be bought in by the judgment-creditor for a nominal sum, which is all the judgment-debtor would get credit for.

Section.	Amendment suggested.	Remarks.
270	....	This is the only section that relates to the attachment of negotiable instruments, and from section 268 it would appear that the attachment of debts secured by such instruments is not contemplated by the Legislature. It is hardly necessary to point out the many difficulties that must necessarily arise in carrying out the procedure laid down in section 270, and it is suggested that the provision of section 268 regarding the attachment of debts should be extended to debts secured by a negotiable instrument.
272	....	No provision is made in the Code as to the mode in which moneys attached under this section are to be paid out of Court.
276	....	*Vide* remarks on section 270 as to the attachment of debts secured by negotiable instruments.
278	After the word attached insert the words "or directed to be sold," and after the word "attachment" insert the words "or sale." Add at the end of paragraph 3 the words "upon such terms as the Court thinks fit."	At present no provision is made in the Code for claims to property directed to be sold under a decree.
283	....	This is another section the various decisions on which have no doubt been brought to the notice of the Legislature.
284	....	*Vide* remarks on section 272.
302	For the words "the Judge may endorse" and "or may execute," substitute the words "the Judge shall endorse" and "or shall execute."	....
306	....	It has been held that, if the judgment-creditor purchases the property, he must pay in 25 per cent. of the purchase money. This appears to be in contradiction of section 294.
307	....	*Vide* remarks on the preceding section.
308	....	It is impossible to see upon what grounds the deposit should be forfeited to Government instead of being applied in part satisfaction of the decree.
311	....	Regard being had to conflicting decisions, it is desirable that the expression "material irregularity" should be defined.
351	Omit from in clause (*b*) the word "property" to the end of the clause.	The section as at present is opposed to section 359, and also to the proceedings under the Insolvent Act, to which it is suggested it ought to be assimilated.
373	....	Regard being had to the various decisions, it is desirable that the section should be amended.
380	After the word "money" to insert the words "or other property."	The insertion of the words is suggested looking to the number of instances which occur, of women being instigated to institute false suits, while no hardship is likely to occur, the power in the Court being a discretionary one.
407	Omit the words in paragraph (*b*) "within the two months next before the presentation of the application."	If the applicant has disposed of his property fraudulently or with a view to obtain the benefit of this chapter, such disposal should be a bar to the application irrespective of the date of such disposal.
479	....	Provision should be made for the realization by a successful plaintiff of the security in deposit under this section and also in sections 493, 545 and 546.
532	After the word "specified" insert the words "or, if not specified at the rate of 6 per cent."	There seems to be no reason why interest should be entirely disallowed only in proceedings under this chapter.
544	....	Provision should be made for a minor representative who wishes to appeal having a guardian or next friend appointed for that purpose.
561	....	This section should state in explicit terms whether a respondent is entitled to raise questions as to the effect of the decree between himself and a co-respondent.
562	....	There have been various contradictory decisions on the interpretation to be placed on the words "preliminary point" and a more explicit definition of what is meant by the term is desirable.
622	....	Regard being had to the decisions on the meaning of the words "illegally or with material irregularity," it is suggested that the section should be amended so that the High Court may call for the record of a case where a decree has been passed contrary to law.

From B. MACLEOD, Esq., B.A., Barrister-at-Law, Acting District Judge, Tinnevelly, to the Chief Secretary to Government, dated Tinnevelly, 28th February 1895, No. 97.

I have the honour to submit, herewith, a letter, dated 27th February 1895, from M.R.Ry. V. Ranga Chariar Avargal, a Pleader of this Court and Secretary to the Bar Library, suggesting certain amendments to the Civil and Criminal Procedure Codes, and I request, if it should please the Government, the suggestions may be transmitted to the India Government in the Legislative Department.

ENCLOSURE.

From M.R.Ry. V. RANG ACHARIAR Avargal, Secretary to the Tinnevelly Law Library, to the District Judge, Tinnevelly, dated Tinnevelly, 27th February 1895.

In regard to the proposed general revision of the Civil and Criminal Procedure Codes, I beg to submit herewith a few important suggestions which the members of the Bar in meetings duly convened have considered it desirable to offer, and, on behalf of the Bar, I beg to request that you will be so good as to place them before the Government.

2. The members of the Bar regret very much that they have not been able to submit their views earlier.

AMENDMENTS SUGGESTED.

* * * * *

Civil Procedure Code, Act XIV of 1882.

Section 278.—Under this section claims can be preferred only in regard to properties *attached*. Where a property is directed by the decree itself to be sold, as in mortgage decrees, no claim is allowed under section 278; there is no reason why any distinction should be made. Provision should be made in the section for entertaining claims to property *advertised to be sold*, whether after attachment or in pursuance of a direction in the decree. Considerable time and labour will be saved by making this provision.

Section 305.—This section is made applicable only to money decrees. It is highly necessary that the section should cover mortgage decrees also.

Section 463.—This section is limited to persons of unsound mind, adjudged to be so under Act 35 of 1858, or under any other law for the time being in force. Suitable provision should be made for a proper representation of persons of unsound mind *not* so adjudged; both in the case of lunatics against whom suits have to be brought and in the case of those who become mad after the institution of the suit.

Sections 451 *to* 453.—Provisions similar to those contained in these sections should be made to the case of minor defendants who come of age in the course of the suit.

Section 539.—There is considerable difficulty in making out the class of cases falling within this section as distinguished from those which come under the Native Religious Endowments Act, No. 20 of 1863. The distinction must be clearly defined.

Further, there is a conflict of decisions as to whether a trustee may be *removed* under this section. Distinct provision ought to be inserted in the section to that effect.

Section 541.—As in the case of plaints, copies of the memorandum of appeal must accompany every appeal to be served on the respondent or respondents as the case may be.

Section 253.—This section is restricted by the Calcutta High Court to cases of original decrees only, while the Madras High Court extend the section to include appeal decrees also. The section should be modified so as to be in accordance with the views of the Madras High Court and the surety be made liable *in execution* and *not in a separate suit*, whether the surety was for the performance of the original decree or appeal decree.

Section 584.—It is considered highly desirable, if not necessary, that second appeal should be provided for where there has been no concurrent finding on a question of fact by the Court of First Instance and the First Appeal court.

P.S.—There is no provision in the Civil Procedure Code for *attaching* documents as there is in the Criminal Procedure Code. Sometimes the plaintiff's case or the defendant's case mainly depends upon the documents in the possession of the other party, who, it is feared, will suppress them or tamper with them. In such cases, the party relying on them has got very little remedy in the present state of the law. It is, therefore, highly desirable to insert a provision in the Civil Procedure for attachment and seizure of documents.

From R. S BENSON, Esq., M.A., LL.B., Barrister-at-law, Acting District and Sessions Judge, South Malabar, to the Chief Secretary to Government, dated Calicut, 13th March 1895, No. 507.

With reference to G.O., dated 17th November 1894, No. 2795, Judicial, I have the honour to submit, in original, the report of M.R.Ry. T. V. Anantan Nair Avargal, District Munsif of Kutnad, and the notes of M.R.Ry. P. P. Karunakara Menon, First Grade Pleader, Calicut.

ENCLOSURE.

From M.R.Ry. T. V. ANANTAN NAIR Avargal, B.A., B.L., District Munsif of Kutnad, South Malabar, to the District Judge of South Malabar, dated Ponnáni, 27th January 1895, No. 40.

With reference to G.O., dated 17th November 1894, No. 2795, Judicial, on the letter from the Government of India, dated the 22nd October 1894, No. II, Judicial 1148, inviting proposals for the amendment of the Codes of Criminal and Civil Procedure and referred to me for remarks, I have the honour to submit the following observations.

2. The Code of Criminal Procedure, Act X of 1882, and the Code of Civil Procedure, Act XIV of 1882, have now been in operation for more than twelve years, subject to special amendments and local modifications effected from time to time to meet the requirements of proved necessity. There can hardly be two opinions as regards the desirability of revising them in the light of the experience gained of their working, so as to remove the defects and to supply the omissions in them which practice has brougt to light during the last twelve years.

The leading branches of Indian Substantive Law have, within the last twenty years, been rendered into Statutory enactments of considerable juristic excellence, and it is therefore right and proper that the law of procedure, which is the handmaid of substantive law, should, *pari passu* with the progress of the latter, be so codified as to be in accordance with its general spirit and policy. The procedure law of a country affects the people more immediately than the substantive law, and its effect upon the weal or woe of the subject population is far greater than that of substantive law. However excellent the body of substantive laws may be, unless the adjective law, through the instrumentality of which the benefit of substantive laws is to be brought home to the people, is well conceived and well fashioned, the measure of happiness enjoyed by the public must always fall short of the beneficent intention of those substantive laws. To bring the great body of adjective laws into harmony with the system of substantive laws in accordance with the altered circumstances of society is a legislative function of the highest public utility; and to an attempt in this direction the general objection in principle to frequency of legislative changes is hardly applicable, regard being had to the well-known maxim of law *Salus populi Suprema est lex*. It is impossible to over-estimate the importance of having a clear, compact and methodical code of procedure law suited to the provisions, and in keeping with the policy, of the body of substantive laws. Having regard to these considerations, the proposed amendment of the two great codes of Indian adjective law, viz, the Codes of Civil and Criminal Procedure, is, in my humble opinion, not only desirable, but also highly expedient. With these prefatory remarks I shall proceed to consider as briefly as possible the defects and omissions in the codes aforesaid, and in so doing I propose to take up, in the first instance, the Code of Civil Procedure, Act XIV of 1882, because it is with the practical working of that code that my experience, first as a High Court Vakil and latterly as a District Munsif, has been more intimately concerned.

3. In considering the Code of Civil Procedure (Act XIV of 1882), the first matter that claims attention is the definition of terms contained in section 2, and here the point which requires to be remarked upon is the absence of any definition of *moveable* and *immoveable* property. Of all adjective laws, the law of civil procedure is most intimately concerned with property; and in a code which professes to be an exhaustive and self-contained embodiment of the rules regulating such a law of procedure, the omission to define the two great divisions of property, moveable and immoveable, is a serious drawback. No doubt, the General Clauses Act I of 1868 contains a definition of immoveable and moveable property, but that definition, in so far as it appears to make standing timber, growing crops, and grass, immoveable property as "*things attached to the earth*," cannot, without grave inconvenience, be adopted as suitable to the law of Procedure. Different enactments define the terms "moveable and immoveable" property differently. The definition which appears to be best suited to the procedure law is the definition contained in the leading Code of Indian property law, viz., the Transfer of Property Act, which is, next to the Penal Code, the most juristically perfect piece of Indian legislation. According to the definition given in the Transfer of Property Act, growing crops and grass fall under the category of moveable property, and this is in accordance with the definition given in the Registration Act III of 1877. For purposes of the law of civil procedure, practical convenience

requires that growing crops and grass should be defined as "moveable property." They cannot be treated as immoveable property without giving rise to considerable practical difficulties (*vide* I.L.R., 9 Mad., 193). To illustrate this by an example, I shall take the case of a decree-holder who, in execution of his decree, applies for attachment of growing crops which are about to be reaped. If such crops are treated as immoveable property, the attachment must be by a prohibitory order under section 274, and the sale following upon it cannot take place till after the expiry of 30 days from the date of proclamation (section 290). The purchaser can get possession of the crops only in execution of his sale certificate, and to get the sale certificate he must wait for at least thirty days from the date of sale sections 312 and 316). If objections are made to the sale in the meanwhile, the sale can be confirmed only after the objections are disposed of and the purchaser can get his sale certificate only after the sale is confirmed. By the time that he gets his sale certificate after all these proceedings are gone through and proceeds to take possession, what would be the state of the crop? To a certainty, it would have matured and fallen and become absolutely useless, if not entirely decayed. In the presence of these risks, purchasers cannot be expected to bid more than a nominal sum in such illusory sales, and the result will be that the impecunious judgment-debtor will lose his crop and at the same time have his judgment debt not appreciably diminished. If, on the other hand, the crop in question is treated as moveable property, all this risk and inconvenience can be safely avoided. The decree-holder can in that case attach it as moveable property, and the attaching officer can take it into his custody under section 269. If the crop is likely to perish if not reaped at once, it may either be sold instantaneously under the rules prescribed for the sales of property which is subject to speedy and natural decay (section 269) or the court may depute one of its officers to have it reaped in time and converted into grain, as such conversion is the natural and necessary mode of conserving it from decay. This is the procedure generally adopted by the courts in Malabar in the case of paddy crops attached in execution of decrees, and it is a procedure highly convenient in practice and attended with much benefit both to the decree-holder and to the judgment debtor. For the reasons shown above, it is desirable, in my opinion, to set out in section 2 a definition of moveable and immoveable property and to expressly exclude from the definition of immoveable property growing crops and grass. Another matter for comment in section 2 is the definition of the term "decree." This definition, so far as it goes, is couched in terms of considerable legal precision, but it does not appear to be exhaustive. According to the letter of this definition, to constitute a decree there must be a formal expression of an adjudication upon any right claimed or defence set up in a Civil Court. In other words, it is only adjudications which formally dispose of matters in contest between the parties that fall under this definition of a "decree." The disposal of a suit on grounds which are preliminary to, and do not touch, the merits does not, strictly speaking, come under this definition. For instance, the dismissal of a suit for default of appearance (section 98) or default of prosecution (section 97) does not appear to fall under this definition. This is a defect the removal of which will be a decided improvement. Further, the section says that an order rejecting a plaint is within the definition of a "decree," but the definition of a "decree," as given in the section, does not, in terms, embrace such an order. A decree as defined presupposes an adjudication by the court on a right claimed or a defence set up, but an order rejecting a plaint does not involve such an adjudication and is based upon grounds which are preliminary to the merits, such as the frame of the suit, its valuation, stamp, &c. To say that such an order, which, construed according to its words, does not fall within the language of the definition of a decree, *is* within that definition has the appearance of an anomaly. This can be obviated by withdrawing such orders from the definition of a decree and by providing an appeal in respect of them in section 588, the leading section regulating appeals against orders.

4. *Section* 10.—The expression "descent or place of birth," as used in this section, is not clear and exhaustive, and it appears to be desirable to amend it by the insertion of some such words as "rank, nationality, or domicile," as the intention of the section appears to be to exclude privileges of this description as grounds of exemption from the jurisdiction of Civil Courts.

5. *Section* 13.—This section which embodies the rule of *res judicata*, which the Indian Legislature, differing from the view of English law, has placed in the domain of procedure, is one of the most important, and at the same time one of the most difficult, sections in the whole code, and accordingly considerable care and juristic research appear to have been bestowed in the preparation of it. It is a matter of legal history that on every revision of the law of civil procedure, the section relating to *res judicata* has, above all others, engaged the most careful and earnest attention of the Legislature. The wording of it has been enlarged and amplified on every successive amendment of the code, and the language of the present section is a decided improvement upon the language of the corresponding section of the earliest Code of Civil Procedure, Act VIII of 1859. Though such is the case, it cannot be said that the wording of the section, as it stands at present, is in every respect artistically perfect and that it leaves nothing to be desired. That notwithstanding the care and deliberation bestowed in the framing of this section, it is still defective in some respects and capable of improvement is evident from the hopeless conflict of judicial interpretation which it has given rise to. The Indian Law Reports teem with cases in which judicial constructions diametrically opposed to one another have been placed upon the various parts of this section by the different High Courts

in India, and in not a few cases Judges of juristic eminence have pointed out in clear and unmistakeable language many of the defects and obscurities which still enshrowd the section (*vide* I.L.R., 8 All., 324; 11 All., 159; 9 Bom., 75). As regards the wording of the section (paragraphs 1 and 2) it leaves room for improvement in some respects. The section, as it now stands, is highly complex and, to a certain extent, devoid of artistic precision. Dividing the section into two parts and reading the second part of it with the words following the disjunctive particle "or," the sentence which results will stand as follows: "No court shall try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court of jurisdiction competent to try the suit in which such issue has been subsequently raised and has been heard and finally decided by such court." The expression "any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit" does not read very happy. To speak of a matter being *in issue in an issue* is a use of language too technical for popular comprehension. An amendment of this phraseology will conduce to greater perspicuity. Then, again, the section, as it now stands, lays down that, to constitute the bar of *res judicata* in the case of an issue decided in a former suit, the court which tried it should have been competent to try not only such issue, but also the suit in which issue is subsequently raised. The effect of this provision is that no adjudication whatever of an inferior tribunal will be *res judicata* in a subsequent suit concerning the same subject-matter, provided that the subsequent suit can somehow be brought before a superior tribunal. Even if the court which tried the issue originally had full jurisdiction in every respect to try such issue with conclusive effect, its decision upon the issue will not be *res judicata* in a subsequent suit before a superior court in which that issue is again raised. This appears to be a state of things not having much of reason and principle to support it. I shall illustrate what I mean by an example: A plaintiff who claims title under a deed of gift which comprises properties worth Rs. 10,000 brings a suit in a Munsif's Court to recover an item of property worth Rs. 500 included in it. The defendant denies the validity of the deed of gift and the court, on an issue raised between the parties as regards the validity of the gift deed, finds it valid and decrees recovery of the property sued for. It is not clear why the adjudication as regards this particular item of property should not be *res judicata* in a subsequent suit in which the validity of the deed of gift is in contest before a superior court. The Madras High Court has held that in such a case the decision of the Munsif's Court as regards the particular item of property would be *res judicata* in a subsequent suit before a Sub-Court in which the validity of the gift deed is disputed (I.L.R., 8 Mad., 83). The result of a contrary view would be that no adjudication by a Munsif's Court on a matter within its jurisdiction could ever be conclusive between the parties in a subsequent suit, provided the adjudication involves the determination, incidentally, of a question of title to try which with definitive effect is beyond its competency. This could hardly have been the intention of the Legislature. If, however, such is the intention, the safest way of effectuating it will be to exclude such suits from the cognizance of inferior courts which are not competent to try the wider question of title. So long such courts are authorized to try such suits and to adjudicate upon them with reference to their subject-matter which is within the jurisdiction of such courts, it is not consonant to legal principles or conducive to public welfare to treat such adjudications as nullities in a subsequent suit. Juristic reason requires that the decision of a court upon a matter within its jurisdiction should always be conclusive between the parties, and that its adjudication upon that matter, conclusive at the time when it was made, should not be deprived of that character in subsequent proceedings between the same parties. A contrary rule would have the effect of upsetting titles acquired, and nullifying transactions entered into, on the faith of such adjudications. Then again suppose a suit is brought in a Munsif's Court for recovery of Rs. 1,000 due on a bond, and the court on an issue, joined between the parties as regards the genuineness of the bond, finds it to be a forgery and dismisses the suit. Suppose the plaintiff subsequently, uniting this claim on the bond with a claim on another bond for Rs. 6,000 against the same defendant, brings a suit in the Sub-Court for recovery of both the amounts. As the section now stands, the decision, in the first suit, of the Munsif's Court as regards the Rs. 1,000 bond will not be *res judicata* in the second suit instituted in the Sub-Court, because the Munsif's Court which tried it was not "a court of jurisdiction competent to try the suit in which the issue (as to the genuineness of the Rs. 1,000 bond) is subsequently raised." The consequence will be that the Sub-Court will be entitled to try the issue *de novo*, treating, as absolutely null and void, the adjudication previously arrived at by the Munsif's Court, which had full jurisdiction to decide it. This is only a typical illustration, and the anomaly pointed out above can be predicated of every case in which astute litigants, with a view to nullify the effect of adverse adjudications, bolster up speculative claims, and by ingenious joinder of other causes of action meant to enhance valuation manage to bring subsequent suits before courts of superior jurisdiction. The wording of the section leaves them considerable latitude to work such frauds upon the policy of the law, and it is therefore a matter worth considering whether the substitution of the words "such issue" for the sentence "suit in which such issue has been subsequently raised" in the concluding part of the 2nd paragraph will not better carry out the intention of the Legislature. Then again, reading the first half of the section relating to suits as distinguished from issues, we get the

following collocation of words: "No court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit . . . . in a court of jurisdiction competent to try such subsequent suit. The section speaks of "any suit in which *the matter* directly and substantially in issue has been directly and substantially in issue in a former suit." The expression "*the matter*" refers to one particular matter and cannot be held fairly applicable to a suit which involves two distinct matters, one only of which was in issue in the first suit. Then again the question arises whether, to constitute the bar of *res judicata* in respect of the issue decided in the first suit, the court which tried it should have had jurisdiction to try both the issues raised in the subsequent suit. In my humble opinion, many of these difficulties can be got rid of by making "issues" instead of "suits" the basic ground of the rule of *res judicata*. In other words, the force of *res judicata* must be annexed to adjudications on "issues" made by courts competent to try such issues. The expression "competent to try such subsequent suit" does not appear to be exhaustive. It is not clear whether the word "competent" here means, as held by Mr. Justice West in I.L.R., 9 Bom., 75, competent to try the suit with conclusive effect. In this connection it is necessary to remark that the expression, as it stands, fails to solve in a satisfactory manner the vexed question as to how far the decision of a matter by a Small Cause Court will be *res judicata* in (1) a subsequent Small Cause suit concerning the same matter, and (2) a regular suit concerning the same matter. The wording of the section, as it stands, throws no clear light on the question as to how far and under what conditions a decision between co-defendants is *res judicata* in a subsequent suit, and as to whether a decision *inter partes* on a point of a law, afterwards declared to be erroneous, will operate as *res judicata* (*vide* I.L.R., 10 Cal., 1087; 15 All., 327; 5 Mad., 304). Then again the expression "parties under whom they or any of them claim" is literally deficient, though it is a convenient equivalent of the juridical term "privies." According to the strict letter of it, a decree passed against a mortgagor after the mortgage will be binding upon the mortgagee, because he "claims through" the mortgagor, but this is clearly not the law. It appears to be desirable, therefore, as observed by Mr. Justice Mahmood in I.L.R., 8 All., 324, to insert after the word "claim" the words "under a title arising subsequently to the commencement of the former suit." Moreover in the expression "competent to try such subsequent suit," there is nothing to indicate whether the "competency" meant refers to the time of the former suit or of the subsequent suit. This is an important matter in view of the possibility of jurisdictional changes. The interpretation which has been generally adopted by the courts on the point is that the "competency" aforesaid refers to the time of the former suit (*vide* I.L.R., 11 Cal., 153; 15 Mad., 494) and this is certainly the interpretation recommended by reason and principle. The omission in the section of any indication as to which of the two views has been accepted by the Legislature is a matter for comment. Then as to explanation II, the words "any matter which might and ought to have been made ground of defence or attack in such former suit" are very wide and to a certain extent indefinite. A liberal interpretation of these words will include within the scope of *res judicata* every possible matter which is relevant by way of defence or attack in a suit. No doubt the word "ought" restricts to some extent the extensive operation of the word "might," but no indication is given as to what are the matters which fall within the purview of the word "ought." A suit for recovery of property may be brought on half-a-dozen distinct and independent grounds of title, such as inheritance, devise, purchase, adoption, &c. Supposing that a suit is brought upon one of these grounds of title, does the adjudication upon it preclude a subjsequent suit based upon any of the other grounds of title? As the words stand in the explanation, the adjudication would probably operate as *res judicata* upon the other grounds, because it may well be contended that directly the plaintiff failed on the specific ground alleged by him, he should have put forward the other grounds available to him in support of his title. This could not, however, have been the intention of the Legislature. To restrict the operation of this "explanation" to its legally permissible scope, it appears to be necessary to insert after the words "defence or attack" some such words as "with reference to the basis of action on which the suit is brought." I may mention in this connection that the High Court of Madras has put this construction upon the words of the "explanation" as it stands (*vide* I.L.R., 7 Mad., 264). It is desirable to amend the phraseology of this explanation so as to make it accord with the restricted views aforesaid, deduced from a doctrinal interpretation of it. In explanation IV the sentence "a decision liable to appeal may be final within the meaning of this section until the appeal is made" is framed, to quote the words of Mr. Justice Mahmood, in "unspecific language" (*vide* his observation in the case reported in I.L.R., 11 All., 159). The wording of the sentence is silent as to what happens when the appeal *has been* made. This appears to be a defect, seeing especially that the wording of the preceding sentence attaches the quality of finality to all decisions duly perfected. In view of the inflexible structure of the main sentence, it is necessary to lay down in express terms in the subsequent sentence what the legal effect of an appeal is on a decision so far as the question of *res judicata* is concerned It is not clear, on the wording of the sentence as it stands, whether the rule embodied in it is the rule of English law that a writ of error does not disturb the finality of a judgment except for the purpose of execution by operating as a "supersedeas," or the rule of continental jurists which, treating the "naturalia" of an appeal as the "effectus

devolutions et suspensions," holds that a decision is not final till all the legal means by which it can be impeached have been exhausted. It is a matter of legal history that in English law, a writ of error like its counterpart "provocatio" in Roman Law, was a process of gradual formation and that all judgments were originally final. The liability of a judgment to be impeached in error (appeal) does not, according to the doctrine of "English law," interfere with its finality for the purpose of the "*exceptio rei judicatæ*." The view adopted by the Indian Legislature in the last sentence of explanation IV appears to be more in accordance with the rule of English law than the theory of continental jurists. This is evident from the tenor of the sentence; but the use of the word *may* in it does not appear to be very opposite. The word "may" implies that there are cases in which a decision liable to appeal is not final; but it is not stated what those cases are. It will be well, if possible, to supply this omission. Then again, as I have already observed, the sentence requires to be enlarged by the insertion of words showing what the legal effect of an appeal is on the finality of a judgment for the purpose of *res judicata*. According to the decision of the Bombay High Court in I.L.R., 6 Bom., 110, the matter decided by a judgment becomes, after appeal is made, *res subjudice*; but in such a case section 12 precludes the trial of a subsequent suit in respect of the same matter pending the decision in appeal. In explanation V the words "in respect of a private right claimed in common for themselves and others" require comment. It is evident from the context that what is meant by a "private right" here is a right of easement or other right analogous to it, which several persons claim under a common title. That this is so has been expressly decided by the Calcutta High Court in the decision reported in I.L.R., 6 Cal., 49. The term "private right" is, however, a term of extensive legal import and embraces every kind of rights other than public rights. Strictly speaking, a right to property is such a right, but it is doubtful whether it is within the purview of this section. It is desirable, therefore, to define the scope of the term "private right" in such a way as to prevent all possible misunderstanding. Then again, having regard to the conclusive character of the presumption laid down in this "explanation," it is desirable that the law should provide all possible precautions for safe-guarding the interests of those against whom the presumption is to operate. For this purpose it is necessary, in my humble opinion, to enact not only that the litigation should have been *bonâ fide*, but also that it should have been conducted with the due legal formalities enjoined by law to make it a representative suit (*vide* I.L.R., 8 Mad, 496). Section 30 of the Code provides the mode in which such a litigation is to be conducted to make the adjudication in it binding upon persons not actually before the court. However *bonâ fide* the conduct of the litigation may have been, unless the legal pre-requisites prescribed by law for rendering an adjudication against a few individuals of a class conclusive upon all the individuals of that class are duly complied with, it is hardly legal to treat the result of such litigation as binding upon that class as a whole. It may be that the persons who conducted the litigation *bonâ fide* omitted certain legal formalities essential to its success or failed, through oversight, to utilize all the available means of proof at their disposal. In such a case, it will be unjust to treat the result of the litigation as binding upon persons not constructively parties to it; and it is desirable therefore to insert, after the words *bonâ fide* in this explanation some such words as "and with the requisite legal formalities."

6. *Section* 15.—It will be a useful measure of legal reform if, in connection with the contemplated revision of the code, this section can be so amended as to make the village courts, established by Madras Act I of 1889, the exclusive tribunals for the trial of petty suits up to Rs. 20 in value. As matters now stand, such village courts have concurrent jurisdiction with the regular Courts in regard to petty claims up to the amount of Rs. 20, but suitors in the majority of cases prefer to institute such claims before the regular courts on their Small Cause side. The result is that, notwithstanding the creation of a special tribunal meant to relieve the regular courts of the great bulk of petty litigation, the regular courts are still deluged with petty suits, which, in point of value, are cognizable by village courts. A good deal of the time and attention of the regular courts is thus taken up with the trial of such petty suits ranging in value from a pie up to Rs. 20 and the intention of the Government in establishing the village courts is practically frustrated. This is due to the fact that the suitor has the choice of two forums, the jurisdiction being *concurrent*. If the jurisdiction of the village courts is made exclusive in regard to such petty suits, the regular courts will be considerably relieved, and they will be able to devote greater time and attention to judicial work more important in character and better suited to their position and dignity. This desirable change in the law can be effected by making this section applicable to village courts established by Madras Act I of 1889. The term "Court" is not defined in this code, as it has been defined in the Code of Criminal Procedure, and in the absence of such a definition it is not possible to say that it includes courts established by special and local laws. Section 6 says that nothing in this code affects the jurisdiction of village munsifs under the provisions of the Madras Code. The Madras Code having been now replaced by Act I of 1889, the question arises how far the provisions of the Code of Civil Procedure affect it (*vide* I.L.R., 13 Mad., 145). In dealing with this question, it will be well if section 6 is so amended as to bring about the desired change. Another matter for comment as regards this section is the use of the word "grade" in the expression "Court of the lowest grade." Having regard to the meaning of the term "grade" as applied to courts in administrative matters, it is questionable whether this word is the most appropriate to express the idea involved in this section.

The term "grade" implies difference in rank in identity of functions; but the term "Court" as used in this section includes courts of different and dissimilar jurisdictions. It is therefore a matter worth consideration whether the word "grade" may not be usefully replaced by the word "class" or by the word "jurisdiction."

7. *Section* 32.—There is an anomaly in this section worth notice, and it is that while the court has power to add parties at any stage of the suit, its jurisdiction to strike out the name of a party is restricted to the time of the first hearing. The striking out of the name of a party is a matter which requires careful consideration and sound handling, and in many cases it cannot be properly effected till the evidence is entered upon. If, after the investigation is once begun, the court cannot strike out the name of an unnecessary party, it means that the name of the party should be retained on the record till the disposal of the suit, and that the party should be subjected to the vexation, trouble, and expense of such unnecessary retention which does good to nobody. The removal of this restriction, which appears to serve no useful purpose, will be a step in the right direction.

8. *Section* 44-A.—This section appears to be defective. According to the wording of the section, in suits for recovery of immoveable property damages can be claimed only if the property is held under a contract. Suppose a trespasser commits waste on the land or converts to his own use moveable property found on the land. In suing for the recovery of the land, the owner cannot, according to this section, claim in the suit recovery of damages for the wrong done as aforesaid. This is a defect and requires to be remedied. This can be effected by adding to clause (*a*) the words "damages arising from any wrong committed to the property."

9. *Section* 101.—There is a clear anomaly involved in this section, in that it does not empower the court to set aside the *ex parte* order and to hear the defendant then and there when he appears during the hearing of the suit *ex parte* and assigns good cause for his previous non-appearance. According to the section as it stands, it is only when the court has adjourned the hearing of the suit *ex parte*, but not when it is proceeding with the hearing *ex parte*, that the defendant is entitled to come in and apply to set aside the *ex parte* order. If the court proceeds with the hearing *ex parte* and concludes the trial then and there, the defendant who is all the while before the court is perfectly helpless, and is obliged to wait till the decree is passed, and then to come in under section 108 to set aside the *ex parte* decree. It is impossible to see the expediency of this procedure.

10. *Section* 111.—The last paragraph of this section requires a slight clearing up. It is said that a set-off pleaded in a written statement tendered under this section shall have the same effect as a plaint in a cross-suit. What the nature and extent of this effect is, and how far it is qualified by the words which follow, is not clear on the language of the paragraph as it stands. For instance, it is not clear whether such a written statement should fulfil all the requirements prescribed for a plaint, and whether it is to bear the *ad valorem* Court-fee stamp. Notwithstanding the obscurity of the section, the High Courts of Madras, Bombay and Allahabad have held, on a construction of it, that such written statements containing a claim of set-off should be stamped with the requisite Court-fee stamp—(*vide* I.L.R., 15 Mad., 29; 13 Bom., 67; 8 All., 396. It will be well if the result of these rulings is embodied in the section so as to make it more intelligible.

11. *Section* 120.—It is not clear from this section whether the power of the court to order the personal appearance of a party, on pain of a decree against him on default of appearance, is limited to the first hearing of the suit, or whether such power can be exercised by the Court at any stage of the suit. The words of the section are wide enough to cover all stages of the suit, but the position of the section in chapter IX, which relates to examination of parties by the Court prior to investigation into the merits, throws some doubt upon this view. It is very necessary for the efficient administration of justice that the court should have, throughout all the stages of a suit, this salutary power over parties. It is after the first hearing that such a power becomes most useful. Very often a party who is cited as a witness by the opposite side and whose evidence is very material on the question at issue finds it to his advantage not to attend, and accordingly he either absconds or wilfully evades service of summons. In such cases the court must have this summary power to enforce obedience to its mandate. Otherwise, an astute and cunning litigant will be enabled by means of a little stratagem to deprive his adversary of the benefit of his testimonial admissions. As the code now stands, a party to the suit cited as a witness stands, as regards the penalty for non-attendance, in the same position as an ordinary witness unconnected with the suit (section 178). It is a notorious fact, that notwithstanding the provision of such penalty, considerable difficulty is experienced by the Courts of First Instance in this country in securing the attendance of witnesses in time. It is, therefore, highly desirable that the court should have a stronger hold on a party to the suit, cited as a witness; and for this purpose a slight amendment of the section so as to warrant the exercise, by the court, of the power aforesaid at any stage of the suit, appears to be expedient. Another matter which requires notice in this section is the wording of the last paragraph of it. It lays down that in case the party ordered fails without lawful excuse to appear in person on the day appointed, *the court may pass a decree against him*. It is not stated what the nature and scope of

such a decree is to be. A "decree" means any decree, a term of indefinite import. Suppose a part of the claim sued for is admitted by the defendant and the plaintiff at the hearing fails to appear as ordered. Is the whole suit to be dismissed? The same indefiniteness of language occurs in section 177 where also the same phraseology is used.

12. *Section* 174.—The omission to provide for the mode in which the fine imposed under this section upon a disobedient witness is to be realized is a serious defect in this section, and the effect of it is highly prejudicial to the administration of justice. In the absence of a clear guide as to the procedure to be adopted in such a case, many of the Courts of First Instance in the moffusil quietly decline to impose fines under this section, and the result is that witnesses, encouraged by the strange leniency of the courts, not seldom obstruct the course of speedy justice. It may be that under some other sections of the code taken with the provisions of the general Clauses Act and the sections of the Penal Code relating to fines, a sort of procedure can be constructively deduced for the realization of such a fine; but this is certainly an unsatisfactory way of dealing with the question. The penalty prescribed in this section is a penalty which, from its nature, the courts have constantly to put into operation, and to enforce then and there. A procedure of such constant and summary resort should be clearly defined, and it should be laid down in the section itself which authorizes the imposition of the fine. Seeing that the procedure for realizing a fine imposed upon a witness who has evaded service of summons is expressly provided in sections 168 and 170, the omission to provide for the procedure to be followed in the case of a fine under section 174 appears to be an oversight. The removal of this defect is a matter of extreme necessity in the interests of judicial administration. In my humble opinion, the procedure provided by sections 168 and 170, viz., attachment and sale of the property of the recusant witness, appears to be a very efficacious mode in which a fine imposed under section 174 can be realized, in addition to imprisonment. But both in the case of attachment and imprisonment, having regard to the unilateral character of the proceedings under section 174, express provision will have to be made as to the mode in which they are to be effected.

13. *Section* 177.—The phrase "to give evidence" in this section is not clear. Whether the refusal to give evidence spoken of in this section includes a refusal to answer a question while the party is in the witness box, giving evidence is a moot point. A verbal amendment calculated to remove this doubt will be a decided improvement.

14. *Section* 182.—This section does not require that the witness should sign the deposition given by him, but the practice in many courts in the moffusil is to get the witnesses to sign their depositions. This is a practice both useful and expedient. It serves as a guarantee of accuracy, and as a security against subsequent retraction. It will be well if this practice which has sprung up as a "*curs is curiæ*" is translated into a legislative provision and embodied in the section.

15. *Section* 206.—This section is silent as to which is the court competent to amend a decree when there has been an appeal against it. The rulings of the different High Courts on this point are conflicting. The Madras High Court has held in I.L.R., 9 Mad., 354, that it is competent to a Court of First Instance to amend its decree after it has been confirmed in appeal; but the contrary view has been held by the High Courts of Allahabad and Calcutta—*vide* I.L.R., 11 All., 267; 14 All., 226; 21 Cal., 259. The dissentient judgment of Mr. Justice Mahmood in the case reported in I L.R., 11 All., 267, contains a masterly exposition of the principles underlying the question, and it agrees with the decision of the Madras High Court in I.L.R., 9 Mad., 354. The view taken by the learned judge in concurrence with the Madras High Court appears to be the view most in accordance with juristic principles and practical convenience. An amendment of this section is highly necessary in view of the decisions aforesaid which have construed it in diametrically opposite ways.

16. *Section* 223.—This section has given to considerable conflict of judicial opinion in regard to the question whether a court to which a decree is sent for execution should be a court competent to try the suit in which the decree is passed, with reference to the nature and value of its subject-matter. For instance, can the decree of a Sub-Court for Rs. 20,000 be sent for execution to the Court of a District Munsif! In the absence of any provision in the section laying down the condition of jurisdiction as regards the court to which a decree may be sent for execution, and in view of the fact that in section 25, which deals with transfer of suits from one court to another, there is an express provision prescribing competency of jurisdiction, the Madras High Court has held in I.L.R., 7 Mad., 397, and 17 Mad., 309, that a court can, by reason of the extraordinary jurisdiction conferred by this section, execute a decree of any amount sent to it, though the suit in which it was passed was beyond the limit of its jurisdiction. The Calcutta High Court has dissented from this view—*vide* I.L.R., 16 Cal., 457. It requires to be made clear which of these conflicting views is in accordance with the real intention of the Legislature in framing this section. In my humble opinion, there is no valid reason for creating by this section an extraordinary jurisdiction in courts for the purpose of execution, and the policy of investing a court with power to execute a decree in a suit beyond its jurisdiction is, to say the least of it, of questionable expediency. Very often the execution of a decree involves more intricate, more delicate and more responsible, legal determinations than the trial of the suit itself,

and it is an anomaly that a Court which has no jurisdiction to try such a suit should be competent to execute the decree passed in it. It will be well, therefore, if the section is amended by the insertion in it of the words of limitation regarding competency of jurisdiction such as are contained in section 25.

17. *Section* 232.—The section speaks of the transfer of a "decree." It is not clear whether the term "a decree" includes a portion of a decree, where the decree contains two or more distinct and separate decretal awards, such as a decree for rent a decree for costs, and a decree for delivery of property, in the same suit. The Calcutta High Court has held in I.L R. 17, Cal. 341, that a "decree" includes every component part of a decree, and that a part of a decree, distinct in itself can be the subject-matter of an assignment. This is, of course, quite in accordance with reason and principle.

18. *Section* 235.—The omission of the word "signed" in line 2 of this section is evidently an oversight. There is no reason why the important formality of "signature" necessary in the case of all judicial applications should be dispensed with in the case of such an important proceeding as an application for execution of a decree. That the law attributes to such an application as much solemnity and weight as a plaint is clear from the fact that it insists upon verification as a *sine qua non* of its validity, and such being the case, it is highly necessary to provide for signature as well. Then, again, having regard to the usual practice of the Courts in requiring the production of a copy of the decree along with the application for execution, it will be desirable to enact that a copy of the decree shall accompany the application for execution. Without a copy of the decree, it will be difficult for the Court to ascertain whether the various particulars set out in the application are correct. The practice adopted by the Courts as a matter of necessity may, with advantage, be embodied in the section.

19. *Section* 244.—It is a matter worth consideration whether in clause (*c*) of this section the words "parties to the suit in which the decree was passed" may not, with advantage, be replaced by the words "parties to the decree." As the words now stand, if a man is impleaded as a party to the suit and is afterwards exonerated from the decree, he is as much within the purview of the section as a party to the decree, although to all legal intents and purposes. he is in the position of a stranger. Whether the restriction enacted by this section should be made applicable to a party so situated is a matter open to question. In my humble opinion, it is not consonant to reason to hold him bound by such a restriction. Then, again, in clause (*c*) it is desirable to state in express terms whether the term "representatives" means representatives in their character as such or in such character as well as in their individual capacity. On this point there has been quite a crop of decisions by the High Courts, not in all cases reconcileable. The latest decisions of all the High Courts are in favour of the latter interpretation—*vide* I.L.R., 7 Mad., 255, 17 Cal., 711, 17 Mad., 399, 9 Bom., 458, 12 All., 313. It will be well if the result of these decisions is incorporated into the section, so as to place its intention beyond doubt.

20. *Section* 253.—The reason for restricting the summary liability for execution enacted by this section, to a surety who has become liable *before the passing of a decree in the original suit*, is not apparent. There appears to be no valid reason why a surety who has become liable for the decree pending on appeal, should be treated on a different footing. The wording of the section being defective in this respect, Courts have very often construed the word "decree" as including a decree in appeal, to prevent a failure of justice—*vide* I.L.R., 12 Bom., 411 . It is very necessary in the interests of speedy and efficient administration of civil justice that surety bonds executed pursuant to the provisions of this code, should in all cases be summarily enforceable. Otherwise, complications, delay, multiplicity of suits, and, very often, miscarriage of justice consequent upon legal technicalities, will be the inevitable result—*vide* I.L.R., 14 Mad., 473. Impressed with a due sense of this, the Legislature has in very many places in this code, made express provision for the summary enforcement of such surety bonds in the manner provided by this section (253). But there are still some cases of surety-ship in regard to which the like provision has not been made. Reserving these cases for consideration in their proper places, all that I have to submit while dealing with this section is that it will be a desirable improvement in the law of procedure if all cases of surety-ship under this code are made summarily enforceable.

21. *Section* 257-*A*.—It is a doubtful question, on the wording of this section, whether a bond in discharge of a judgment-debt made without the sanction of the Court is valid, and if so, to what extent—*vide* the decisions in I.L.R., II. Mad., 469, 12 Mad., 61. The removal of this doubt will be a great boon.

22. *Section* 259.—A decree for the recovery of a wife is placed by this section in the same category as a decree for the recovery of a chattel; but the mode of execution prescribed is different. In the case of a chattel, execution is to be effected by the seizure and delivery of it to the party entitled; but in the case of a decree for the recovery of a wife, execution is to be effected by attachment of the judgment-debtor's property or by his imprisonment. The decree contemplated by this section is evidently a decree for the recovery of a minor wife from the possession of a third party who keeps her back from her husband. If the wife is of sufficient legal volition and is a free agent, the case becomes very often one of restitution of conjugal rights, which is provided for by section 260. That the decree contemplated by section 259 is a

decree of the kind supposed above, is placed beyond doubt by the fact that the judgment-debtor is spoken of as *he* (meaning evidently the third party). If, then, the decree dealt with by this section is a decree for the recovery of a minor wife from the possession of a third party who detains her illegally, it is clear that the remedy by attachment of property and imprisonment, of that third party, is a very poor, and altogether inadequate, mode of execution. By making the recusant judgment-debtor suffer in property and liberty, the husband-plaintiff does not get the object of his suit, viz., his wife. He sues for the possession of his wife and the Court gives him a decree for it; but in execution of the decree, the law gives him quite a different thing instead, viz., the bare satisfaction of seeing his adversary suffer. For the law to tell a husband who has obtained a decree for the recovery of his wife, that it is powerless to execute the decree and give him possession of his wife, is an extremely sad confession of weakness. The glory of an enlightened legal system, strong in the reign of justice and order, consists in its ability to vindicate injured rights and to make complete and adequate "identical restitution" in cases where pecuniary or other satisfaction is useless. It is impossible to conceive of a more important and fit case of "identical restitution" than the case of a wife kept away from her husband, and, in a case like this, which concerns so intimately the domestic happiness of individuals, and by consequence the well-being of society, it is in the highest decree desirable that the law should exert its power to the utmost. There appears to be no reason for not delivering the wife into the possession of the husband in execution of such a decree. Such a mode of execution was not unknown in the early years of British administration in India—*vide* the dicta in 6 W.R., 105, and 11 Moore's Indian Appeals, 551. The objection to such a procedure is more sentimental than substantial, and it cannot be allowed to prevail in a case of such vital importance. To prevent all unseemly spectacle in executing such decrees, the seizure of the person of the wife may be left to the husband-plaintiff under the supervision of an officer of the Court. With some such safeguard as this, the section may well provide for the seizure of the wife in execution of the decree.

23. *Section* 260.—The spirit of modern civilization and refinement and the dictates of enlightened humanity, and sound morality, alike demand the abolition of imprisonment prescribed by this section as a mode of enforcing a decree for restitution of conjugal rights. A suit for restitution of conjugal rights is a remedy introduced into India by the British Law, and was originally unknown to the personal laws of the Hindus and Muhammadans. The Hindu law does not recognise a compulsory discharge of marital duties, but treat them as duties of imperfect obligation to be enforced by religious sanction. It is a well-known fact that in England, the land of its birth, restitution of conjugal rights as a matrimonial remedy has, in progress of civilization, lost much of its living force and operation. In the words of Mr. Justice Pinhey it has become "discredited" in England, and it is well worth consideration whether it may not be now usefully changed in India, in the present circumstances of its family and social life. The evil of this institution has been graphically depicted by the great Jurist Bentham in the following words:—"To live under the perpetual authority of a man you hate is, of itself, a state of slavery; but to be compelled to submit to his embraces is a misfortune too great even for slavery itself." Imprisonment of a wife as a means of enforcing conjugal obedience is a remedy unknown to Hindu jurisprudence, and the whole system of Hindu law and family life is opposed to it. The sacred character of a Hindu marriage as an indissoluble bond of union lasting for life, and the rules of conjugal life laid down by the Hindu law, are such as to render this remedy positively useless and unsuited to the Hindus. Decided cases having gone far, in establishing restitution of conjugal rights as a remedy in the law of India (*vide* 10 Bom., 301; 5 Cal., 500, 8 All., 149; 11 Mad., 237), it is perhaps not practicable to do away with it at present, but there can be no difficulty in making it, by means of a suitable amendment in the law of procedure, as little in conflict with the spirit of Hindu and Muhammadan law, as possible. The Hindu law is conspicuous for its tenderness towards the soft sex, and Menu, the Great Law-giver, says:—"Let not a husband strike even with the petal of a gentle flower, the wife of his bosom." When such is the profundity of kindness to a wife enjoined upon a husband by the shastras, it is a veritable irony of fate that the husband should be the means, by this section, of putting his wife in prison, and causing her mental anguish without measure and social degradation worse than death. The extreme unsuitability of this remedy to the condition of Hindu family life will be evident from the history of the famous Rugmibhai case reported in I.L.R., 9, Bom., 529 and 10 Bom., 301. In England, Statutes 47 and 48, Vic. Cap. 68 has recognized the propriety of abolishing imprisonment as a mode of enforcing a decree for restitution of conjugal rights, and there is no reason why the same should not be done in India. Then, again, imprisonment of a wife in execution of a decree for restitution of conjugal rights is not a remedy which does any real good to the party for whose sake it is enacted. In cases in which "identical restitution" is undesirable, no useful end is gained by the imprisonment of the wife. Considering that the institution of marriage is "the tie of a society and the basis of civilization," it is in the highest decree desirable that the law should treat obligations founded upon it on a different footing from a commercial contract. For these reasons, it is in my humble opinion highly expedient that the law should dispense with imprisonment as a mode of enforcing a decree for restitution of conjugal rights. In line 7 of the section the word *his* is used to denote the party bound by the decree. As the section includes cases where a wife may be the defendant, it is desirable to insert the words "or her" after the word "his."

24. *Section* 268.—The provisions of this section do not appear to be exhaustive. First of all, the word "debt" as used in this section is not clear. It is a moot point whether a debt secured by a hypothecation of immoveable property is a "debt," to be attached under the provision of this section—*vide* I.L.R., 9 Cal., 511; 15 All., 134; 20 Cal., 805. Secondly, there is no provision in this section as to the way in which the person in whose hands moveable property is attached under clause (*c*) can get a discharge. Paragraphs 3 and 6 deal with the cases of attachment under clauses (*a*) and (*b*), but there is no corresponding provision for clause (*c*). This appears to be a defect. Thirdly, clause (*a*) lays down that the creditor prohibited under it cannot recover the debt until the further order of the Court. It is not clear whether this means that he cannot sue for it. If so, the provision is hard, as the claim may be barred by limitation in the meanwhile. Having regard to the decision in I.L.R., 13, All., 76, it is necessary to provide for such a contingency. Fourthly, paragraph 3 of the section is silent as to the procedure to be followed when the debtor prohibited denies the existence of the debt. The Bombay High Court has held in I.L.R., 4 Bom., 323, that a claim does not lie in such a case, and if this is so, it is not clear what remedy a person has against whom a fictitious debt is alleged and made the subject of an attachment. Fifthly, the section provides for attachment of debts and moveable property in the hands of third parties; but in the whole chapter there is no provision as to the way in which moveable property in the hands of third parties is to be got at, for the purpose of eventual sale. If the third party fails to produce the property for the purpose of sale, it is not clear what the remedy is in such a case.

25. *Section* 271.—The prohibition enacted by this section to breaking open the outer door of a dwelling house is fraught with considerable hardship to decree-holders, and is calculated in practice to encourage fraud and concealment on the part of cunning judgment-debtors; and it is a matter for consideration whether the prohibition may not be safely removed. There are cases in which a dwelling house consists of but a couple of rooms, without any outer door, as distinguished from the door of the rooms themselves; and in such cases officers executing the decree feel reasonable doubt as regards their power to break open the rooms. Taking advantage of this doubt fraudulent judgment-debtors conceal themselves and their property inside such dwelling houses and defy the law. In my humble opinion, it is not expedient in a country like India to push the right of domestic sanctuary so far as this section has done, in deference to the doctrine of English law, that every man's house is his own castle.

26. *Section* 273.—The first paragraph of this section is silent as to the way in which the proceeds of the attached decree are to be realized for the purpose of being applied in satisfaction of the decree sought to be executed. It is not clear whether, notwithstanding the attachment, the holder of that decree can execute it; and what the procedure is to be in case he fails to execute the decree, is not stated. It appears to be desirable to insert a provision in the section enabling the attaching decree-holder to execute the decree in such a case, on the analogy of the provision in clause (*b*). In the case of money-decrees passed by other Courts, it is laid down in the section that the Court receiving notice of attachment shall stay execution unless and until the attaching decree-holder applies to it for execution of the decree. Supposing that he neglects to execute the decree within the period of limitation, it is not clear whether the decree-holder therein can interfere for the purpose of taking out execution himself. As this point is doubtful, it will be well to make an express provision in the section enabling the decree-holder therein in such a case to take out execution, subject to the money realized being detained in Court to satisfy the decree under execution. In the case of decrees other than money-decrees, there is no provision made in the section as to how, after the attachment, they are to be made available for satisfying the decree for which they have been attached. Perhaps, they are considered to fall under the term "saleable property" as used in section 266 (*vide* I.L.R., 16 Bom., 522), but even if this is so, the express statement of the procedure relating to them is highly desirable.

27. *Section* 276.—It seems to be a serious defect in this section that it does not fix the period during which an attachment is to be in force. Very often, decree-holders, with a view to vex and injure their judgment-debtors, effect an attachment and then keep quiet till it suits their fancy to resume proceedings. The absence of a provision in this section as regards the period during which an attachment is to have legal efficacy is a direct encouragement to such evasiveness, and it is in a great measure responsible for the great dilatoriness which attends execution of decrees in Indian Courts. It gives rise, moreover, to innumerable complications and legal difficulties—*vide* I.L.R., 10 Cal., 416; 17 Mad., 58, 180. It will therefore be a highly desirable improvement, if a provision fixing the period during which an attachment is to be in force is inserted in this section, as in sections 259 and 260.

28. *Section* 278.—Under this section, a claim lies only in the case of property *attached in execution of a decree*. When the decree itself directs sale of the property, there is no necessity for attachment, and in such a case no claim can lie on the wording of this section. This gives rise, in practice, to considerable hardship and injury. This may be illustrated by an example. A man fraudulently mortgages property belonging to another and the mortgagee brings a suit upon the mortgage and gets a decree for sale. When the property is advertised for sale in execution of the decree, the owner intervenes with a claim

objecting to sale. The Court being powerless to entertain the claim can give him no relief and has to tell that he must wait till the purchaser comes to eject him. In the meanwhile he has to quietly reconcile himself to seeing his property being brought to the hammer through the fraud of another. This is an eminently unsatisfactory state of things, to say the least of it. But this is not all; the existence of a claim put forward, but not decided, very often deters purchasers, and results in the property being sold for far less than its real value. These injurious consequences can be avoided if a claim legally lies in such a case. To achieve this object, all that has to be done is to add the words "or proclaimed for sale" after the words "attached in execution of a decree," in the first paragraph of section 278, and to amend the subsequent paragraphs in conformity with it.

29. *Section* 283.—Whether a judgment-debtor is included in the term "party" as used in this section is a question which has given rise to considerable legal speculation. This question has not been solved by decided cases, beyond contraversy—*vide* 4 M.H.C.R., 47 I.L.R., 11 Bom. 114, 15, Cal, 674, 13 Mad., 366; 17 Cal., 57 and 711. Having regard to the conclusive character of the order dealt with by this section, it is necessary that the doubt entertained by Courts on this point should be set at rest. Another point deserving notice in this section is as to how far the declaratory suit enacted by it is controlled by the provisions of section 42 of the Specific Relief Act. Whether, notwithstanding the restriction contained in section 42 of the Specific Relief Act, a suit for declaration lies under this section is a moot question—*vide* I.L.R., 9 Mad., 206, 16 Mad., 140. The balance of public convenience appears to be in laying down a provision in the affirmative.

30. *Section* 287.—To ensure the correct description of the property and to minimize as far as possible subsequent disputes in regard to it, it will be well if the amin whose duty it is to proclaim the order of attachment under section 274 in the locality of the property is empowered to ascertain the necessary particulars regarding the property and to embody the result in a report to the Court. I understand that in some parts of the Madras Presidency, this procedure obtained while Act VIII of 1859 was in force and was attended with much benefit. Such ascertainment of particulars by a responsible officer of the Court will, subject to objections, serve as a useful check upon the information furnished by the decree-holder. Decree-holders in their hurry to bring the property to sale cannot always be expected to be very scrupulous in the manner in which they furnish the particulars, and it is necessary that the Court which sells the property of the judgment-debtor should maintain a check upon them. As things stand at present, the correctness of a court-sale depends exclusively upon the accuracy of the decree-holder; and the result is that judicial sales in this country are in many cases eminently unsatisfactory.

31. *Section* 291.—It is not clear from this section, whether, when there are decree-holders who have applied for rateable distribution, the sale can be stopped on payment of the attaching decree-holder's judgment-debt and costs alone. The Madras High Court has held in I.L.R., 10 Mad., 157, that the sale cannot be stopped in such a case If so, the question arises whether the other decree-holders can go on with the sale on the existing proclamation. It is desirable to clear up this obscurity.

32. *Section* 292.—It will be a useful measure of reform if the prohibition to purchasing in court-sale enacted by this section is extended to pleaders practising in the Court. It is a well-known fact that pleaders very often exercise considerable influence upon sales by reason of their local influence, and knowledge, and their position which gives them opportunities of secret information. The rule of public policy embodied in section 136 of the Transfer of Property Act, which prohibits the purchase of an actionable claim by a pleader practising in the Court within whose jurisdiction it falls is *á fortiori* applicable in the case of a court-sale; and in the interests of sound administration of justice, the prohibition suggested above appears to be salutary.

33. *Section* 295.—This is a section which has given rise to innumerable difficulties in practice. The following are some of the vexed questions which have arisen on this section:—

(1) What is the point of time when "assets" can be said to be realized by sale? There is considerable diversity of judicial opinion on this point. Some Courts have held that "assets are realized" on the date of sale (*vide* I.L.R., 6 Bom., 16), while others have held that they are realized when the whole purchase money is paid in and the sale is confirmed—*vide* 18 Cal, 242.

(2) What is meant by "sale or otherwise?" Does it include a case of payment by the judgment-debtor after arrest in execution, or is the word "otherwise" used as *ejusdem generis* with the word "sale"—*vide* I.L.R., 13 Cal., 225; 6 Bom., 588.

(3) Is it necessary that an execution application filed prior to realization should be pending undisposed of, to enable a decree-holder to rateable distribution?—*vide* I.L.R., 4 Mad., 383.

One of the objects of this section appears to be to prevent a multiplicity of attachments of the same property by different decree-holders; and for this purpose, the section enacts that, where a decree-holder has already attached the property and is bringing it to sale, all the other decree-holders who are then in position to attach it shall share rateably in the benefit of such sale brought about by the attaching decree-holder. After the sale is actually effected at the instance of the attaching decree-holder, the property becomes the purchaser's; and as the decree-holders

are not then entitled to attach the property, those decree-holders who come in after the sale have no right, consistently with the object of this section, to share in the sale-proceeds. If this is a correct view of the policy of the section, the words "prior to realization" in line 3 should be altered into "prior to sale, or realization otherwise."

34. *Section* 305.—According to the wording of this section, and the decision of the Madras High Court in I.L.R., 14 Mad., 277, sanction for private alienation can be granted only in cases in which there is a reasonable prospect of the whole decree-amount being realized by such alienation. In other words, the section can have application only in cases where the value of the property is equal to, or larger than, the decree-amount; but not in cases where the value of the property is less than the amount of the decree. The great majority of attachments with which the Mofussil Courts have to do are cases where the property is of little value compared with the decree-amount; and if the section does not apply to such cases, it cannot have much operation. It is not clear why the beneficent provision of this section should be restricted in the above manner, seeing especially that it is a provision enacted in the interests of impecunious judgment-debtors who are about to be sold up in Court by their unscrupulous decree-holders. All that reason requires is that the private alienation should be *bonâ fide* effected, for such fair value as the property is capable of fetching, and that the money realized should be produced in Court. Subject to this condition, and the condition prescribed by the last paragraph, this section may usefully be amended so as to apply to all cases without the limitation aforesaid.

35. *Section* 306.—In view of the decision of the Madras High Court in I.L.R., 14 Mad., 235, that a bidder can withdraw his bid even after the lot is knocked down, a provision as regards the point of time up to which such withdrawal is allowable appears to be a *desideratum* in this section.

36. *Section* 310-A.—This new provision of law enacted by the Amending Act V of 1894 would have been more appropriately posited as a rider to section 311, or as an independent section, as section 310 to which it is now annexed appears to have very little connection with it. This newly added provision is a highly indulgent measure of legislative amelioration; but its juristic consistency with the principle and scheme of the other provisions of the chapter *in pari meteria*, may well admit of doubt. To put it in the power of a judgment-debtor to set aside a sale regularly effected by a Court, for no reason affecting the sale, but simply because he chooses to come forward, does not appear to be very much consonant to legal principles, and it looks a little incongruous by the side of section 311, which, in words of considerable strictness, lays down that a sale can be set aside only on the ground of material irregularity combined with substantial injury. The result of making a court sale so uncertain in point of legal efficacy will be to deter purchasers by the fear of the risks involved, and to render court sales more unsatisfactory than they are at present. If, as is probable, the object of this new provision is to protect the rights of honest debtors who, in spite of due diligence, find themselves unable to raise the judgment in time to save their property from sale, this object can be achieved by a provision of less general scope. The addition of a clause to section 311 making it discretionary with the courts in cases of real hardship to set aside the sale within thirty days on the application of the owner of the property is quite sufficient to attain the desired end. In my humble opinion it is not expedient to enact a general right in favour of all judgment-debtors, both honest and dishonest. Even as the section stands at present it is desirable to restrict the unduly wide operation of it by substituting for the words "the court shall pass an order setting aside the sale" the words "the court may, if it appears to it that there are sufficient grounds for so doing, set aside the sale." On the section as it now stands, it is not clear whether it applies to proceedings in execution commenced before Act V of 1894 came into operation. Notwithstanding clause (2) of section 1, which enacts that it shall come into force at once, it has been held by the majority of a Full Bench of the Calcutta High Court in I.L.R., 21 Cal., 940, that this new provision is not applicable to sales held in execution of decrees passed before it came into force. In view of this decision it appears to be necessary to render this point clear. Then again it is not stated whether the limitation of thirty days prescribed by this section is subject to section 5 of the same Act, and if it is, it is desirable to provide an appeal against an order under this section; and this can be done by adding in clause 16 of section 588 the words "and section 310 A," before the words "under section 312." Another point worth notice is whether, by reason of this new provision, section 312 does not require to be amended by the insertion of the word "310 A" in line 2 of it. Then again the expression "any person whose immoveable property has been sold" used in sections 310 A and 311 is not clear. Whether it includes a mortgagee of the property is a moot-point.

37. *Section* 311.—As regards this section, a question which has been the subject of conflicting decisions is whether substantial injury proved can be presumed to have been the result of material irregularity, or whether the casual connection between the two requires to be established by positive evidence (*vide* I.L.R., 20 Cal., 599; 14 Mad., 227). Another point worth consideration in this section is the term "decree-holder." This term has been construed by the Calcutta and Madras High Courts as including a decree-holder claiming rateable distribution (*vide* I.L.R., 20 Cal., 673; 10 Mad., 57). If this view is correct, the term requires to be amended.

38. *Section* 313.—This section has been construed by the Madras High Court in I.L.R., 17 Mad., 228, as meaning that if the person whose property purported to be sold has any the slightest interest in the property sold, the purchaser cannot claim to set aside the sale. In other words a total want of interest in the property, it is held, must be proved to justify the application under this section. This is hard upon the purchaser. An amendment of this section is useful to remove this hardship Besides this it is a point worth considering whether it is not advisable, by an enlargement of the scope of this section, to give a right to the purchaser to apply for the setting aside of the sale where he is damnified by the fraudulent conduct of any of the parties to the sale.

In division H of chapter XIX treating of resistence to execution, sections 331, 332 and 335 speak of "possession" in third parties in the sense of actual possession. The result of restricting the term to actual possession is that parties who are in constructive possession through their mortgagees, lessees or tenants are altogether deprived of the remedy prescribed by these sections. This is hard. It is not right that the protection of their interests in the property should be left to the tender mercy of their mortgagees, lessees or tenants. In case of a collusion between the latter and the decree-holder or the purchaser, they are obliged to bring regular suits with the disadvantage of being *plaintiffs in ejectment*. This hardship will be removed if the wording of the sections aforesaid is amended in such a way as to include cases of constructive possession in the term "possession."

39. *Sections* 336 *and* 337 (*a*).—These sections do not show what the procedure is to be when a judgment-debtor, who is a substantial man, is brought before the court under arrest, and he applies for a few days' time to enable him to produce the judgment debt in court. It will be a cruel injustice to commit such a man to jail when the court is satisfied that he is likely to produce the judgment if a few days' time is allowed. But as the sections now stand the court has no power to grant him time, leaving him in the custody of an officer of the court. Even in the absence of an express power in this behalf courts sometimes adopt this practice to remedy clear cases of hardship. The express enactment of such a power in the courts is at once useful and necessary. No reasonable objection can be alleged against it seeing that such a power is conferred upon courts by section 337 A, clause (3), in the much less deserving case of a judgment-debtor whose object is to escape committal to jail.

40. *Sections* 339 *and* 341.—A defect involved in these sections may be illustrated by the following case. A judgment-debtor brought before the court under arrest (section 336) is ordered to be committed to jail; but the decree-holder fails to make payment of the monthly allowance fixed by the court and which he is bound, under section 339, to pay to the proper officer of the court. It is not clear whether the discharge of the judgment-debtor in such a case is a "discharge from jail" within the meaning of section 341. This is a question of much practical importance, as the effect of such a discharge is to exempt a judgment-debtor from liability for re-arrest. On this question the decisions of the Madras and Bombay High Courts differ, the former holding that a discharge of the kind supposed above is not a discharge from jail within the meaning of section 341 (*vide* I.L.R., 8 Mad., 21), while the latter holds that it is (*vide* I.L.R., 9 Bom., 181). This point requires to be made clear in view of this conflict of judicial opinion.

41. *Section* 349.—It will conduce to greater convenience and practical benefit if the security furnished under this section be made summarily enforceable as in section 336. As decisions now stand, such security cannot be enforced in execution (*vide* I.L.R., 7 Mad., 273). This is a manifest omission, and there appears to be no legal justification for it, seeing that other provisions of the Code bearing upon this matter enact such a power (*vide* section 549).

42. *Section* 351.—In view of the usual practice of the courts on the subject it is desirable to enact, in continuation of the last paragraph of this section, an express provision empowering the court, on the application for insolvency being rejected, to retake the judgment-debtor into custody, if already released on security, for the purpose of being committed to jail.

43. *Section* 368, *paragraphs* 3 *and* 9.—It is not stated what the procedure is to be when the person brought in by plaintiff as the legal representative of a deceased defendant under paragraph 3 happens to be a different person from the individual who comes in as such legal representative under paragraph 9. How and at what stage this dispute is to be decided by the court is not shown by this section.

44. *Section* 373.—Paragraph 2 of this section enacts that in the case of a withdrawal of a suit by plaintiff without the permission of the court he shall be precluded from bringing *a fresh suit for the same matter*. This prohibition appears to be unduly wide, and to extend to suits for the same matter, though based on a different cause of action. All that reason and principle require is that suits based on the same ground of action should be prohibited, and it does not appear to be right that every suit, whatever its legal character may be, relating to the same matter should be brought within this prohibition. It seems desirable, therefore, to add the words "on the same cause of action" between the words "a fresh suit and for the same matter." In paragraph 3 of this section it will be well to replace the word "consent" by the words "written consent" to prevent unnecessary disputes as to whether there was consent or not in any particular case.

45. *Section* 374.—It is possible that the case of a suit withdrawn under section 373 may be a case of "defect of jurisdiction or other case of a like nature" within the meaning of section 14 of the Limitation Act, and in such a case there will be a conflict between the provisions of this section and the provisions of section 14 of the Limitation Act, which allows a deduction of time. It is desirable to avoid this likely conflict by the use of appropriate words directed to that end.

46. *Section* 380.—As I have remarked above, it will be a decided improvement in procedure to enact that every case of security given under the provisions of this Code is summarily enforcible in execution. The security for costs furnished under this section may accordingly be made summarily enforcible in the manner provided in section 353.

47. *Section* 386.—It is not clear why the examination of a witness on commission is limited to the case of a "suit." Very often courts find it necessary to examine a witness on commission in execution proceedings, the trial of which is, in some cases, more important than the trial of suits. It will be better to remove the words "in any suit" from this section and to substitute for them the words "in any case in which the court thinks fit to do so."

48. *Section* 392.—Commissions issuable under this section are limited to cases where it may be necessary to ascertain (1) market value of any property, (2) mesne profits, (3) damages, and (4) annual profits. To the cases so specified must be added the case of compensation for value of improvements which, in the Malabar district of the Madras Presidency, is the most frequent, and the most important, subject-matter of commissions under this section. According to the customary law of Malabar which has always been recognized by the courts as a *lex loci* and which has lately been the subject of legislative interpretation by Madras Act I of 1887, every person sued in ejectment has a right to claim the value of improvements effected by him on the land; and before his ejectment is ordered the court has to fix by its decree the amount of compensation for such improvements effected by him. More than 90 per cent. of the "land suits" tried by the courts in Malabar involve this question of improvements, and the inveterate practice of the courts in such suits is to issue commissions to experienced persons to prepare and submit *valuation account* of improvements. On the return of the commission, the courts proceed to decide the question of improvements on the basis of such *valuation accounts*, after hearing the objections of the parties thereto, and on the evidence which they may adduce. This practice of issuing commissions to ascertain the value of improvements being a practice of general prevalence in one entire district of the Presidency it appears to be worth recognition in the law of procedure enacted by this Code. It will be well, therefore, to add the words "value of improvements in respect of any property" immediately after the words "market value of the property" in the first paragraph of this section.

49. *Section* 393.—When section 392 is amended in the way suggested above it will be necessary to enact in this section a provision for directing a further enquiry, and for setting aside a Commissioner's account, as provided for in the last paragraph of sections 395 and 396.

50. *Section* 402.—The collocation of the words of this section is not very happy. "No suit shall be brought by a pauper to recover compensation for loss of caste, libel, slander, abusive language or assault." This sentence has the appearance of laying down that a pauper is absolutely precluded from bringing suits of the above description, whether he sues as *a pauper* or not. It has, moreover, the *appearance* of a promulgation of rule by law that a poor man has no right to caste, honour, reputation or personal liberty. It is not meet that the law should have the appearance of countenancing such an ethically unsound and politically unwholesome doctrine. The object aimed at by this section can well be achieved without such undesirable result by changing the form of the sentence as "no person shall sue as a pauper to recover, &c."

51. *Section* 425.—This section lays down that no warrant of arrest shall be issued in suits against Government or against public officers without the consent in writing of the District Judge. It is not clear whether the prohibition enacted applies to a warrant of arrest for enforcing the appearance of a disobedient witness. The words used are wide enough to cover such a case, but the reason for extending the prohibition to such a case is not apparent. The section appears to require amendment in this respect.

52. *Section* 463.—This section says that the provisions of sections 440 to 462 (both inclusive) shall, *mutatis mutandis*, apply in the cases of persons of unsound mind, adjudged to be so under Act 35 of 1858, or under any other law for the time being in force. The effect of this provision is that before a person can sue as the guardian of a lunatic or before a lunatic can be sued through a guardian, the lunatic must be adjudged as such, in an independent proceeding taken under the Lunacy Act. This is attended with considerable hardship in practice, especially in the case of a creditor who has to recover a small debt. It is not clear why the court trying the suit should not be empowered to enquire into the fact of lunacy and to appoint a proper person as guardian *ad litem*, when the fact of lunacy is proved to its satisfaction (*vide* the analogy of section 443). Not to vest such a power in the court will be a practical denial of justice in the case of poor suitors.

53. *Section* 491.—Having regard to the highly penal provisions of this section, it appears to be necessary to provide sufficient precautions against its being put in operation against suitors

who are the victims of *bonâ fide* mistakes. If possible, it will be better to make separate provisions for compensation in the case of improper arrests and in the case of improper attachments, as the consequence of an improper arrest is altogether different from that of an improper attachment of property. If this is not possible, the wording of the first and second paragraphs requires to be recast by importing into them a little more strictness of language. As the section now stands the court can fine a plaintiff Rs. 1,000 if it is of opinion that the arrest or attachment was applied for on insufficient grounds. This is hard. The grounds which led him to make the application may have appeared to him sufficient; but if the court happens to take a different view of the sufficiency of grounds, he becomes liable. Such a difference of opinion, which is inevitable in many cases, ought not to subject the party to punishment. Then again paragraph 2 says that in the case where the suit fails the plaintiff can be fined under this section if it appears to the court that there was no probable ground for instituting the suit. This too appears to be hard. The plaintiff may have had a strong case on the merits, but the suit may have failed on some technical ground of law, in regard to which the plaintiff might have made a *bona fide* mistake. It is clearly unjust that the section should operate in such a case. It will be more in accordance with reason and justice to restrict the penalty prescribed by this section to cases where a plaintiff, without reasonable and probable cause, makes such an application.

54. *Section* 497.—The same remarks as those made above apply to section 497. As the effect of an improper injunction is more serious than that of an improper attachment of property, a little more severity is allowable in the penal provision of this section; but it is open to doubt whether the difference of phraseology made in paragraph 2 of the section is sufficient for the purpose.

55. *Section* 521.—In the expression "misconduct of the arbitrator" used in clause (*a*) of this section, it is not clear whether the term "misconduct" means misconduct in a moral sense, or legal misconduct such as irregularity of procedure or a conscious violation of the principles of justice. It is desirable to include both these phases of misconduct in clause (*a*), and for this purpose the wording of it requires to be amended.

56. *Section* 539.—It was decided by two Judges of the Madras High Court (the Honourable Mr. Justice Muttuswami Iyer dissenting) in I.L.R., 14 Mad., 186, that, under this section, a suit could be instituted by two or more persons claiming an interest in a public trust to remove a hereditary trustee for breach of trust, but the recent Full Bench decision of the same High Court in I.L.R., 17 Mad., 462, has taken a different view. Having regard to the fact that the language of this section is borrowed from Sir Samuel Romilly's Act. (52 George III, Cap. 101) and the decisions bearing upon it, and seeing that the statute aforesaid was enacted to provide a summary remedy by petition and that the section under notice appears in a chapter of the Code dealing with special and summary procedure, it is clear that the operation of this section is limited to non-contentious proceedings which do not involve the adjudication of disputed questions of title. If, however, the wording of this section admits of a different interpretation, it is desirable to remove all cause of doubt by a suitable recasting of it (*vide* I.L.R., 20 Cal., 810).

57. *Section* 540.—According to this section an appeal lies from all decrees of a court of original jurisdiction, unless otherwise provided. In other words an appeal is the rule in every case, and the only limitation to it is a provision to the contrary contained in any law. The section relating to appeal in the Code of Criminal Procedure is couched in terms quite the opposite of this. Under that section (404 of the Code of Criminal Procedure) no appeal lies from the judgment of a criminal court unless the same is expressly provided for. The provision relating to appeals in the law of Civil Procedure is thus wider and more comprehensive than the provision regulating appeals in the law of Criminal Procedure; and accordingly, greater finality attaches to the judgment of a criminal court than to the decision of a civil court. The reason and policy of the distinction so made is open to question. On abstract principles the judgment of a criminal court dealing with questions of life and liberty needs to be more carefully hedged round with safeguards than the decision of a civil court dealing with rights of property. If, having regard to the competency of the ordinary criminal courts in India, such a rule as is laid in section 404 of the Criminal Procedure is considered by the Legislature a safe one, there is greater reason for adopting that rule in the case of civil courts, having regard to their position and functions. It is a fact well recognized in all quarters that the Judges presiding over civil courts exercising original jurisdiction in India are, as a rule, more educated, more efficient and better trained in the theory and practice of law than the corresponding body of the judiciary exercising original criminal jurisdiction; and the high capacity of natives of India for judicial work on the civil side has been admitted over and over again by eminent and responsible authorities. In view of the high degree of efficiency which the civil Courts of First Instance in India have now generally attained, and having regard to the fact that such courts are now mostly presided over by Native judges of high character, high legal attainments and unrivalled experience of the society with which they have to deal, it is a question well worth consideration by the Legislature whether the time has not come for giving greater finality to the judgments of such courts. A good many of the more unimportant classes of appeals from the judgments of such courts may now be usefully done away with, and appeals in

important matters may be expressly provided, with a limitation analogous to that contained in section 404 of the Code of Criminal Procedure. The effect of doing this will be to improve the tone and status of such courts by giving them a higher sence of responsibility, and at the same time, to enable the Appellate Courts to bestow more time and attention to their legitimate work. This is a reform much to be desired.

58. *Sections* 545 *and* 546.—It is necessary for the proper and efficient execution of decrees that the security furnished under these sections should be made summarily enforcible. Section 546 appears to require a recasting. According to the first paragraph of it as it now stands the court can, in the case of a money-decree under appeal, go on with the execution proceedings after taking security from the plaintiff for the due performance of the appellate decree; but according to the third paragraph, when the execution proceedings have reached the stage of an order for the sale of the property, the sale has to be stayed on security being taken from the defendant. This is a little inconsistent. Why, when security has been already taken from the plaintiff, the operation of it should be arrested in the middle of the execution proceedings, and another security taken from the opposite party is, by no means, clear. Then again it is possible that the appeal may be by a party other than the judgment-debtor whose property is going to be sold. The wording of paragraph 3 is wide enough to cover such a case. But the reason for making it apply to such a case is not clear. Moreover, it is not clear why the provisions of this section are limited to immoveable property. Moveable properties require the same amount of protection, if not more. Immoveable property can be recovered in the event of a successful appeal by reversing the sale; but there is no means of getting at moveable property after it has once changed hands by sale. In the case of moveables of special value, such as heirlooms and other chattels possessing a value of affection not measureable in money, the absence of such a provision will be a great hardship. It is therefore a fit matter for consideration whether moveable property, or at least some kinds of moveable property, should not be brought within the purview of this paragraph.

59. *Section* 561.—The provisions of this section as it now stands on the amendment made by Act VII of 1888 are a decided improvement upon the section as it stood originally; but it is a matter admitting of doubt whether the period of one month from date of service of the notice of appeal prescribed for an objection memorandum is not too long a period. Formerly such objection memorandum had to be filed before seven days next preceding the date of hearing of the appeal, and now it is altered to one month from date of service of the notice of appeal. As in some courts, more than a month elapses before a notice of appeal can be served upon the respondent, the practical effect of the section is to make it impossible for an appeal in such a case to be disposed of till after the expiration of two months. The existence of the provision as regards one month renders it incumbent upon the court in every case to allow, between the filing of the appeal and its hearing, an interval of time composed of this one month *plus* the time requisite for serving notice of the appeal upon all the respondents. This will, in some cases, operate as a useless drag upon the freedom of the court, and by tending to avoidable delay in the disposal of appeals, produce administrative inconvenience, not to speak of public dissatisfaction. In unimportant cases of appeals, and in cases where the parties reside in the immediate vicinity of the Appellate Court, it is quite possible to dispose of an appeal within a month; but the section as it now stands renders this legally impracticable. For these reasons it will be well if the period prescribed is reduced to fifteen days.

60. *Sections* 562, 564, 565 *and* 566.—These sections as they now stand on the amendment made under Act VII of 1888 are perhaps less obscure than the corresponding sections in the Code of 1882, but it may well admit of question whether they are as exhaustive as those sections. As sections 562 and 565 now stand there is no express provision laying down the procedure in appeal where the Court of First Instance has disposed of the suit on a preliminary point *so as to exclude evidence as regards the merits*, and the decree on such preliminary point is reversed in appeal. Perhaps such a case falls within section 562. So does a case, where the evidence upon all the issues has been recorded, though the court has disposed of the suit upon a preliminary point (*vide* I.L.R., 16 Mad., 208). The propriety of making both these cases fall under section 562 may be doubted. Then again section 566 says that when the Court of First Instance has failed to *try* any material issue, the Appellate Court is to send down an issue for trial. In the case of a suit in which the material issues on the merits have been tried, though findings have not been recorded, the Appellate Court is to remand under section 562. In other words a fully-tried suit is to be remanded outright for a fresh decision, while an untried suit is to be disposed of by the Appellate Court after referring issues for trial. This is a little inconsistent. Moreover, as these sections now stand, cases falling under section 562 fall within sections 565 and 566 also, and this is not a satisfactory arrangement. It appears to be desirable to lay down distinctly in what cases a remand is to be made and in what cases *issues are to be referred*. Another matter for observation in section 565 is the expediency of giving an Appellate Court power to dispose of an appeal on the evidence, without having the benefit of the finding of the Court of First Instance upon it. A suitor is entitled to the benefit of the opinion not only of the Appellate Court, but also of the court by which the suit was tried; and it is hard to deprive him of this right, seeing especially that the Court of First Instance, before which the witnesses are examined, is in a better position to appraise the evidence at its proper value than the Appellate

Court. Such a power in an Appellate Court is not desirable seeing that the finding of an Appellate Court on questions of fact is final (*vide* section 584).

61. *Section* 568.—This section appears to confer upon an Appellate Court far more power than is either necessary or desirable, in the matter of admitting new evidence—clause (*b*) is unduly wide, and under it it is possible to make out a new case in appeal by the letting in of an indefinite quantity of additional evidence. Seeing that section 566 has already provided for cases of substantial exclusion of evidence, clause (*b*) of section 568 may well be limited to cases where the production of any document or the examination of any witness is necessary to clear up a particular obscurity or to supply an evident omission. Otherwise the record of the suit in appeal will be encumbered with a mass of new evidence on which the Court of First Instance had no opportunity of having its say.

62. *Section* 584.—The High Courts being the courts of final resort, and in public estimation the strongest palladium of justice in India under the British Government, nothing can be more desirable than to provide a right of ultimate appeal to them in every case possible. The clauses (*a*) to (*c*) of this section are not wide enough to cover all the cases in which a right of second appeal to the High Court is expedient in the interests of public welfare. According to this section the finding of an Appellate Court on questions of fact is final, and cannot form a ground of second appeal to the High Court. This is so even if the Appellate Court's finding is in conflict with the finding of the Court of First Instance, and even if the finding was arrived at by the Appellate Court on a manifestly wrong or perverse view of the evidence and in disregard of the reasons and arguments stated by the Court of First Instance in support of its finding. Having regard to the present state of high efficiency in general of the Courts of First Instance in India, and their capacity to deal with questions of fact arising in suits before them, it is a question worth consideration whether it is desirable to give absolute finality to an Appellate Court's finding on a question of fact when it dissents from the finding of a Court of First Instance. Having regard to the diversified customs and usages which often come up for decision before most of the appellate tribunals in India, it appears to be inexpedient to give absolute finality to their finding on a question of fact when it is opposed to the conclusion of the Court of First Instance. It will be a decided improvement in the benign policy of this section to provide for a second appeal to the High Court in cases where the Appellate Court's finding on a question of fact is contrary to the finding of the Court of the First Instance. The effect of enacting this provision will no doubt be to increase the appellate work of the High Courts, but having regard to the gravity of the interests at stake, such a situation must be faced. If the provision aforesaid is added to the section, a good many of the unimportant classes of appeals which now lie to the High Court may be done away with. Under the Code of 1882 the High Court often remedied the injustice of perverse appellate findings on questions of fact by a free and liberal use of the power of remand and reference of issues given by sections 562 to 566; but seeing that those sections have been considerably circumscribed in their scope by the amendment made by Act VII of 1888, and by the latest Privy Council ruling on the subject of remand, it has now become more than ever necessary to lodge in the High Courts an express power to remedy the clear injustice resulting from an appellate finding manifestly wrong or perverse.

63. *Section* 622.—This section, which prescribes the revisional jurisdiction of the High Courts in non-appealable cases, is couched in terms far too narrow and restricted, and the consequence is that the Indian Law Reports teem with cases in which the High Courts, while admitting the propriety of interference in revision, have confessed their powerlessness to interfere on the wording of the section as it now stands. This is an eminently unsatisfactory state of things, and is very much to be regretted. There appears to be no valid reason why in civil cases the High Courts should possess less extensive revisional jurisdiction than they have in criminal cases under section 439 of the Code of Criminal Procedure. The ruling of the Privy Council in L.R., 11 J.A., 237, which has been largely followed by the High Courts, has put upon this section the construction that a wrong decision of a question of law by a court having jurisdiction is not a ground for interference. The word "jurisdiction" and the expression "illegally or with material irregularity" in this section have been construed in very many decisions of the High Courts after the Privy Council ruling aforesaid. Mr. Justice Mahmood in the case reported in I.L.R., 7 All., 345, defines the term "jurisdiction" in its broad legal sense, signifying the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by law upon the judicial authority. The same learned Judge in the case reported in I.L.R., 8 All., 519, interprets the term "jurisdiction" as including, over and above pecuniary or territorial limit to a court's power, the presence or absence of a positive authority or power conferred by law upon tribunals. The scope of this section was construed by the learned Judge in these words: "In framing the section the Legislature gave to the High Court power to interfere with the action of subordinate tribunal in cases where there is no remedy either by appeal or otherwise and where those tribunals, have either exercised, or wrongly declined to exercise, the authority, the power and the jurisdiction, which the law confers upon them, or under the pretence of exercising such authority, power and jurisdiction, have acted against a positive prohibition of the law." This is a very liberal and salutary view of the scope of the section; but unfortunately this view has not always prevailed in practice.

The word "illegally" in this section has been construed by the Allahabad High Court in I.L.R., 8 All., 111, as referring to cases where the court below has, in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law, or failed to determine some material issue of law or usage; and in the same case the words "with material irregularity" were construed as referring to a material irregularity in procedure which may possibly have produced error or defect in the decision of the case on the merits. The same view has been taken by the Calcutta High Court in the decision in I.L.R., 13 Cal., 225, and by the Madras High Court in the cases reported in I.L.R., 11 Mad., 220, 303, 322, 144 and 17 Mad., 410. It is very desirable, in the interests of public welfare, that the section should be so amended as to bring it into conformity with the eminently liberal and juristic view enunciated by the decisions aforesaid. To ensure full scope for the maxim *ubi jus, ibi remedium*, it is necessary that the High Courts, as the tribunals of ultimate resort, should have plenary jurisdiction adequate to the redressing of palpable injustice in every case in which a party is without a remedy under the ordinary provisions of the Code. For this purpose the addition of a clause to this section conferring upon the High Courts a discretionary power to interfere in every case in which the ends of justice require such interference appears to be absolutely necessary.

* * * * *

Signed) V. ANANTAN NAIR,
District Munsif.

By M.R.Ry Karunkara Menon
1st grade Pleader
Calicut

MEMORANDUM.

Now that there is a Bill to amend the Code of Civil Procedure before the Viceregal Legislative Council, the following points are suggested for consideration:—

Section 2.—The term "decree" requires further explanation. It is sometimes doubted whether decree means the decree of the last court when there has been an appeal or second appeal. Whether orders dismissing suits or appeals for default of prosecution or appearance or orders allowing the withdrawal of suits or appeals are decrees (*vide* I.L.R. 3 All. 382; 14 All. 361. *Contra.* I.L.R. 16 Bomb. 23).

The term "immoveable property" has not been defined. The omission causes numerous difficulties. Whether "growing crops" are moveable or immoveable property is a vexed question and requires to be decided. Different enactments define the term differently.

C. The General Clauses Act I of 1868 would seem to take growing crops as immoveable property, being "*things attached to the earth.*" The Transfer of Property Act IV of 1882 while defining the term "attached to the earth," expressly enacts that the term immoveable property does not include standing timber, *growing crops* or grass. The Indian Registration Act III of 1887 says that "moveable property" includes standing timber, growing crops and grass, fruit upon and juice in trees, &c. The Indian Penal Code, section 22, would seem to take growing crops as immoveable, being *attached to the earth.*

In the face of this conflict in the Statutes themselves, the High Courts of Bombay (5 Bom. A. C. 90), Calcutta (5 B.L.R. 124) and Madras (I.L.R. XI Madras 193) have coolly decided that growing crops ought to be treated as immoveable property. Evidently the mischievous result of the above decision has not been considered. For growing crops should then be attached by an order prohibiting the debtor from transferring or charging them in any way and all persons from receiving the same by purchase or otherwise. The sale can take place only 30 days after the said proclamation has been fixed up in the Court-house. The purchaser can get possession only by executing a sale certificate, which again can be issued only after the time allowed by law (30 days) for making objections to the sale, or if any had been made, only after the disposal of such objections; so that some three or four months must necessarily pass from the time of attachment to the time the crops can be harvested. What could be the state of the harvest then? Either the crops might be stolen or they might mature and fall. The attaching officer cannot take the crops into custody under section 269, for they are not *moveable* property. Intending purchasers know all these risks and would bid only a nominal price. The debtor already in distress loses his crops and yet the debt remains not much diminished. Some remedy ought to be provided for this evil.

Section 13.—The following questions deserve attention:—

(1) How far is a decision *res judicata* between defendants? (*vide* I.L.R. XI. M. 204).

(2) Whether decisions of Small Cause Courts will operate as *res judicata* in subsequent regular suits? (I.L.R. 15 B. 104).

(3) Whether the decision of a court of original jurisdiction will operate as *res judicata* in a Small Cause Court?

(4) Whether a decision on a point of law afterwards declared to be erroneous will operate as *res judicata*? (I.L.R. V. M. 304).

(5) How far the omission to urge a claim in a former suit will be a bar to advancing that claim in a litigation?

Section 15.—If after the institution of a suit or appeal in a court having jurisdiction at the time, there be another court opened or authorized to try such suits, or if the law is changed as to where such suits ought to be instituted, what is to be the procedure? Is the first court to try the suit or is it to return it for presentation in the new court?

Section 25.—Suppose a case is transferred on the application of a party, and after giving notice to the other party, from one court to another on the ground that the presiding Judge is biased or prejudiced against the applicant. It so happens that that Judge is afterwards transferred to the court to which the suit had been transferred.

Or suppose there are two or more connected appeals or suits filed in a court. In the ordinary course of business, some of those cases happen to be sent to one court and others to another for disposal. In any of these contingencies, suits or appeals cannot be *retransferred* on the application of a party without notice to the other parties. This is unnecessarily increasing the amount of costs. The court cannot act of its own motion, because it does not ordinarily know that there are such circumstances, and if the circumstances are made known by a party, notice to the other party is indispensable as the Judge has no power under the section to dispense with notice under any circumstances, where there is an application by a party.

It is therefore desirable that the court be authorized to dispense with notice to the opposite party when there is a proper case.

Section 32.—Why should the court's power to strike out the name of a party be restricted to "on or before the first hearing" while court has power to add parties at any stage?

In paragraph 5 of this section it is said that the proceedings against a newly added defendant shall be deemed to have been commenced *on the service of a notice on him.* Ordinarily the date of *instituting the suit in court* without regard to the date of serving notice upon a defendant, is the commencement of proceedings against a defendant. In the case of a newly added defendant, such commencement is put off until service of notice, on him. This distinction is unjust. Courts may take their own time to issue or serve a notice, or a notice issued may be returned unserved and a fresh one may have to be issued. Why should all this time count against plaintiff? By the time notice is actually served on him, the period of limitation might run out. As the date of *filing the suit in court* is the commencement of proceedings ordinarily, so the date of the application to the court to add a new defendant should be made the commencement of proceedings against the defendant if added.

Orders refusing to add parties should also be made appealable under section 588.

Section 39.—(1) It is very necessary that the Chief Ministerial officer of a court should be competent to attest a vakalatnama to be filed in that court.

(2) Just as clients are at liberty to revoke the appointment of a pleader by a writing signed by him and filed in court, so pleaders should also be allowed to withdraw from a case by a similar writing.

It is doubtful if a pleader who conducted a suit up to decree can execute the decree without a fresh vakalatnama. The recent amendment of section 647 (Act VI of 1892, section 4) would seem to authorize a pleader to execute a decree on the original appointment, as the proceedings in execution are declared to be proceedings in suit.

Section 43.—If leave to omit to sue for any of the remedies be refused, the plaintiff should be authorized to amend the plaint by including the remedy intended to be omitted. Otherwise a plaintiff who, in the hope of obtaining the court's leave, omitted to include any of the remedies to which he may be entitled, but who was afterwards refused such leave, will be without any remedy, for he cannot bring a fresh suit.

Section 44-*A.*—This section authorizes the inclusion of damages to immoveable property in suits for its recovery, only if the property be held under a contract. So, if a trespasser commits waste on the land or misappropriates moveable property found on the land, the owner in suing to recover possession of the land cannot sue for damages also in the same suit as the section now stands. This anomaly should be removed.

Section 101.—If a defendant did not appear when called, and was declared *ex parte* and the court proceeds with suit, the defendant cannot in the course of the proceedings apply to be heard in answer to the suit on proof of good cause for his previous non-appearance; for it is only when the court has *adjourned* the hearing of the suit *ex parte*, but when it is proceeding with the suit *ex parte*, that a defendant may so apply. As the sections now stand, he will have to wait until decree is passed and then apply under section 108. This distinction ought to be removed. Many a time defendants do not turn up immediately they are called. It is hard that they have no remedy, unless the hearing has been adjourned.

Section 116.—This section allows amendment of written statements only under the circumstances therein mentioned, and there is no section allowing amendment for any other reason. When under section 53 a plaintiff is allowed considerable latitude in the matter of amending plaints, it is hard that a similar indulgence should not be given to the defendant as well. As the code now stands, a defendant cannot alter or correct even a clerical error in a written statement.

Section 120.—It is very necessary that the courts should have power to direct the personal appearance of either party *at any stage of the suit*. Now, after the first hearing, courts cannot order any party to appear in person. If a party is cited by the other party as witness, he is just in the same position as a stranger (section 178). If therefore he succeeds in evading service of process and the court is satisfied of it, yet his personal appearance cannot be ordered. Party witnesses ought to be more under the control of courts.

Section 137.—The section does not provide for the placing of a certified copy of the record sent for and perused on the record of the case. Section 142-A takes in only original documents and copies substituted under section 141-A.

Section 182.—This section does not require that depositions should be signed by witnesses. Yet witnesses are called upon to sign in all courts.

Section 205.—Under this section decrees bear date the day on which judgment was pronounced. It is however a notorious fact that decrees come into existence only long after the day of judgment. It is desirable that the date on which the decree is signed should appear on the decree and be the commencement of the period of appeal. Otherwise, it often happens that the period of appealing from a decree runs out before the decree comes into existence. It is unjust that intending appellants should be required to apply for *copy* of a decree before the *original* is in existence (*vide* I.L.R. 12 All. 461. *Contra* 13 Cal. 104).

Section 206.—It is necessary to lay down which court is competent to amend a decree, when there has been an appeal or a second appeal. High Courts differ strongly on this point (*vide* I.L.R. 9 Mad. 354. *Contra* I.L.R. 11 All. 267). The Madras High Court recently called in question the correctness of their decision in I.L.R. 9 Mad. 354 (*vide* I.L.R. 15 Mad. 403). But they did not deem fit to decide the question by a reference to the full bench. The Allahabad High Court persists in its opinion that the last court is the only court competent to amend a decree (*vide* I.L.R. 14 All. 226). The Calcutta High Court falls in with the view of the Allahabad High Court (*vide* I.L.R. 21 Cal. 259). Here the question whether orders dismissing appeals for default of prosecution or appearance or for failure to furnish security or pay additional court fees or orders allowing withdrawal of appeals falls within the definition of the term *decree* (as suggested in the commencement of this memorandum) becomes important. For when any of the circumstances enumerated above has occurred, the question will be which court is competent to amend the decree, the court of first instance or the appellate court?

Section 210.—It is necessary that courts should have power to demand security before passing an instalment decree, and such security should be enforceable under section 253.

Section 223.—It requires to be decided whether a court can execute a decree for a larger amount than the limit of its pecuniary jurisdiction. High Courts differ (*vide* I.L.R. 7 M. 307. *Contra* 16 Cal. 457).

Section 228.—It is desirable to say if the latter court can only execute the decree, *i.e.*, recover money under the decree and has no other powers. The words "in executing the decree" have led to different constructions. It is said such a court cannot entertain insolvency proceedings (I.L.R. 11 Mad. 301) or transfer it to another court (I.L.R. 3 Cal. 512). It is very inconvenient that debtors or decree-holders should have to appeal to the original court for either of those purposes. The difficulty can well be conceived when a decree is transferred to another court at a distance, say from Bombay to Calcutta or from Madras to Calcutta. The words "with regard to" may be substituted for "in executing." This amendment will have the required effect.

Section 230.—The word "granted" is evidently misplaced (I.L.R. 6 Mad. 359). What is intended is that the application should be *made* within the specified period, as parties are unable to get their applications *granted* by courts within such period.

It is also necessary to lay down that the provisions of section 5 of the Indian Limitation Act apply to applications under this section (I.L.R. 18 Cal. 631) as in section 372-A added to the Code by Act VII of 1888, section 32.

Section 232.—This section requires amendment. If a decree has been transferred to another court for execution, a transferee of such decree has no court to apply to for enforcing the decree; for he can only apply to the court which passed the decree for execution under this section. But the court which passed the decree cannot execute it, as it has been transferred to another court, and the court to which it has been transferred cannot receive his petition as it is not the court *which passed the decree*. The insertion of the words "or in which execution is pending" after the words "which passed it (decree)" will remedy this flaw.

Orders refusing to recognize an assignment should be made appealable.

Section 235.—The application does not require to be *signed* by any person. This is evidently an omission. The insertion of the words "signed and" before the word "verified" will answer the purpose. Should a copy of the decree accompany the application for execution?

Section 239.—The addition of the words "upon such terms as to security or otherwise as the court thinks fit" at the end of the 2nd paragraph would be desirable. For, if property or person be restored or discharged, and the result of the application be adverse to the applicant, the court has no hold on either of them now.

Section 244.—The phrase "parties to the suit in which the decree was passed" had better be altered into "parties to the *decree*." If a person who was impleaded in suit be declared an unnecessary party to the suit and exonerated from the operation of the decree, why should he proceed or be proceeded with under this section? (*vide* 10 W.R. 191).

It also requires to be defined whether "representatives" in their character as such or in such character as well as in their individual capacity is intended by the section.

Section. 246.—It will be well to insert the words "or for the delivery of ascertained goods" after the words "payment of money" (*vide* I.L.R. 10 All. 188).

Section 257.—(*a*) If a decree has been transferred to another court for execution it is the duty of the latter to executive it; while so can a decree debt be paid into the court *which passed the decree*, and if so, what is the procedure?

(*c*) If decree directs payment on a specified day and that day is a holiday, will payment on the next court day be as good as payment on the day specified? (I.L.R. 5 Cal. 906). Some provision as to notice to decree-holder and its effect is necessary.

Section 257-*A*.—It is a vexed question whether a bond for a judgment debt without sanction of court is altogether void (*vide* I.L.R. XI. Mad. 469) or only in execution (I.L.R. 12 Mad. 61). It will be well to fix how far such agreements will be invalid as in section 258.

Section 258.—This section purports to enact that any payment without being certified will be ineffectual in the execution proceedings and that any payment if so certified will be conclusive in so far as that decree is concerned. If, however, a payment once made and certified turns out to be ineffectual, as for instance the decree-holder being obliged to refund the purchase money on the cancellation of a sale or otherwise, it requires to be provided that the decree-holder may take out execution of his decree afresh.

Section 259.—The section begins with the manner of executing decrees for any specific moveable property or share therein or for the recovery of a wife; but further on it enacts that the specific property or share therein may be seized and delivered. How is a decree for the recovery of a wife to be executed?—In view of the proposed amendment in section 260 by doing away with imprisonment for enforcing decrees for restitution of conjugal rights, it becomes all the more necessary to lay down how a decree for the recovery of a wife is to be executed.

Section 265.—How are decrees for the partition or the separate possession of a share of an undivided estate *not* paying revenue to Government to be executed?

Section 268 (*a*).—How is a debt secured by mortgage to be attached? By a prohibitory order under this section or as immoveable property? High Courts differ (*vide* I.L.R. 9 Cal. 511 *contra* 15 All. 134 and 20 Cal. 805).

In paragraph 3, the course to be followed by a debtor who does not repudiate the debt is provided, but provision is wanting as to the procedure to be adopted by alleged debtor who denies the debt; for it is said that no claim is entertainable in the case of attachment of an alleged debt (I.L.R. 4 Bom. 323).

In paragraphs 4 and 6 the words "or local authority" require to be inserted after the words "Railway Company" in view of section 626 proviso.

Section 276.—The period for which an attachment in execution of a decree shall be in force requires to be defined as has been done in the case of attachments under other circumstances, viz., sections 259 and 260. The omission to do so causes numerous complications. A decree-holder may effect an attachment and then drop further proceedings for any length of time. He may long after apply for sale of the properties. In the meanwhile, the property might be alienated by private sale or court auction. Complications arise as to the effect of the attachment originally effected (*vide* I.L.R. 10, Cal. 416; 17 Mad. 58 and 180). If the period of the efficacy of an attachment be fixed, all difficulty will be removed.

Section 278.—When decree itself directs sale of the property, it is said there is no necessity to make an attachment (I.L.R. 4, Bom. 515; 18 Bom. 98). Only a sale proclamation need be issued under section 287. In such cases, courts refuse to entertain any claim to or objection to the sale of the property as such property has not been *attached in execution of a decree* in the wording of section 278 (I.L.R. 14, Cal. 631). This practice works immense mischief sometimes. Very often purchasers find to their cost that they did not get any interest in the property which they purported to buy. As any claim that may be made would not be investigated, there is no chance of the merits of the claim being known before the sale. It is equally injurious to decree-holders and debtors. When a claim is put forward, but not investigated, property would not fetch a reasonable price. So decree-holders lose their security and the debtors their property for nominal prices and it might happen that the claim of which notice was given is altogether unfounded.

Hence this section requires amendment by the addition of the words "or proclaimed for sale" after the word "attached."

Section 283.—Whether the judgment-debtor is a party to an order in a claim case is a vexed question (*vide* 4 M.H.C. 47; *contra* I.L.R. 15, Cal. 674; 11 Bom. 114; see also I.L.R. 13 Mad. 366; 17 Cal. 57 and 711). Some definite provision on this point is necessary.

Is the right given by this section subject to the provisions of section 42 of the Specific Relief Act I of 1877? It is differently held by the High Courts at different times (*vide* I.L.R. 9 M. 206 *contra* 16 M. 140). It is hard that the privilege afforded by this section should be subject to the restriction in section 42 of the Specific Relief Act. Suppose there is a mortgage of Rs. 2,000 over ten items of property—one of such items is attached and a claim put in by the mortgagee is rejected by the court after investigation. Is it not unjust to require the mortgagee to sue for the realization of the full Rs. 2,000 from all the ten items in order to substantiate a claim to one of them? The reasoning in I.L.R. 9 Mad. 206 may be adopted and it be declared that a suit for the establishment of the right claimed may be brought notwithstanding anything contained in any law to the contrary.

Section 285.—If property which has been latterly attached by another court be sold away by the former court, what should be the procedure? Is the sale invalid if the latter court is of a superior grade? Or are the sale-proceeds to be placed at the disposal of such latter court, or is such latter court to sell the property again, discarding the sale by the first court?

Section 291.—If when a property is put up for sale in execution of a decree and there are other decree-holders applying for rateable distribution, the debtor pays up the amount due under the decree for which property is put up for sale, can the sale be stopped? If the sale cannot be stopped (I.L.R. 10 M.157) can the other decree-holders proceed with the sale on the original proclamation.

Section 295.—When can assets said to be *realized*, immediately on the sale or after the sale is confirmed (I.L.R. 18, Cal 242)? If after a property is proclaimed for sale, the debtors pay up the amount, can that amount be said to be *assets realized* under this section? In such a case, or if the decree for which the sale has been proclaimed is found to be inexecutable, or if the holder of such decree is unwilling or omits to proceed with the sale, can the applicants for rateable distribution proceed with the sale on the proclamation already promulgated?

Section 311.—This section allows sales to be set aside only when there is material irregularity causing substantial injury—not on any other ground—not even when there was *fraud* on the part of any party. If purchaser has been misled, he has no remedy under this section (I.L.R. 20, Cal. 8). The section should be amended to take in any proper case for cancelling a sale.

Further, has substantial injury to be *proved* to have resulted from the irregularity (I.L.R. 14 M. 227 P. C.) or can injury be inferred from a material irregularity (I.L.R. 20 Cal., 599)?

Section 313.—The section seems to contemplate only cases in which judgment-debtor has no saleable interest at all. If debtor is found to have had only an interest of a much smaller value than what was advertized, the purchaser, it would appear, has no remedy (*vide* I.L.R. XVII M. 228). He cannot come in under section 311 also. This inequity should be removed by making suitable amendment in this section as well as in section 315.

Section 316.—If the purchaser's title dates from the date of the sale certificate only, who is entitled to the rents and profits up to that date? Or if a purchaser who is already in possession fails to obtain a sale certificate, what would be the result? Has he obtained a title or does the sale go for nothing?

Sections 331, 332, 335.—What sort of position is contemplated requires to be specified. Courts are inclined to recognize only *actual* possession. This is hard. Owner or mortgagee may be in possession through tenant or mortgager. If a decree-holder or purchaser collude with a tenant or mortgager, he can get possession to the prejudice of the owner or mortgagee, who then will be driven to the necessity of bringing a suit at great trouble and cost. Possession must be declared to be actual or constructive.

Section 336.—It is incumbent on courts to send debtors to jail as soon as they are arrested and brought before them, unless they intimate their intention to apply for insolvency. Yet courts find it necessary, and they do so as a matter of fact, to leave the debtor in the custody of the peons in order to enable him to raise money and pay off. This is not warranted by the Code as it now stands. Suppose a respectable man is all of a sudden arrested and brought before the court. He has no intention of applying for insolvency. He can and will pay off if a short time is allowed. Now, the section requires him to be sent to jail immediately. So the power given to courts under sections 337 A (3) and 349 to leave the debtors in the custody of an officer of the court should be extended to cases in which debtors are arrested and brought before courts, a reasonable period, say a week, being fixed.

Again, paragraph 3 provides that security should be given (1) that the debtor will appear when called upon and (2) that he will within one month apply under section 344; while the next paragraph prescribes the penalty of the security being realized only if debtor fails so to apply. So that if the debtor who has been released on security does put in an insolvency petition, but fails to attend when called upon or to prosecute the petition, the security is not realizable. It cannot also be said that section 349 governs the procedure after the filing of an insolvency petition, for that section applies only when the debtor is *in custody*, but not when he has been released on security. Therefore it is necessary to insert the words " or to appear when called upon, or to prosecute the application if made " after the words " fails so to apply."

The courts should also be authorised to extend the period within which an insolvency petition may be filed, if a proper case is made out for such extension.

Section 349.—The security given under this section should be made enforceable summarily as in section 336. It is said that such security cannot be enforced summarily (I.L.R. 7 Mad. 273). This is inconsistent with the other provisions of the Code (see also section 549).

Section 351.—Experience shows that it is necessary to add the following to the last paragraph of this section:—

" Whereupon the judgment-debtor if already released, shall again be taken into the custody of the court to be dealt with under section 336 of this Code."

Section 372.—The provision contained in this section should be extended to proceedings in extension also. At present, if a judgment-debtor's interest passes to another after decree, either by assignment or by operation of law, there is no means of enforcing such decree against such transferee.

Section 380.—Security furnished under this section must be enforceable summarily (section 253) as suggested under section 349.

Section 407.—Orders under this section should be made appealable under section 588.

Section 442.—The words " if the pleader of the party or other person knew, or might reasonably have known the fact of such minority " ought to be added after the word " presented." This protection is given in section 444, and there is no reason why the same should not be introduced in section 442 as well.

Section 463.—The provisions of sections 440 to 462 apply only if one has been *adjudged* a lunatic (I.L.R. 6 Mad. 380), see however I.L.R. 16 B. 32. So if one has not been so adjudged there is no means of that one suing or being sued through a next friend or guardian. In such a case proceedings should first be taken to have the lunatic so adjudged before any suit can be field. Even this is not possible if a stranger has to bring a suit against a lunatic not so adjudged, for he is not competent under Act XXXV of 1858 to initiate proceedings in respect of one's lunacy.

This difficulty should be removed.

Sections 545, 546.—Security given under these sections should be declared to be enforceable summarily as in the case of security given under section 549.

Section 561.—Can a respondent file an objection memorandum in the case of an appeal filed under section 544 as against parties who are not represented in appeal? If so, the court would be trying a case against a person behind his back. The memorandum of objection should be limited to the appellant who is before the court actually—not constructively (see however I.L.R. XI B. 596).

It has also to be decided whether an objection memorandum can be adjudicated upon, if the appeal is withdrawn, or dismissed for default of prosecution or otherwise disposed of without going into the merits (I.L.R. 10 All. 597).

Section 584.—On the construction of this section the Privy Council has repeatedly ruled that High Courts in second appeals are bound to accept findings of fact by the lower appellate court (I.L.R. 20 Cal. 93) however erroneous such findings might appear to the High Court (I.L.R. 18 Cal. 23). This state of the law is very much to be regretted. Even the Privy Council not unfrequently looks into details of evidence and interferes with findings of fact. Why then should High Courts be debarred from interfering with findings of fact whenever such a course is found actually necessary to meet the ends of justice? In this connection the following may be aptly quoted from a recent issue of the *Madras Standard*:—" Your client, I have no doubt, is as fair as a lemon. The District Munsif saw him and pronounced him to be fair. But the District Judge who has had no opportunity of seeing your client comes to the finding, without rhyme or reason, that your client is as black as jet. And we Judges of the High Court are here to uphold the finding of the District Judge. That is law, Sir, that is law; if you wish to have that law altered, you had better go to the wiseacres of Calcutta." So said that eminent jurist, the late Mr. Justice Holloway, when a High Court Vakil was vehemently arguing against a perverse finding of a District Judge in a case of second appeal.

The High Courts would, however, get over the Privy Council rulings by remanding appeals for revised findings on question of fact. But this practice has also been condemned of late.

Hence, the powers of the High Court in second appeals should be considerably enhanced in the matter of findings on fact. In the case of appeals to Her Majesty in Council, the High Courts are at liberty to allow an appeal being filed if they think fit, even though the value of the subject-matter falls short of the prescribed limit (sec. 595 ce.). Likewise, High Courts may be invested with power to look into evidence if the ends of justice require it as in the case of non-concurrent findings.

Section 622.—The scope of this section should be considerably expanded. The High Courts interfere now, only if the court whose order is in question, has had *no* jurisdiction in the case. If the court has had jurisdiction, they refuse to interfere, however erroneous or absurd the order in question may be. This state of the law requires improvement.

Section 624.—This section sometimes works great hardship. For, under it a review cannot be admitted by a succeeding Judge, even for a patent error, unless such error be *a clerical error apparent on the face of the decree*. Even though the error, clerical or otherwise, be apparent on the face of the *record*, there is no remedy. In view, however, of the constant changes of Judges, it is very necessary that the scope of this section should be somewhat enlarged.

(Signed) P. P. KARUNAKARA MENON.

From the District Judge of North Malabar, dated 23rd March 1895, No. 121.

ABSTRACT.—Stating that he has no remarks to offer with reference to circular No. 614.

From M. D. BELL, Esq., Acting District Judge, South Canara, to the Chief Secretary to Government, dated Mangalore, 26th March 1895, No. 343.

ABSTRACT.—Stating that he has no remarks to offer on the proposals to amend the Codes of Criminal and Civil Procedure.

From F. H. HAMNETT, Esq., Acting District Judge of Kistna, to the Chief Secretary to Government, dated Masulipatam, 27th March 1895, No. 1027.

In reply to circular No. 614, dated 19th March 1895, I have the honour to make the following proposal for the amendment of the Civil Procedure Code, which in my opinion, if adopted, will enormously facilitate the disposal of civil suits and further the ends of justice.

2. The proposal is that a proviso should be added to sections 179 and 180, Civil Procedure Code, to the following effect :—

"Provided that the court may refuse to allow witnesses to be examined on points which in its opinion have been already sufficiently proved, or whom it considers are being examined for the purpose of vexation or delay or for defeating the ends of justice."

3. The expression "points which in its opinion have been already sufficiently proved" is taken from section 142, Indian Evidence Act, from which it is clear that the Legislature recognizes that there are points about the truth of which the court can come to a definite decision during course of the trial before the whole evidence is complete.

4. The expression "for the purpose of vexation or delay or for defeating the ends of justice," in my proposed amendment, is taken from section 257, Criminal Procedure Code, which empowers a Magistrate to refuse to summon witnesses cited by an accused person if he considers that they are not being cited *bonâ fide*. Section 253, Criminal Procedure Code, gives a Magistrate power to dismiss a complaint without examining all the complainant's witnesses if he considers the charge to be groundless. Section 216, Criminal Procedure Code, empowers a Magistrate to refuse to summon witnesses to appear for an accused person committed to sessions, when he considers that they are cited for the purpose of vexation or delay or of defeating the ends of justice.

5. When there are so many safeguards in the Criminal Procedure Code to prevent vexation, delay and the defeat of the ends of justice by the unnecessary examination of witnesses, I do not understand why no similar provisions find place in the Civil Procedure Code.

6. In the mofussil courts, pleaders notoriously waste the time of the courts in examining witnesses to prove points already sufficiently proved, or for the purpose of causing vexation and delay to the other side and of defeating the ends of justice by unnecessarily prolonging an inquiry and swelling the costs of litigation.

7. My experience is that it is impossible to effectually stop such waste of time without some modification of the Civil Procedure Code such as I have suggested. Civil suits would be disposed of in about half the time they now occupy if the amendment were adopted.

8. I enclose a letter from the District Munsif of Bezwada containing his suggestions for the amendment of the Code.

ENCLOSURE.

From M.R.Ry. C. RAMA RAO, Pantulu, District Munsif of Bezwada, to the District Judge, of Kistna, dated Bezwada, 19th March 1895, No. 61.

If I may offer any suggestions relative to the recasting of the Codes of the Civil and Criminal Procedure a little after the date prescribed in G.O., No. 2795, Judicial, dated 17th November last, I respectfully beg that the undermentioned points may be considered as they cause frequent difficulties.

A defendant secures his property in a house and locking up the outer door goes abroad. There seems to be no express provision enabling the court to order the breaking open the lock although the courts, after publishing a notice by tom-tom, are getting the locks broken and realizing the property. The case law authorizing such procedure is to be found at page 189, volume V of the Madras High Court, and page 89, Bombay III, and the November number of the Indian Jurist for 1878. These reports show that section 271, Civil Procedure Code, is applicable only to the executing officers. Similarly, there must be provision to force open the lock of a premises whose delivery was directed.

2. Just at a trial of a civil suit, it is proved by affidavit or otherwise that a document or account affecting seriously the merits of the case is with a party or a third person present in the court; on being asked to show it, its existence is denied. Similarly, a party or witness, after proper summons to produce a document, denies its existence and it is proved by persons who saw the document with the person; there is no provision to order a search. If justice is the aim, there must be such power given to the Civil Courts.

3. A witness who disobeyed summons and who was brought under arrest can be fined by the court. One who disobeyed the summons and avoided warrant and who before attachment of property but on the day appointed in the proclamation appears cannot be fined by the Civil Court for the treble delay caused by his conduct. Similarly, one disobeying summons and avoiding warrant can appear on the day fixed in the warrant without being punished. These provisions are inconsistent.

It is true that the witnesses in the two latter cases might be sent to a Magistrate. But this means annoyance to the court as well as to the witness because the former cannot send the case to the nearest 2nd or 3rd class Magistrate, but it must send it to the Divisional or Sub-divisional Magistrate with 1st-class powers, and that officer in his turn will send it on to the 2nd or 3rd-class local Magistrate. I think it therefore necessary to strike off this circuitous course and empower the Civil Courts to send up such cases to the nearest local Magistrate having power to try the offences.

4. In appealable cases the omission to take the signature of a deponent on his deposition taken down by the Court and read over to him is objected to in some places. As it cannot cause great delay, it may be provided for.

From G. F. T. POWER, Esq., District Judge, Nellore, to the Chief Secretary to Government, dated 30th March 1895, No. 246.

With reference to your circular No. 614, dated the 19th instant, calling for my remarks on the proposals to amend the Codes of Criminal and Civil Procedure as required in G.O., No. 2795, dated the 17th November last, I have the honour to

* * * * *

forward herewith copy of a letter addressed to me by Mr. W. Gopalacharyulu, 1st-grade District Munsif of Nellore, suggesting certain amendments to the Civil Procedure Code to which I have nothing to add.

ENCLOSURE.

From M.R Ry. W. GOPALACHARYULU, Avargal, District Munsif, Nellore, to the District Judge, Nellore, dated 28th March 1895, No. 212.

With reference to proceedings of the District Court, No 42, dated 25th instant, I have the honour to state that the following are some of the points in which an amendment of the Civil Procedure Code seems necessary :—

(1) According to section 3 of Transfer of Property Act IV of 1882, immoveable property does not include growing crops, but there is no definition of immoveable property in the Civil Procedure Code and therefore the definition given in the General Clauses Act I of 1868 has to be adopted. According to clause 5 of section of this Act, immoveable property "includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth." It follows that growing crops have to be treated as immoveable property. Thus when decree-holders apply for attachment and sale of standing crops, the sale cannot be held until thirty

days after the sale notice has been fixed up in the court-house and the sale cannot be confirmed for sixty days and the purchaser cannot get possession until then. This procedure must take up over three months. Owing to this delay and because there is no provision for having the crops cut after attachment and before delivery to the purchaser, both the decree-holder and judgment debtor sustain substantial loss. Under section 503 a receiver may be appointed for gathering the crops, but the cost in several cases is prohibitive. It seems therefore desirable to define immoveable property in the Civil Procedure Code so as to exclude standing crops.

(2) Section 463 states that the provisions contained in sections 440–462 shall, *mutatis mutandis*, apply in the case of persons of unsound mind adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. It was held that, unless a person is so declared to be a lunatic, no guardian *ad litem* can be appointed under the Civil Procedure Code—I.L.R., 6 Mad., 380. There seems to be no provision as to the procedure to be adopted in case of persons who are lunatics, but who have not been declared to be such in the manner aforesaid. It may be true, as held in I.L.R., 7 Cal., 242, that a person not so declared to be a lunatic does not lose his civil rights; but it is not clear how a person incapable of watching his own interest will be able to conduct his own business or instruct a professional man. The procedure in Act XXXV of 1858 is not generally resorted to except in cases where the lunatic is possessed of some property, and it may be a hardship for poor people to proceed under this Act when a suit of small value has to be instituted. It will be safe therefore to make some clear provision.

(3) Section 253 states as follows—

"Whenever a person has, before the passing of a decree in an original suit, has become liable as surety for the performance of the same, or of any part thereof, the decree may be executed against him, to the extent to which he has rendered himself liable, in the same manner as a decree may be executed against a defendant: Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety."

There is no clear provision that this course may be adopted in cases where security is given for decrees of Appellate Courts. Section 610, as amended by Act VII of 1888, reproduces the provisions of section 253, as regards security given for costs, when an appeal to Her Majesty in Council is preferred. In I.L.R., 13 Bom., 411, and in I.L.R., 13 Mad., 1, it was held, following the view of the majority of the Allahabad High Court, in I.L.R., 2 All., 604, that all the rules applicable to execution of original decrees including section 253 were made part of section 583 but in a later case reported in I.L.R., 15 Mad., 203, a different view seems to have been taken. A clear provision seems desirable on this point also.

Perkins relating to
the Code of Civil Procedure

"Hindu" 2/7/95

CHIEF SECRETARY
6 JUL 1895
GOVERNMENT OF MADRAS

What Perkins says about these constant acquittals of European Convicts is quite true. They are a scandal & a disgrace to our admn. The only thing that can be done to remedy it, is to allow Govt to appeal agst. acquittals by Juries — This should be suggested in sending up the papers about the amendment of the C.P.C.

W
11 July

W
7/7/95

Circ

H
6/7/95

J
9/7

H.S. Reynolds Governor

Does not all this go still further to condemn the Jury System?
Perhaps those native gentlemen who made such a howl about retaining this "Palladium of Liberty" will begin to see that it is a two-edged weapon.

C87

Note M

Note by Hons & H.S. on the Jury System in reply an Article in "Hindu" of 2/7/95

Note M

Revision of Civil Pro. Code

Revenue Department.

Hon'ble Bhashyam

Hon'ble Sesha

No.

From

Dated 1895.

FOR ORDERS.

The pencil references in the Notes are to the copy of the draft which contains both the Cr. & the C. P. Code. But the Civil Portions have been since separately printed & will be supplied to the draft

Hon'ble

Herewith notes on the revision of the Civil Pro. Code.

A very large number of suggestions have been made, & I have examined all these with the recorded decisions on each of the sections under consideration.

Where the points are technical or involve controversial & difficult qs. of pure law or procedure I have merely noted that they shd be left to the Leg. Dept. (after 1st) & the Sol. Comee which will sit on the Bill. In the Leg. Dept. the Bill is examined by legal experts & the Sol. Comee will have similar assistance, &, as the practice is, every suggestion however trivial & by whomsoever made is noted up & passes under review

I have only noted on such points (other than merely technical ones, which I have neglected to point out) as I think should be specially brought to the notice of Council

WS
23/9/95

C11/
23/9

FOR ORDERS

But although I have marked a no. of suggestions as to be left for the Jud. Com.ee, I have examined the pleas recorded on them in every instance in order to ascertain whether any point of general principle is involved or any modification is desirable which will tend to the general convenience of suitors & to the interests of justice.

It is to be regretted that we have had so little assistance from the High Court. But when the revised code is put into shape, the amendments will be sent down & the Judges will have an opportunity of expressing their opinions.

S.R. 10/9/95

[G/25] 300—5-10-95

DEPARTMENT.

C. No.

FOR ORDERS.

Please see H.M.'s note marked with red pencil at page 2 of the proof of the letter to India.

Please see p. 24 of H.C. Board note for orders passed encircled in blue pencil

2. The notes in orders &c shew that the "procedure explained" means the simplification involved by empowering the decreeing Court to issue its own writ of execution to a distant place, in lieu of the present practice under which the decreeing Court "sends its decree for execution" to another Court by which the execution writ is issued & questions relating mesne profits &c are decided

C.P.C. s 223

*C.P.C. s 244

It is submitted therefore that the word "from" is incorrect, & that "to" should be allowed to stand; if the decreeing Court "issues its own writ of execution", it will be the "executing Court" & must decide questions of mesne profits &c.

As you please — I really haven't time to work the matter

RD
28/10/95

a provision of law

3. Moreover exempting wedding rings from attachment can be traced; they will probably be held to form part of a woman's "wearing apparel" just as tales were in I.L.R. Bombay IX, 106. - It is proposed to ~~to~~ add the words "wedding rings and"

D

22. x. 95

* The case quoted by the individual who recommended the insertion of "tales"

D

FOR ORDERS.

E

~~H. E. THE GOVERNOR.~~

~~THE HON'BLE MR. H. W. BLISS, C.I.E.~~

~~THE HON'BLE MR. J. GROSE.~~

Direct with copy
I.L.R. Bombay IX IX 106

In Eccl Nos 2192/3 Pub!
§ 30-10-95

C 28/10

Press

Begin setting up galley proof

Govt of Bombay

notes

P.S.

The following letter will be despd to the S. of S.

Letter

Sir,

In continuation of my letter of date 95. No —, I am directed to forward the opinions of the various officers & bodies consulted on the revision of the Code of Civil Procedure. These opinions will no doubt in the course receive the consideration of the Govt of India and the only sections on which H. E. the G. in C. considers it necessary to offer any special remarks are the following:-

(1) Section 53. There is no express provision in the Code permitting the Court to stay of proceedings in suits of a vexatious character. It seems desirable that a provision to this effect should be inserted.

~~so that innocent people may not be harassed by suits of that kind.~~

(2) Section 111 - It is not clear whether the section was intended

P.T.O.

to indicate the time when a set-off should be allowed or whether it was meant only to regulate the procedure in matters of set-off. The section 2 Ald Rules does not also show clearly the how for the written stat.ts containing the particulars nature & extent of the offset of the set-off and the declaration of the High Courts on the point and somewhat conflicting. It is therefore suggested that the section be amended so as to show more clearly the intention of the legislature in these matters.

(3) Sec 129 - attention is invited to the amendments suggested to this section by the Advocate-General and the Madras Attorneys' Assn. This Govt is inclined to support the proposal that the words "at any time before the first hearing" occurring in the section should be omitted.

(4) Section 138 - M. G. in C. would recommend the suggestion made by the Advocate-General of this Govt. that the section should be amended so as to provide that the documents referred to therein should be produced and marked for the purpose of identification by the Court or such other officer of the Court as may be authorized so to do at the time the issues are settled, or on such short date thereafter as the Court may order. This adoption of this suggestion will, it is believed, tend materially to prevent the manufacture subsequent substitution or suppression of documents during the progress of a suit to meet the exigencies of the case

(5) Sec 171 - It seems desirable that Civil Courts should be empowered to summon and examine any person as a witness in a suit, whether such person is a party to the suit or not and or whether he has been named as a witness or otherwise. The law as at present stands seems to preclude a Court from summoning & examining of its own motion as a witness

* To append

a party to a suit, or a person whose name is included in the party's list of witnesses but whom who is not present in Court he may not choose to examine at the trial. ~~Nor does there appear to be any provision in~~ the Code indicating ~~as to~~ the source from which the expenses of witnesses summoned ~~at~~ the instance of ~~the~~ Court of its own motion is in the first instance to be met. Some provision for this purpose may be required made

(6) Section 181 - An explicit provision would seem to be required authorizing the court to dispense with the examination of a witness ~~whose name~~ who appears to have been summoned for the purpose of ~~vexation~~ obstruction or delay, or of defeating the ends of justice. The object may be effected by the insertion of a proviso to the following effect:-

"Provided that the court may refuse to allow a witness to be examined if it considers that the witness is tendered for the purpose of vexation or delay or of defeating the ends of justice."

For appeal. The expression is taken from Sec 25). Cannot this procedure be

(7) Section 198 - It is recommended that a clause may be added providing that when a shorthand writer is

To Press
Rk 10

appointed to a Court. The Judge may dictate his judgment and ~~that~~, such judgment, when reduced to writing, may be signed by him in open court at the time of delivery. A shorthand writer has been is appointed in ~~every~~ most of the District courts of this Presidency, & their employment is extending.

(8) Section 210 (i) A proposal has been made to the effect ~~that~~ power should be given to the Courts to postpone the payment of the amount decreed, ~~in cases~~ where such a course appears to be sufficient reasons for such a course would tend to prevent hardship to the judgment-debtor. The suggestion seems to be deserving of consideration. There does not seem to be any more objection to adopting this proposal than to allowing civil courts to pass instalment-decrees.

(ii) It is not clear why ~~the Courts~~ should not be permitted to exercise the power conferred in para 2 of the section without the consent of the decree-holder.

Note
It is not clear whether the D. Ps desires that the suppression of the D. Munsifs of Tanjore should be noticed in this letter

(i) until the expiration

It is suggested that of the earlier the procedure of clause 2 of the as regards security, interest or attachment &c. be made applicable under chapter to decrees [illegible] originally order instalments. under

the courts -

A.F.D

(9) Section 223 - The question has been raised as to whether a Court can execute a decree for a larger amount than the limit of its pecuniary jurisdiction. The attention of the Govt. of India is invited to the point and to the conflicting decisions of the High Courts thereon.

(10) H. E. the Exmr. in C. generally concurs in the remarks of the Madras advocate-General and the Advocate-General and Mr. J. D. Smith of the Madras Bar as to the advisability of simplifying the procedure in regard to the execution of decrees outside the local jurisdiction of the Court which passes them, and considers that advantage should be taken of this opportunity to provide for a less cumbersome procedure in the matter by means of appropriate amendment of the Code. The complaint is understood that the existing procedure is cumbersome, costly, dilatory and favours fraudulent judgment debtors who desire to evade or to nullify execution proceedings taken them in execution.

Among the suggestions made with this object the more important are:

34

with a view therefore of remedying these defects it has been suggested -

(i) that the procedure laid down in chap. XXI of the Code for the execution of decrees outside the local jurisdiction of the decreeing Court should be assimilated to the practice prevailing in the High Court of Justice & the County Courts in England in this respect and that the decreeing Court should be empowered to issue a precept to the Court within the local limits of whose jurisdiction the judgment-debtor may reside or own property, and

(ii) that the Court to which such decree is sent for execution should, if it is unable to execute satisfy the same, have power to transfer it direct to any other Court within whose jurisdiction the judgment debtor or property may be, without obtaining it to the D.F.O.

original Court for such transfer as it is now required to do.

The adoption of these proposals will, it appears to H. E. in C, result in an increased celerity of proceeding in matters of execution and, on that ground, the suggestions would seem to be deserving of consideration. On the other hand it is clear that it will have the effect of transferring to a material extent, the determination of questions relating to mesne profits, interest, set-off, costs, and the like which have now been disposed of by the local executing Court to which the decree is transferred. But where the convenience of parties & the interests of justice will not suffer by such a course it may be left in the discretion of the Courts to adopt the procedure suggested.

It may not be desirable to require that the procedure explained should be invariably adopted, but where since it will have the effect of transferring to the original decreeing Court

The adoption of these proposals will, it appears to H. E. in C, result in an increased celerity of proceeding in matters of execution and, on that ground, the suggestions would seem to be deserving of consideration. On the other hand it is clear that it will have the effect of transferring, to a material extent, the determination of questions relating to mesne profits, interest, set-off, costs, and the like which have now been disposed of by the local executing Court to which the decree is transferred. But where the convenience of parties & the interests of justice will not suffer by such a course it may be left in the discretion of the Courts to adopt the procedure suggested.

4

To Mr. Dyer

Work out the various proposals for the imp[t] of sec[n] 200 & for a sheet for insertion before this. Mr. Hindlip & Mr. Cumming the A.G. & attorney's proposals generally

Deline Kaine Edmondson

Draft section prepared 27/10/95

Require an inventory of movable property when an application for an att[t] is made, a requirement which is frequently impossible to comply with. It would seem sufficient if the last part of the section were altered to run:—

50

to prevent judgment-debtor from disposing of his property so as to evade or nullify execution proceedings.

This Act would also provide that a writ of execution issued by a Court in one district might shall have legal force throughout the district in which it is situate without the need of any application to the Court, other than the issuing Court, in whose jurisdiction the person to be arrested may be found.

(11) Section 236. It is suggested by the Attorneys around that (supported) the following section be enacted as follows, dispensing with the render of an inventory of property along with the application for attachment:—

"Whenever any application is
"made for the attachment of
"any moveable property belong-
"ing to the judgment-debtor but
"not in his possession, the
"decree-holder shall annex
"to the application a reasonably
"accurate description of the pro-
"perty to be attached".

A. J. O.

(12) Section 253 - The words "in original suit" should, it is considered, be omitted so as to make the provisions of the section apply also to decrees of appellate courts.

(13) Section 265 - In the cases reported in I.L.R. 6 Mad, 91 & 7 Mad, 382. The Madras High Court has held that the words "estate paying revenue to Govt" occurring in the section refer to Zemindari and not to ryotwari estates. The decision of the legislature may be amended to make this clear on the point. The interference of the Courts would of course be unnecessary except in cases of partitions of Zemindari estates.

(14) Section 266 The "Tali" or marriage token should, it is considered, be specifically included in clause (a) of the proviso to the section.

(15) Section 268 - Attention is invited to the suggestion of the Madras Attorneys' Assn. that the provisions of the Code

Civil Procedure

V.R.

Note for Rules

Mr. Ramaswami Aiyar's point to be considered when next Rules are taken up.

It is suggested that 3/10

Recd. very recent this complete proof 1/4/30

Ex

Section 268 should be amended so as to make it clear that the Code does not introduce the English doctrine which for the transplantation of which to this country there appears to be no sufficient reason.

5

68

in regard to the attachment and realization of debts by garnishee order. Debt should be treated as property and not as a judgment. Section should be revised so as to assimilate the Indian to the English practice in this respect. The present procedure in respect of garnishee debts under the Code is cumbrous and dilatory.

(16) Section 271 The fact is considered sufficient to obtain an order that it is not necessary to obtain the provision prohibiting the attaching officer from executing upon the order. Door of the dwelling house in which moveable property is attached is considered sufficient.

(17) Section 276 - M. S. in C. would suggest that a clause be added to the section limiting the period (say to six months) during which an attachment in execution should remain in force. The absence of such a limit has allowed, in certain a reasonable cases, attachments to remain in force for years together, thereby greatly prejudicing the judgment-debtor who may be at times greatly prejudiced.

(18) Section 278 - It has been suggested that provision should be made for the examination of claims to property

which has been directed to be sold in pursuance of a direction in the decree. The law as it at present stands does not provides only for claims in case of attachments seem to allow of this. The (Mr. L.) The postponement of the sale pending the investigation attention of the Court is drawn to Mr. Justice Harnes's suggestion that a short sale as to the Registrar suggests, be made "upon such terms is invited to the suggestion. as the Ct. thinks fit"

(19) Section 305 - The section in its present form seems to allows private alienation only in cases where the value of the immovable property concerned is not less than the decree amount. As it is considered desirable that the scope of the section should be extended (might be advantageously) the full amt of the decree can be so realized to those cases other than those in wh. the so as to make this provision Ct. & made to include cases where the Ct applicable to all cases of is satisfied that private alienation, it is proposed to insert words to the following effect after the word "amount of the decree" in para 1 of the section: — "or a larger proportion thereof than can be otherwise realized".

No! No! DT

Regard being had to the fact that it is anticipated that an private arrangement by mortgage, lease or sale will realize a larger amount on behalf of the decree than by a Court sale

(20) Section 310 A - The Hon. the Judges of the High Court point out that, under the existing law, poundage fees or the poundage fees levied on the amount realized in sales in execution is lost when a sale is set aside. They therefore recommend that the section should be amended so as to include poundage in the expenses for which a judgment debtor is liable. This Govt. supports the recommendation.

Since the amt. is not ascertainable before the sale & cannot therefore be specified in the sale proclamation

(21) Section 339 - H. E. in C would recommend a suggestion made by the Registrars Govt. of Orissa & this Presy. that a provision be inserted requiring payment of subsistence allowance to be made to the Jail persons in charge of jails during ordinary business hours. The law as it at present stands seems to allow a tender of such allowance at any time of the day or on Sundays or holidays, a course which may at times prove very inconvenient. The refusal of the amount to receive the amount at other than office hours may result in the debtor's release.

(22) Section 340 - The Registrars suggested on the same lines recommended that the word "while in intermediate custody or" be inserted between

the words "judgment-debtor" and "in jail", so that the sums disbursed for the subsistence of the judgment-debtor before he reaches jail may be recoverable as costs.

(23) Section 372 - It would seem that this section in its present form would not apply to the execution of a decree passed by the decree-holder, the attention of the L. gd. is invited to the matter point in view to its being considered whether this defect should not be remedied if it is thought that the existing law does not make sufficient provision for the matter.

(24) Section 373 - The section would seem to require revision in the light of the numerous decisions that have been passed thereunder. The first clause of the section is reserved only with cases in which the plff resides out of British India. We recommend that it be considered whether its provisions should not be extended to all cases

(25) Section 380 It seems desirable to amend the section so as to provide for the taking of security in all cases, whether the plaintiff is or is not residing in the Court, where such a course appears to be proper the Court should be empowered to require from the plff security for the payt of the defts costs.

British India, so as to enable a summary of this is done, an appeal should be allowed against the Court's order requiring plaintiffs to give security, so that a safeguard may be provided against any abuse of power which the proposed extension of the section might involve.

(26) Section 424 - In the case of suits against the Secretary of State or a public servant as such, the interval of two months allowed by the present law between the delivery of the notice & the institution of the suit is not sufficient to enable the Govt or the public servant concerned to take the necessary action in the matter. This is especially where a compromise appears to be the most suitable arrangement, and terms have to be settled. H. G. in Council therefore recommend that the period may be extended to three months.

(27) Section 463 - It is recommended that a provision is required may be enacted empowering a Court to appoint a pleader

enquiry a guardian ad litem
in any all cases in which a party
to a proceeding is a lunatic
but in which no adjudica-
tion under Act XXXV of 1858
has been made hold. The Code as at
present stands does not expressly permit this, & allowing this. Attention is
also invited to the decisions
in I. L. R. 6 Mad. 380 & 13 Bom.
656. & 16 Bo. 132.

(28) Section 532. Under this
procedure of this section interest
clear entitles, in the event
cannot apparently be recovered
of a decree being passed more
than date of decree unless interest
pass 3 of the section, interest
can be claimed
is explicitly
been stipulated for in the
instrument. There does not seem
any sufficient reason why the
plaintiff should be deprived of the
interest before decree,
under the section, on the
amount recovered under
Chap XXXIX, which is due by
the deft on a negotiable instr.
left unpaid at its term.

Cases may arise where the Court cannot
grant relief under the Act of 1858 for an adjudication,
& where in the absence
of a provision to the effect
suggested a party may be
in danger of losing his legal
rights or remedies.

(29) Section 539. There have
been contradictory rulings
on the question whether the
section was intended
to embrace the appoint-
ment of trustees when
this is merely a non-contentious ruling
or whether it was meant
also to extend also to

Note
The point noted against Sec 539
will be kept in mind & a Circular
separately. DS

Yours at
once
[illegible]

contentiously or contentiously
the removal of trustees on the ground
and the appointment of
other trustees in their place.
desirable to amend the section
as to make it clear that
all classes of cases.
The removal of trustees
in contentious cases is also
within its purview.

(30) Section 622. A clause
should, it is considered, be
added providing for the giving
of notice to parties before
orders prejudicing them are
passed.

Attention is invited to the
recommendation of the Advocate General
that the section should be made
clearer in view of the
29/9/85 conflicting interpretations
that have been given as to
its scope.

This Court also considers
that a proviso should be added
specially requiring the H. Ct.
to give notice to the parties
interested before an order
under the section may
may prejudice them is passed
under the section.

[illegible]

Revision of the Civil Procedure Code

E

7/10

Note

This will be typewritten & circulated.

AT.
29/9/55

Note / Notes

Please peruse the enclosed Note completely & send your comments / suggestions if any — by 15th Oct. AT.

No. 2193 JUDICIAL, 30TH OCTOBER 1895.

JUDICIAL DEPARTMENT.

LETTER—from

THE CHIEF SECRETARY TO THE GOVERNMENT OF FORT ST. GEORGE,

To

THE SECRETARY TO THE GOVERNMENT OF INDIA, HOME DEPARTMENT.

SIR,

In continuation of my letter, No. 2092 dated 9th October 1895, I am directed to forward the opinions of the various officers and bodies consulted on the revision of the Code of Civil Procedure. These opinions will, no doubt, in due course receive the consideration of the Government of India. The only sections on which His Excellency the Governor in Council considers it necessary to offer any special remarks are the following:—

(1) *Section* 53.—There is no express provision in the code permitting the Court to stay proceedings in suits of a frivolous ~~and~~ vexatious character. A provision to this effect seems desirable.

(2) *Section* 111.—It is not clear whether the section was intended to indicate the time when a set-off should be allowed or whether it was meant to regulate only the procedure in matters of set-off. ~~It~~ should ~~also~~ be made clear how far the written statement containing the particulars of the set-off should fulfil the requirements of a plaint, and in particular whether it is to bear the usual *ad valorem* Court-fee stamp.

(3) *Section* 129.—Attention is invited to the amendments suggested to this section by the Advocate-General and the Madras Attorneys' Association. This Government is inclined to support the proposal that the words "at any time before the first hearing" should be omitted.

(4) *Section* 138.—His Excellency in Council would ~~recommend~~ support the suggestion made by the Advocate-General that this section should be amended so as to provide that the documents referred to therein should be produced and marked for identification at the time the issues are settled, or on such short date thereafter as the Court may order. This course will tend to prevent the manufacture, substitution or suppression of documents during the progress of a suit to meet the exigencies of the case.

(5) *Section* 171.—It seems desirable that Civil Courts should be empowered to summon and examine any person as a witness in a suit, whether such person is a party to the suit or not, or whether he has been named as a witness or not. The law as it stands at present seems to preclude a Court from summoning and examining of its own motion as a witness a party to a suit who is not present in Court, or a person whose name is included in the party's list of witnesses but whom he may not choose to examine at the trial. Nor does the code indicate the source from which the expenses of witnesses summoned by the Court of its own motion is in the first instance to be met. Some provision for this purpose ~~may~~ be made.

(6) *Section* 181.—An explicit provision would seem to be required authorizing the Court to dispense with the examination of a witness who appears to have been summoned for the purpose of obstructing or defeating justice. The object may be effected by the insertion of a proviso to the effect that the Court may refuse to allow a witness to be examined if it considers that the witness is tendered for the purpose of delaying or defeating the ends of justice.

(7) *Section* 198.—It is recommended that a clause may be added providing that, when a short-hand writer is appointed to a Court, the Judge may dictate his judgment, such judgment, when reduced to writing, being signed by him in open Court at the time of delivery. Short-hand writers have been appointed in most of the District Courts of this Presidency, and their employment is extending.

(8) *Section* 210.—(i) It is suggested that the procedure of clause 2 of the section as regards security, interest or attachment should be made applicable to decrees under clause 1 which originally order instalments.

(ii) Power should be given to the Court to postpone the payment of the amount decreed until the expiration of a fixed time, where there appears to be sufficient reason for such a course. There does not seem to be any more objection to this than to instalment-decrees.

(iii) It is not clear why the Court should not exercise the power conferred in paragraph 2 of the section *without* the consent of the decree-holder.

(9) *Section* 223.—The question has been raised ~~as to~~ whether a Court can execute a decree for a larger amount than the limit of its pecuniary jurisdiction. The attention of the Government of India is invited to the point and to the conflicting decisions of the High Courts thereon.

(10) His Excellency the Governor in Council is disposed to concur generally in the remarks of the Advocate-General and the Attorneys' Association as to the desirability of simplifying, if possible, the procedure which regulates the execution of a decree beyond the local jurisdiction of the Court which passes it. The complaint is widespread that the existing rules are in several respects cumbersome, costly, dilatory and favourable to fraudulent judgment-debtors who desire to evade or to nullify proceedings taken them in execution.

Among the suggestions made with this object the more important are—

(i) the assimilation of the procedure laid down for the execution of decrees outside the local jurisdiction of the decreeing Court to the practice prevailing in the High Court of Justice and the County Courts in England in ~~this respect~~, the decreeing Court being empowered to issue its ~~suits~~ of execution direct to the Court or to the chief ministerial officer of the Court, within the local limits of whose jurisdiction the judgment-debtor may reside or own property; and

(ii) the authorizing the Court to which a decree is sent for execution, if it is unable to execute the same, to transfer it direct, instead of through the original Court, to any other Court within whose jurisdiction the judgment-debtor or property is certified to be. ~~It may not be desirable to require that the procedure explained~~ should be invariably adopted, since it will have the effect of transferring to the original decreeing Court questions relating to mesne profits, interest, set-off, cross-decrees and the like which are now disposed of by the local executing Court to which the decree is transferred. But where the convenience of parties and the interests of justice will gain by such a course, it may be left in the discretion of the Courts to adopt the procedure suggested.

(11) *Section* 236.—It is pointed out by the Attorneys' Association that to require an inventory of movable property when an application for an attachment is made is frequently a requirement ~~impossible~~ to comply ~~with~~. It would seem sufficient if the last words of the section were altered to run :—

"The decree-holder shall annex to the application a reasonably accurate description of the property to be attached."

(12) *Section* 253.—The words "in original ~~suits~~" should, it is considered, be ~~omitted~~ so as to make the provisions of the section apply also to the decrees of Appellate Courts.

(13) *Section* 265.—In the cases reported in I.L.R., 6 Madras, 97 and 7 Madras, 382, the Madras High Court has held that the words "estate paying revenue to Government" occurring in the section refer to zamindari and not to ryotwari estates. It is suggested that the section be amended to make this clear.

(14) *Section* 266.—The "tali" or marriage token worn round the neck should be specifically included in clause (*a*) of the proviso to the section.

(15) *Section* 268.—Attention is invited to the suggestion of the Madras Attorneys' Association that the provisions of the code in regard to the attachment

and realization of garnishee debts should be revised so as to assimilate the Indian to the English practice. The procedure of the code in respect of garnishee debts is tedious and costly.

(16) *Section* 271.—The Government is inclined to think that it is not necessary to retain the provision prohibiting an attaching officer from breaking open the outer door of the dwelling-house in which movable property to be attached is contained. It is founded on an English doctrine for the transplantation of which to this country there appears to be no sufficient reason.

(17) *Section* 276.—His Excellency in Council would suggest that a clause be added to the section limiting the period (say, to six months) during which an attachment in execution should remain in force. An attachment should be followed up within a reasonable time; otherwise the judgment-debtor may be greatly prejudiced.

(18) *Section* 278.—Provision should be made for the admission and investigation of claims to property directed to be sold under a decree. The law as it stands provides only for claims in case of attachments.

The postponement of the sale pending the investigation might also, as the Attorneys' Association suggests, be made "upon such terms as the Court thinks fit."

(19) *Section* 305.—The section in its present form allows private alienation only in cases where the value of the immovable property concerned is not less than the decree amount. The scope of the section ~~might, it is considered,~~ be advantageously extended to cases other than those in which the full amount of the decree can be so realized and made to include cases where the Court is satisfied that an arrangement by mortgage, lease or private sale will realize a larger amount on behalf of the decree than a Court sale.

(20) *Section* 310-*A*.—The Hon'ble the Judges of the High Court point out that, under the existing law, poundage, or the fees levied on the amount realized in sales in execution, is lost when a sale is set aside, since the amount is not ascertainable before the sale and cannot therefore be specified in the sale proclamation. They ~~therefore~~ recommend that the section should be amended so as to render the judgment-debtor liable for such fees. This Government supports the recommendation.

(21) *Section* 339.—His Excellency in Council ~~would recommend a suggestion~~, made by the Inspector-General of Prisons, that a provision be inserted requiring payments of subsistence allowance to be made to the jail officers *during ordinary business hours*. The law as it stands would allow a tender of such payments at any time of the day or on Sundays or holidays—a course which may prove very inconvenient. The refusal to receive the amount may result in the debtor's release.

(22) *Section* 340.—On the same officer's suggestion it is recommended that the words "while in intermediate custody or" be inserted between the words "judgment-debtor" and "in jail," so that the sums disbursed for the subsistence of the judgment-debtor before he reaches jail may be recoverable as costs.

(23) *Section* 372.—If this section in its present form does not apply to the execution of a decree assigned by the decree-holder, the section should, it is considered, be amended to include such cases. The attention of the Government of India is invited to the point.

(24) *Section* 373.—In view of the numerous decisions that have been passed in explanation of the section, it is desirable that it should be made clearer.

(25) *Section* 380.—The first clause of the section has no application unless the plaintiff resides out of British India; but this Government would recommend that it be considered whether its provisions should not be extended to all cases, whether the plaintiff is or is not residing in British India, so as to enable the Court, where such a course appears to be proper, to require from the plaintiff security for the payment of the defendant's costs. If this is done, an appeal should be allowed against the Court's order requiring security.

(26) *Section* 424.—In the case of suits against the Secretary of State or a public servant as such, the interval of two months allowed by the code between the delivery of the notice and the institution of the suit is frequently insufficient to

enable the Government or the public servant concerned to take the necessary action or receive the necessary orders. This is especially the case where a compromise appears to be the most suitable arrangement and terms have to be settled. His Excellency in Council would recommend that the period be extended to three months.

(27) *Section* 463.—A provision is required empowering a Court to appoint after enquiry a guardian *ad litem* in any case in which a party to a proceeding is a lunatic but in which no adjudication under Act XXXV of 1858 has been made. The code does not expressly permit this. Cases may arise where the Court cannot be moved under the Act of 1858 for an adjudication, and where, in the absence of a provision to the effect suggested, a party may be in danger of losing his legal rights or remedies. Attention is invited to the decisions in I.L.R., 6, Mad., 380, 13 Bom., 656, and 16 Bol., 132.

(28) *Section* 532.—Under the procedure of this section interest cannot apparently be recovered to date of decree unless interest is explicitly stipulated for in the instrument. There does not seem to be any sufficient reason why the plaintiff should be deprived of interest before decree on the amount recovered under chapter XXXIX, which is due by the defendant on a negotiable instrument left unpaid at its term.

(29) *Section* 539.—There have been contradictory rulings on the question whether the section embraces the appointment of trustees when this is merely a non-contentious relief, or whether it extends also to the removal, hostilely or contentiously, of trustees on the ground of fraud and the appointment of other trustees in their place. The section should, in the opinion of this Government, include both classes of cases.

(30) *Section* 622.—Attention is invited to the recommendation of the Advocate-General that the section should be made clearer in view of the conflicting interpretations that have been given as to its scope.

This Government also considers that a proviso should be added specifically requiring the High Court to give notice to the parties interested before an order which may prejudice them is passed under the section.

I have the honour to be,

Sir,

Your most obedient servant,

Ootacamund,
October 1895.

Chief Secretary.

st copy sent to Press.

urned for sign[illegible].

patched in print.

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